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EMBODYING ALL REPORTED DECISIONS FROM THE EARLIEST PERIOD DOWN TO VOLUME 202 MICHIGAN, INCLUSIVE.

Being a
NEW EDITION OF JACOBS & CHANEY
By
GEORGE F. LONGSDORF
Editor New York Cyclopedic Digest, Illinois Cyclopedic Digest, Ohio Notes, etc.

VOLUME III
ELECTION AND WAIVER TO FRANCHISES

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ALL THE REPORTED DECISIONS OF THE COURTS OF MICHIGAN

VOLUME III

ELECTION AND WAIVER.

TREATS of the occasion and manner of choosing one of two or more diverse rights or remedies and of the waiver of rights or remedies. It is not the intention to collect here all the cases on elections and waivers, but only the general law thereof, together with specific and concrete instances not treated in specific topics. The excluded matters are denoted by the cross-references in the body of this topic, which see.

Analysis.

§ 1. In general; intent and knowledge.
§ 2. Right, power and capacity to waive or elect.
§ 3. Occasion for election, inconsistency of alternatives.
§ 4. Different remedies and defenses.
§ 5. ——Tort or contract remedies.
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§ 12. ——Affirmance, ratification and adoption.
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§ 16. Stipulation or reservation against election.
§ 17. Mistake or nonexistence or futility of remedy pursued.
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§ 19. Questions for jury or court.
§ 20. Effect of waiver.
§ 21. Finality and consequences of election.
§ 22. ——Effect to bind or benefit parties in privity.

§ 1. In general; intent and knowledge.

Right, power, and capacity to waive or elect, see post § 2.
Occasion for election, see post § 3.
Different remedies and defenses, see post §§ 4-7.
Requisites and indicia of election or waiver, see post §§ 8-15.
Finality and consequences of election, see post §§ 21, 22.
Mistake or futility of chosen course as preventing waiver or election, see post § 17.
Estoppel founded on election to claim inconsistent right, see Estoppel, III.

¶ 1. To waive means, in law, to relinquish intentionally a known right, or intentionally to do an act inconsistent with claiming it. —Chamberlain v. City of Saginaw, 135 Mich. 61.

¶ 2. Waiver is voluntary, and implies an election to dispense with something of value, or to forego some advantage which the party waiving it might at his option have demanded or insisted upon.—Warren v. Crane, 50 Mich. 300; International Fair Expo. Ass'n v. Walker, 88 Mich. 62.

¶ 3. Waiver implies the right to object, and where such right does not exist there is no waiver.—English v. Franklin Fire Ins. Co. of Philadelphia, 55 Mich. 273.

¶ 4. A waiver usually involves an intention to yield some known right, or something equivalent to such intention, in the nature of an estoppel.—Sherwood v. Central Michigan Sav. Bank, 103 Mich. 109.

¶ 5. There can be no waiver without knowledge of the defect waived.—Waldron v. Murphy, 40 Mich. 668.

¶ 6. Actions of a party in ignorance of facts affecting his rights cannot be considered a waiver of such rights.—Hoyne v. Wells, 180 Mich. 19.

¶ 7. A merchant, supposing that an insolvent customer to whom he had forwarded goods had received and appropriated them, made an affidavit as a creditor under the assignment. But the goods had not been received. Held, that the affidavit did not estop him from replevying them from the carrier.—Lentz v. Flint & P. M. Ry. Co., 53 Mich. 444.

¶ 8. One bringing assumpsit for the collection of a note in ignorance of the fact that the note had been paid to an agent is not thereby deprived of his right to discontinue and sue in trover for the money so paid.—Hogue v. Wells, 180 Mich. 19.

§ 2. Right, power and capacity to waive or elect.

Consent or waiver of objections to jurisdiction, see Courts §§ 63, 64, 83.
Power of legislature to authorize waiver of tort, see also Constitutional Law § 187.
Waiver of illegality of contract, see Contracts § 95.
Construction of wills as to electives, see Wills, VI.
Election to accept or reject terms of will as against other right, see Wills, VII, B.

¶ 9. A party may waive an absolute right in his favor even though it be granted by statute.—Peninsular Stove Co. v. Osmun, 73 Mich. 570.

§ 3. Occasion for election, inconsistency of alternatives.

Requisites and indicia of election or waiver, how accomplished or shown, see post §§ 8-15.
Remedies calling for election and cumulative remedies, see post §§ 4-7.
Elective rights under contracts or on breach thereof, see Contracts, VI, B, VII; Sales, VIII, IX.
Election between dower and other estates or rights, see Dower, V.
Election to take under or against terms of will, see Wills, VII.
Election between restitution of premises and improvements, in ejectment, see Ejectment §§ 76, 77.
Election of infant to affirm or avoid contract, see Infants.
Election between several securities, see Marshalling Assets.
Elective right of creditor against estate of deceased partner or against surviving partner, see Partnership, IV.
Election of counts in declaration, see Pleading, II.
Election between counts in indictment, see Indictment, I, C.
Necessity that seller who has received money on unapportionable contract elect to repay before action for partial delivery, see Sales, VIII.

¶ 10. Right of action for breach of contract is independent of clause therein providing for deduction from last payment of liquidated damages for breach.—Mitchell v. McKinnon, 65 Mich. 683.

§ 4. Different remedies and defenses.

Tort or contract remedies, see post § 5.
Legal or equitable remedies, see post § 6.
Statutory or other remedies, see post § 7.
Election between action on contract of exchange and action on implied contract for goods sold and delivered, see also Exchange of Property.
Elective right of creditor to bring action on account or on indorsement of draft, see Negotiable Instruments, XIV.
Between remedies of agent against principal, or vice versa, see Agency § 104.
Between seeking resale on foreclosure and pursuing agent for fraud therein, see Agency ¶ 506.

Election of remedies for injuries by and against dogs, see Animals §§ 14, 20.
Right to maintain concurrent actions and suits without abatement where issues are different, see Abatement §§ 10-13.
Election between methods of review, see Appeal § 8.
Urging inconsistent theory on appeal, see Appeal § 268.
Changing theory on appeal or on retrial or second review, see Appeal §§ 267-269, 468, 559.
Concurrent remedies for review of or relief from drain proceedings and assessments, see Drains §§ 96-98, 113, 114.

¶ 11. Where a brewing company makes a sale of beer to another liquor dealer in violation of the conditions of an agency contract, which it had the right to rescind because the agent could not legally sell, and the agent thereupon treats the contract as rescinded, he cannot, in a suit by the company to recover the amount due for beer theretofore ordered, recoup damages for plaintiff's breach of the contract.—Niagara Falls Brewing Co. v. Wall, 98 Mich. 158.

¶ 12. One who has repudiated a contract cannot afterward claim the benefit of it for the purpose of turning the other party out of court on the ground that the latter should have sued him on the alleged contract instead of under the common counts.—McQueen v. Gamble, 33 Mich. 344.

¶ 13. Where an express contract exists, the commencement of an action of assumpsit affirms such contract, and precludes recovery on the theory of an implied contract.—Hathaway v. Vaughan, 162 Mich. 269.

¶ 14. By commencing and trying an action upon his contract of sale a vendor is not precluded from suing on notes given for the price.—Kingsbury v. Kettle, 90 Mich. 476.

¶ 15. A tender in money to prevent a default on contract does not estop the tenderer to assert that by virtue of an independent agreement the same obligation was to be discharged by the performance of work which was done and accepted. They are not inconsistent defenses.—Hill v. Carter, 101 Mich. 158.

¶ 16. Replevying property transferred under false representations does not necessarily bar an action for damages from the deceit.—Lenox v. Fuller, 39 Mich. 268.

§ 5. ——Tort or contract remedies.

See also post ¶ 89.
Waiver of tort to sue in assumpsit or of contract to sue in tort, see Assumpsit, I; Conversion, II; Fraud, § 88; Contracts, VII, D; Sales, VIII, IX; Vendors and Purchasers, VIII, IX.
Waiving tort and shifting to other contract, see Assumpsit § 5.
Elective rights and remedies for breach of contract or for fraud in contracts, see Contracts, VII, D; Sales, VIII, IX; Vendors and Purchasers, VIII, IX.
Right to sue either in tort or on contract where breach amounted to a tort, see also Contracts § 252.
Election to sue on contract or for fraud inducing it, see also Contracts § 275.
Election of assumpsit as bar to remedy of replevin for goods sold, see Sales, VIII.
Recovery of damages for fraud after election to repudiate contract and retake possession of property sold, see Fraud, III.
Assumpsit or tort action for extortion by abuse of process, see Malicious Prosecution.
Contract or tort remedies against carriers, see Carriers §§ 78, 106, 142, 146, 206, 256.
Right to assumpsit or to action ex delicto for breach of contract by telegraph company, see Telegraphs and Telephones.

¶ 17. Where a plaintiff in ejectment has been aggrieved by the defendant's removing timber from the premises, although a tort may be waived by him and assumpsit brought, the statute does not require that in all cases a tort must be waived.—Wilson v. Hoffman, 93 Mich. 72.

¶ 18. By bringing assumpsit for the value of chattels in the possession of defendant under an option to purchase from plaintiff, the latter elects his remedy, and cannot thereafter maintain replevin for the property, although the suit in assumpsit has in the meantime been discontinued.—Cooper v. Smith, 109 Mich. 458.

¶ 19. Suing in assumpsit for the price under a contract reserving title until paid for does not amount to an election to treat the title as having passed and prevent replevin.—Canadian Typograph Co. v. Macgurn, 119 Mich. 533.

¶ 20. Where by a contract for the sale of wood, title to such wood was reserved in the vendor until the wood was fully paid for and payment was provided to be made as the wood was sold, and where the vendor had made an ineffectual attempt to recover in assumpsit a sum not due, such attempt did not constitute a waiver of a future tort in selling wood after default in making payment to the vendor, nor an election to treat the title of all the wood as having passed to the vendee.—Bryant v. Kenyon, 123 Mich. 151.

¶ 21. Section 10421, Comp. Laws 1897, provides that where a plaintiff has suffered an injury for which an action of deceit would lie, he may recover for the same in an action of assumpsit. Held, that in a case of money obtained by fraud, the starting of a suit in assumpsit to recover it and the

abandoning of such suit does not prevent the plaintiff from later suing in an action on the case.—Mintz v. Jacob, 163 Mich. 280.

¶ 22. Plaintiff began an action in assumpsit to recover money obtained from him by fraud, by capias ad respondendum, under Comp. Laws 1897, § 9998. He took a nonsuit in this action. Held, he was not by this course estopped to bring a later action of deceit in case, to recover damages.—Mintz v. Jacob, 163 Mich. 280.

§ 6. ——Legal and equitable remedies.

Choice of and right to equitable remedy because more adequate than legal remedy, see Equity, III, B.

Elective right of payee of promissory note to have equitable relief or to intervene in action by indorsee against maker, see Negotiable Instruments, XIV.

Quo warranto and chancery dissolution suit as concurrent remedies, see Corporations § 201.

Common law, chancery and statutory remedies for enforcement of stockholders' liability for creditors as cumulative, see Corporations § 326.

¶ 23. One who takes a chattel mortgage for the purchase price of goods shipped by him, and brings a suit in chancery to protect his security and for the appointment of a receiver, and an action in assumpsit to recover the entire amount claimed to be due, will be held to have elected to treat the title to the property as in the debtor, and to be estopped from thereafter maintaining an equitable proceeding against the receiver based on the theory that title had not passed.—McDonald v. Preston Nat. Bank, 111 Mich. 649.

¶ 24. Where the complainant had entered into a contract with defendant for the purchase of a certain lot, which defendant had obtained from her deceased husband by will, and had made all payments and gone into possession and made improvements on the lot, but before making the last payment insisted that the defendant give him a conveyance authorized by the probate court, and bringing suit for breach of contract was defeated, he is not estopped because of this action from maintaining a suit in equity to enforce specific performance of the contract, upon refusal of a deed by the vendor.—Wilson v. Knapp, 143 Mich. 64.

¶ 25. Where an action at law and a suit in equity are substantially for the same cause of action the plaintiff should elect in which he will proceed, for the defendant should not be harassed and annoyed by oppressive litigation.—Monier v. Mizner, How. N. P. 60.

¶ 26. The fact that a claim for a mechanic's lien and a bill to enforce have been filed will not prevent recovery in an action of trover for the value of an elevator installed in a building under an agreement that it is to remain the property of the seller until paid for.—Warner Elevator Mfg. Co. v. Capitol Investment, Building & Loan Ass'n, 127 Mich. 323.

¶ 27. There is no election of remedies by the executor of the estate of a beneficiary under a will of a portion of stock, which was bequeathed to trustees in trust for the benefit of testator's wife and children, including plaintiff's testate, to be held until a specified date, the dividends to be paid equally to the beneficiaries, and the principal equally divided after the expiration of such period, where the executor of the estate of such beneficiary first unsuccessfully attempts by a bill in chancery to secure a share of the dividends due to the estate of such beneficiary and petitions for the removal of the executor, and, after the expiration of such period, files a petition in the probate court asking for an accounting of the dividends declared and paid since the death of said beneficiary and to compel the payment of same to him as executor of the estate of such beneficiary, as the remedies were not inconsistent.—Wessborg v. Merrill, 195 Mich. 556.

§ 7. ——Statutory and other remedies.

Statutory action in assumpsit for money obtained by fraud or other remedy, see also ante ¶ 22.

Exclusiveness of statutory remedy for unlawful distraint of animals, see Animals § 11.

Between motion to vacate an award and action for relief in equity from it, see Arbitration § 15.

Cumulative remedies by suit against association or against members, see Associations § 10.

Resort to contempt proceedings as barring other remedy against officer, see Sheriffs, VI.

Election between general claim and lien against estate, see Estates of Decedents, VI.

Election between statutory remedy under Log Lien Law and assumpsit, see Forestry, III.

Elective rights of plaintiff on appeal in forcible entry cases, to sue on bond or in trespass, see Forcible Entry, II.

Election of employee injured in interstate commerce between Workmen's Compensation Act and Federal Employers' Liability Act, see Workmen's Compensation Law.

¶ 28. There are some cases where a party has an election of remedies, and where the result of the remedy chosen is decisive; but private remedies for an officer's omission to execute legal process are not lost by the failure of statutory proceedings against him for contempt.—Schwab v. Coots, 44 Mich. 463.

¶ 29. The remedies of garnishment proceedings at law wherein the plaintiff, a creditor, relies upon the defendants' liability as garnishees and suit under the Bulk Sales Act, Pub. Acts 1905, No. 223, How., 2nd Ed., § 2612 et seq., wherein the complainant relies upon the same defendants' liability as trustees for the complainant and other creditors of the value of the proceeds of goods obtained by the debtor and sold by him to one of the defendants and by such defendant to another defendant without complying with the provisions of the act, are consistent.—Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82.

§ 8. Requisites and indicia of election or waiver.

Occasions and alternatives calling for election, see ante § 3.
Right and capacity to waive or elect, see ante § 2.
Acceptance or repudiation as whole, see post § 9.
Bringing inconsistent action or claim, see post § 10.
Making inconsistent defenses, see post § 11.
Affirmance, ratification and adoption, see post § 12.
Acquiescence, delay, and silence, see post § 13.
Compromises and settlements, see post § 14.
Election as to one of several parties, see post § 15.
Stipulation or reservation against election, see post § 16.
Degree and sufficiency of proof of waiver or election, see post § 18.
Necessity that waiver be in writing, see Frauds, Statute of, I, G.
[Note. Since it is the purpose to treat in this topic the general law of election and waiver only and to treat in specific topics the waiver of given rights pertaining to such topics or the elections between alternative rights pertaining to them, the reader is cautioned to search the topic treating of the right in question. See illustrative cross-references which follow.]
Waiver of right to appeal or error, see Appeal, V.
Waiver of right under contract to have arbitration, see Arbitration § 7.
Effect of receiving dividend from assigned estate, see also Assignments for Creditors ¶ 183.
Waiver or abandonment of attachment lien, see Attachment § 97.
Waiver of attorney's lien, see Attorneys § 51.
Waiver of prepayment of freight, see Carriers ¶ 190.
Waiver of constitutional questions, see Constitutional Law § 29.
Requisites and indicia of waiver of defaults and delays under contracts, see Contracts § 237.
Notice of election under contract to call for alternative right, see Contracts § 231.
Election and waiver of rights on breach of contract, see Contracts § 259.
Denial of right as tantamount of waiver of demand for possession by person entitled, see also Conversion § 10.
Sale on execution as bar to bill in aid of execution, see Creditors' Suits § 15.
Election between dower and husband's will, see Dower § 38.
Waiver of conditions on subscriptions for corporate stock, see Corporations §§ 53, 54.
Waiver of prepayment of costs, see Costs § 146.
Waiver of fees by officers or of right to prepayment, see Courts, I; Sheriffs, III.
Waiver of corporation's lien on its stock, see Corporations § 314.
Waiver of breach of condition in deed, see Deeds § 90.
Waiver of log labor lien, see Forestry, III.
Waiver or election under insurance policies, see Insurance.
Waiver of right to cancel for breach of warranties in application for insurance, see Insurance, XII, C.
Waiver of forfeiture by landlord, see Landlord and Tenant.
Election and renunciation between will and other right, see Wills, VII.

¶ 30. By asserting a valid ground of defense one does not waive reliance on a different one that is equally valid and consistent with it.—Vanneter v. Crossman, 39 Mich. 610.

¶ 31. Where the remedies are consistent there is no election until one of them has been prosecuted to judgment, unless the plaintiff has gained an advantage or the defendant has suffered a disadvantage.—Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82.

¶ 32. Where the remedies are inconsistent the failure to secure satisfaction by means of the remedy adopted does not take the case out of the doctrine of election.—Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82.

¶ 33. Plaintiff sued in assumpsit to recover for plumbing done in a house which a third party contracted to erect for defendant, and with whom plaintiff agreed in the first instance to do the plumbing, upon the theory of an abandonment by the contractor of his contract, and an agreement by defendant to pay plaintiff for the work agreed to be done for the contractor if plaintiff would finish said work, and make certain changes at an additional price, which defendant agreed to pay. It appeared on the trial that, prior to bringing suit, plaintiff had filed a statement of lien, in which he swore that the work and materials sued for were furnished in pursuance of his contract with said contractor. Held, that plaintiff did not thereby elect his remedy so as to preclude

the bringing of the suit against defendant.—McLaughlin v. Austin, 104 Mich. 489.

¶ 34. A defendant in ejectment who files a bill in equity to enjoin the prosecution of the suit, plaintiff consenting by his answer that the question of whose is the superior title may be transferred to that forum, cannot invoke the doctrine of election of remedies to defeat plaintiff's right to a decree.—McKenzie v. Cook Co., 113 Mich. 452.

¶ 35. A payee who has repudiated a payment in securities cannot avoid a defense of such payment by showing a breach of the warranty of the securities in an action of assumpsit for the amount to be paid.—Bulen v. Burroughs, 53 Mich. 464.

§ 9. ——Acceptance or repudiation as whole.

See also post ¶ 54.

Repudiation of contract as indicia of election, see also ante ¶ 12.

Necessity of repudiation as whole, see also ante ¶ 35.

Election as involving repudiation of other remedy, see also post ¶ 38.

Necessity of complete acceptance or complete rejection of offer to contract, see Contracts § 20.

¶ 36. One cannot repudiate a contract and claim under it at the same time.—Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

¶ 37. F. bought property upon a foreclosure which turned out to be invalid, and conveyed it with warranty. The mortgagor then conveyed the equity of redemption to N. for the protection of F.'s grantees, but by an understanding between N. and F. a portion of the premises was excepted from this arrangement. Held, that if the grantees relied on the arrangement made for their protection they must recognize its terms throughout, and could not insist on rights in the land that was thus excepted, even though the original conveyance to them antedated the arrangement and exception.—Norris v. Michigan State Ins. Co., 51 Mich. 621.

§ 10. ——Bringing inconsistent action or claim.

See also ante ¶¶ 7, 8.

Pursuing inconsistent remedies without satisfaction, see also ante ¶¶ 32-34.

Inconsistent remedy after pursuit of mistaken or futile one, see post § 17.

Inconsistent defenses, see post § 11.

Adherence on appeal to theory chosen on trial, see Appeal §§ 267-269.

Bringing suit as revocation of submission to arbitration, see Arbitration § 6, ¶ 23.

Pursuit of remedy on main case as waiver of dissolution proceedings in attachment, see Attachment §§ 125, 127.

Election to litigate in state courts as estopping party from resort to Federal courts, see Courts ¶ 299.

Resort to one remedy for relief from drain proceeding as election against other, see also Drains § 114.

Election to bring action to recover back taxes as bar to certiorari to review drain proceedings, see Drains § 114, ¶¶ 359, 363.

Suing for breach of warranty or on theory contract has been rescinded, see Sales, VIII.

Replevin for goods sold or trover for their value, see Sales, VIII.

Elective right of action or defense of vendee in land contract where house on land encroaches on adjoining property, see Vendor and Purchaser, VIII.

¶ 38. Where the deliberate choice of one mode of redress involves the repudiation of another the party cannot change his election of a remedy; e. g., where one sued in assumpsit for the wages of his minor son on the basis of an implied contract with the person to whom the latter's services were rendered, and on the disagreement of the jury discontinued his suit, and sought to bring an action in case against the same defendant for unlawfully enticing away and harboring the son.—Thompson v. Howard, 31 Mich. 309.

¶ 39. It is the inconsistency of the demands which makes the election of one right of action an estoppel against the subsequent assertion of the other and not the fact that the forms of action are different.—Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82.

¶ 40. Suing for compensation for use and occupation is a waiver of any claim for treble damages on obtaining restitution of leased premises.—Hogsett v. Ellis, 17 Mich. 351.

¶ 41. One who has sued to recover money lent to an executrix as her individual debt can hardly claim redress from the heirs, afterwards, on the ground that the money was used for the benefit of the estate.—Alterauge v. Christiansen, 48 Mich. 60.

¶ 42. As to effect upon application for mandamus of relator's having previously brought an action of assumpsit which he has left undetermined, quære.—Walcott v. City of Jackson, 51 Mich. 249.

¶ 43. Certiorari will not be allowed to review irregularities in laying out drain, where plaintiff has elected another remedy, viz., action to recover tax paid under process.—Mathias v. Mason, 66 Mich. 524.

¶ 44. Where a creditor secured by bill of sale sold the property privately instead of publicly as his agreement required in case the debt was not paid, and refused to account for the surplus, the debtor by suing in assumpsit for the surplus elected his remedy, and to treat the title to the property as in the creditor; and if, after his suit has been dismissed for his failure to secure costs, he sues in trover, for the value of the prop-

erty, the defense of election is admissible in the trover suit under the general issue without notice; since it tends to show a title passed by contract.—Thomas v. Watt, 104 Mich. 201.

¶ 45. The bringing of an action of assumpsit, waiving tort, under Comp. L. 1897, § 10421, after plaintiff's property has been seized under a writ of replevin, and before sale of such property, is not an election of remedy barring an action of trover for the same property, brought subsequently and after the dismissal by the plaintiff of the action of assumpsit; since the defendant had not yet converted the property and had committed no tort.—Holmes v. Smith, 149 Mich. 327.

¶ 46. Where timber has been cut and removed from plaintiff's land, he may bring trespass quare clausum, or replevin, or assumpsit (under Comp. L. 1897, § 11207) or trover, but having elected to bring trover he waives the other remedies.—Anderson v. Besser, 131 Mich. 481.

¶ 47. A creditor's right of action is not affected by his having filed a claim in assignment proceedings.—Detroit Stove Works v. Osmun, 74 Mich. 7; Hinchman v. Weeks, 85 Mich. 535.

§ 11. ——Making inconsistent defense.

Waiver of right to claim default of plaintiff by answer or plea, see Defaults ¶ 28.

¶ 48. Defendant, having a license to cut timber, gave a mortgage on the timber lands to complainant. By failing to pay taxes as required by the license the defendant had forfeited all his rights. Complainant mortgagee brought a bill to foreclose. Intervening petitioners came in and claimed title by a grant from the owner, after defendant's forfeiture. Defendant first denied such forfeiture, and then by amended pleadings asked to be relieved of the effects of the same by paying the taxes. Held, the defendant could not take such inconsistent positions, and relief from the forfeiture would not be granted.—Scott v. Sullivan, 159 Mich. 297.

§ 12. ——Affirmance, ratification and adoption.

Ratification of acts of agent, see Agency, II, C.

Affirmance, reliance or waiver as elements in actionable fraud, see Fraud, I.

Adoption of results or benefits of situation created by fraud as waiver, see Fraud, III.

Acceptance of performance as election to waive defects, see Contracts, VII, C; Sales, V, C.

Waiver of right to rescind contract by later acceptance of goods delivered under it where acceptance is caused by mistake of goods for those of another seller, see Sales, VIII.

Waiver of right to rescind contract by bringing action on it, see also Rescission, I, III.

¶ 49. Parties gave a mortgage in exchange for a promissory note against their father, and afterwards obtained an allowance of the note as a claim in their favor against their father's estate; held, that they were estopped from defending against the foreclosure of the mortgage on the ground that it had been procured by false representations, of which they knew before prosecuting their claim; having elected to confirm the original exchange by making the note the basis of their claim, they could not, when called upon to pay the mortgage, elect again in such a way as to stultify their first election.—Sloan v. Holcomb, 29 Mich. 153.

¶ 50. A conveyance of her interest in the assets of her husband's estate, made by a woman while under the stress of being charged with the murder of her husband, was not set aside where after the occasion for the stress had passed and after she knew that her bargain was an unwise one, she accepted and appropriated the proceeds, less a considerable amount as consideration for anticipating the time of payment, thus making an election which for all times affirmed the transaction.—Sanderson v. Adams, 133 Mich. 359.

§ 13. ——Acquiescence, delay and silence.

See also post ¶ 53.

Acquiescence as indicia of election, see also post ¶ 73.

Acquiescence curing void execution sale of plank road franchise, see Corporations ¶ 726.

Waivers effected by default, see Defaults §§ 17, 18.

Failure to bring proceedings for assignment of dower within the statutory period as waiver of right, see Dower § 38, ¶ 99.

¶ 51. A debtor waives no rights by his silence when he is not called upon to act.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 52. Where a complainant conveys a remainder to defendant, reserving possession and a life estate to himself, and the defendant takes possession and fails to pay to complainant the monthly sum stipulated, the fact that complainant does not sue the defendant in ejectment is not a waiver of his rights to the payments.—Herpel v. Herpel, 162 Mich. 606.

§ 14. ——Compromises and settlements.

Waiver of original dispute by accord and satisfaction, see Accord and Satisfaction.

Waiver and discharge by formal release, see Releases.

¶ 53. Parties are barred by such subsequent dealings as indicate a waiver of their

right to complain for fraud. Compromises, even though under pressure of pecuniary difficulty, constitute waiver. To keep his claim in force the defrauded party must act consistently in refusing acquiescence.—Craig v. Bradley, 26 Mich. 353.

¶ 54. One who has settled with his licensee under an oral agreement changing the discounts allowable and the percentages payable under a royalty contract, and has received increased discounts thereby, cannot repudiate it while retaining and not accounting for the increased discounts.—Mouat v. Bamlet, 123 Mich. 345.

§ 15. ——Election as to one of several parties.

Election against one of several parties where action held void, see post ¶ 63.

Election as to one of several parties where remedy is mistaken, see also post ¶ 66.

Election to bring suit against one of several parties as precluding separate suits against others, see Equity, III, C.

¶ 55. By proceeding to enforce collection of a judgment that has been recovered against one of several parties jointly guilty of conversion, plaintiff elects to look to him alone and bars himself from recourse to the rest.—Kenyon v. Woodruff, 33 Mich. 310.

¶ 56. Plaintiff sued defendant corporation for services rendered. The case was appealed, reversed, and remanded. At the first trial it did not appear that plaintiff had sued one Foss individually to recover for said services, and the declaration in the Foss suit did not clearly indicate that the services sued for were identical with those relied on in the suit against defendant. Held, the court properly refused to direct a verdict for defendant on the theory that plaintiff had elected to hold Foss liable.—Ruttle v. What Cheer Coal Mining Co., 161 Mich. 150.

§ 16. Stipulation or reservation against election.

Finality and consequences of election in absence of reservation, see post § 21.

¶ 57. The presentation in the probate court of a claim against an estate does not estop the claimant from afterwards suing it in equity as a partnership claim if its former presentation was not intended as an abandonment of it as such, and if it was expressly rejected on that ground at the respondent's instance.—Way v. Stebbins, 47 Mich. 296.

¶ 58. The taking of additional security by a creditor providing for the payment of his debt does not constitute an election of remedies such as to preclude him from enforcing his original security where the agreement for additional security expressly provide, that it does not waive any of his rights under the original agreement.—Schmidt v. Gaukler, 156 Mich. 243.

§ 17. Mistake or nonexistence or futility of remedy pursued.

See also ante ¶¶ 20, 24, 28, 38, 44.

Election where court without jurisdiction, see also post ¶ 89.

Effect of following nugatory remedy to waive right to question validity of statute giving no other remedy, see Constitutional Law § 29, ¶ 150.

Right to proceed in contempt after void and ineffective levy, see Contempt § 22.

¶ 59. Clients having improvidently given a bond of indemnity to secure their attorney from the effect of selling, without consulting them, more of the mortgaged goods than was sufficient to satisfy the client's mortgage interest, their right to have the bond canceled, on becoming aware of the facts, is not affected by their employing counsel to defend the suit against the attorneys; they having already given the bond, and there being no evidence that they knew at the time what their rights were.—Gray v. Emmons, 7 Mich. 533.

¶ 60. The rule that one who has elected his remedy by bringing an action upon one theory cannot afterwards sue upon another, is not inconsistent with bringing a second and different action where it appears plaintiff never had a right of action as first brought, and therefore could not have elected. —McLaughlin v. Austin, 104 Mich. 489.

¶ 61. The prosecution of a claim against a decedent's estate for the purchase price of logs alleged to have been sold and delivered to decedent under an oral agreement, though carried on with knowledge that the claim as presented is unfounded, and with an intent to deceive the court by keeping it in ignorance of a written contract by which the relations of the parties are defined, will not, on grounds of public policy, estop the claimant from thereafter asserting his rights under the written contract, and from seeking a recovery based upon the breach of a trust thereby created.—Sullivan v. Ross's Estate, 113 Mich. 311.

¶ 62. Where a purchaser of a lot has entered into possession, made improvements thereon and has tendered the amount due on the payments he is entitled to specific performance of the contract, even though he may have instituted an unsuccessful action against the vendor for breach of contract, his first suit not being an election on which theory to sue, inasmuch as he never had a right of action in the suit first brought.—Wilson v. Knapp, 143 Mich. 64.

¶ 63. In an action to recover for services, the fact that plaintiff had previously sought to recover the debt by action against a third person is immaterial where such action proceeded upon oral guaranty, which the court in that action held to be void.—Lemiette v. Starr, 66 Mich. 539.

¶ 64. Whether the bringing of an action upon a promissory note was such an election of remedies as estopped the plaintiff, when such action was found to be barred, from suing for fraud and deceit practiced on him by the defendant, to induce the purchase of the note, quære.—Black v. Miller, 75 Mich. 323.

¶ 65. While a person is bound by an election between two inconsistent remedies, one having a meritorious claim, who mistakes his remedy, and attempts to enforce it in an inappropriate action, wherein no recovery can be had, is not precluded thereby from resorting to his proper remedy.—Sullivan v. Ross's Estate, 113 Mich. 311.

¶ 66. The fact that a consignee of wheat brought suit against the sheriff in trover when it was replevied in transit by order of the farmer who sold it to the local dealer for cash is not an election of remedies so as to prevent the consignee from dismissing his action in trover and enforcing his right of action against the bank on the theory of a failure of consideration for the drafts attached to the bill of lading by the bank.—Shanahan v. Coburn, 128 Mich. 692.

§ 18. Pleading and proofs of waiver or election.

Election of another remedy as defense under general issue, see Pleading, IX.

Proof of election to sue in assumpsit rather than trover under general issue in trover action, see Conversion § 27.

Presumptions in general, see Evidence, II.

Evidence of election or waiver of rights under contract, see Contracts § 330.

¶ 67. Evidence of the waiver of stipulated rights should be explicit.—Gault v. Van Zile, 37 Mich. 22.

¶ 68. Slight evidence of waiver may be held sufficient when no substantial rights are to be lost thereby.—Snyder v. Washtenaw Circuit Judge, 80 Mich. 511.

¶ 69. A waiver of a legal right is not to be implied from slight circumstances.—Bird v. Hamilton, W. 361.

¶ 70. A waiver may be proved by circumstances as well as by direct testimony.—Cobbs v. Fire Ass'n of Philadelphia, 68 Mich. 463.

¶ 71. The question of waiver is one of intent, and is a proper subject of inference from surrounding circumstances.—Hibernia Ins. Co. v. O'Connor, 29 Mich. 241.

¶ 72. The question of waiver is one of intent, and is a proper subject of inference from surrounding circumstances, and it may be proved by circumstances as well as by direct testimony.—International Fair & Expo. Ass'n v. Walker, 88 Mich. 62.

¶ 73. Plaintiff, in an action against a railroad company for the breach of a contract to retain him in its employ for life at a fixed monthly salary in settlement of a claim for personal injuries, may show, for the purpose of rebutting a presumption of waiver of his right to the stipulated salary, arising from his acceptance of a smaller salary for several years, that he protested against the reduction to several in authority, that he consulted his attorney in regard to it, and that the latter advised him in effect that his acceptance of the lesser sum would not deprive him of the right to recover, in the event of his wrongful discharge, the full amount due under his contract.—Brighton v. Lake Shore & M. S. R. Co., 112 Mich. 217.

§ 19. Questions for jury or court.

Questions for court and jury in general, see Trial, VI.

¶ 74. Whether waiver is made out is a question for the jury unless the facts are admitted or the evidence undisputed.—Marthinson v. North British, etc., Ins. Co., 64 Mich. 372; Cobbs v. Philadelphia Fire Assoc., 68 Mich. 463, 465; Peninsular Stove Co. v. Osmun, 73 Mich. 570; International Fair & Expo. Ass'n v. Walker, 88 Mich. 62.

¶ 75. When the fact of waiver is sought to be established by circumstances, or inferred from facts proved, or where the testimony is doubtful or conflicting, the question of waiver is one of fact for the jury.—Cobbs v. Fire Ass'n of Philadelphia, 68 Mich. 463.

¶ 76. Where there is no conflicting testimony, and all the facts are admitted or conceded, it is the province of the court to inform the jury, as matter of law, whether a waiver has or has not been established.—Cobbs v. Fire Assn. of Philadelphia, 68 Mich. 465 on rehearing.

¶ 77. Waiver by delay of the right to sue is one of fact and not of law in all cases that are not within the statute of limitations.—Dayton v. Monroe, 47 Mich. 193.

¶ 78. Where the facts relied on as amounting to a waiver of irregularities in the proceedings in a case are undisputed, the question of such waiver is for the court.—Peninsular Stove Co. v. Osmun, 73 Mich. 570.

¶ 79. Where it is claimed to be established by conduct and circumstances from which different minds might draw different conclusions, the question whether waiver is made out or not is one for the jury.—International Fair & Expo. Ass'n v. Walker, 88 Mich. 62.

¶ 80. A waiver is a mixed question of law and fact, and each case depends much upon its own peculiar circumstances and surroundings. It is a question for the court to determine whether there is any evidence tending to show a waiver; but, when there is any

evidence, the jury must determine what the intent of the party was, as the question of waiver is usually one of intent, as indicated by the acts and declarations of the party.—Griswold v. Ludington, 116 Mich. 401.

§ 20. Effect of waiver.

Effect of election, see post § 21.
Consents and waivers as considerations for promises, see Contracts, §§ 117, 118.

¶ 81. A waiver cannot renew an estate that has expired by limitation and accordingly the failure of the state to institute proceedings did not continue a franchise to take bridge tolls after its expiration.—Grand Rapids Bridge Co. v. Prange, 35 Mich. 400.

§ 21. Finality and consequences of election.

See also ¶¶ 49, 50.
Effect of waiver, see ante § 20.
Effect to bind or benefit parties in privity, see post § 22.
Election where remedy mistaken, futile or nonexistent, see ante § 17.
Of election of remedy, see also ante ¶¶ 23, 28.
Of election by commencement of action, see also ante ¶¶ 13, 14, 16.
Of election of remedy where inconsistent action or claim is made, see also ante § 10.
Stipulation or reservation against election, see ante § 16.

¶ 82. By electing to pursue one of two inconsistent remedies, the plaintiff is precluded from resorting to the other.—Black v. Miller, 75 Mich. 323.

¶ 83. A party having elected by bringing an action upon one theory has no right afterwards to sue upon another.—Wilson v. Knapp, 143 Mich. 64.

¶ 84. An execution debtor, by bringing trover for the value of property wrongfully levied on, elects to sever the seizure from the act of entry and cannot thereafter bring trespass for the latter.—Finn v. Peck, 47 Mich. 208.

¶ 85. Waiving the tort of a conversion and suing in assumpsit amounts to an election to regard defendant as owner of the property converted and such election is a bar to a subsequent action for conversion.—Nield v. Burton, 49 Mich. 53.

¶ 86. Where a plaintiff has a choice between inconsistent claims, the commencement of action upon one theory constitutes an election, and while he may discontinue and sue again upon the same claim, he cannot be allowed to sue upon an inconsistent claim.—Mintz v. Jacob, 163 Mich. 280.

¶ 87. Where a railroad company had contracted to haul timber, and upon being sued for damages for a breach thereof had elected to treat the contract as severable and not as entire, it was bound to perform its part of the contract, and seek compensation in damages for any breaches which it was in a position to complain of.—Gates v. Detroit & M. R. Co., 147 Mich. 523.

§ 22. ——Effect to bind or benefit parties in privity.

¶ 88. Estoppel by an election between remedies extends beyond the immediate parties thereto, and binds all who claim under them or are in privity with them.—Rowley v. Towsley, 53 Mich. 329.

¶ 89. Waiving the tort of a conversion and suing in assumpsit amounts to an election to regard the defendant as owner of the property converted, and estops the plaintiff from bringing trover against the defendant's vendee. And the fact that the first action was brought in a court which did not have jurisdiction does not destroy the effect of such election so far as the vendee is concerned.—Nield v. Burton, 49 Mich. 53.

¶ 90. A vendor, who elects to pursue his remedy against his vendee by obtaining judgment against him for the value of his interest in the property, cannot thereafter claim the property itself from one to whom the vendee has sold it.—Button v. Trader, 75 Mich. 295.

ELECTIONS.

TREATS of the procedure to ascertain the choice or will of the people by ballot of the electors for candidates for office or for some public project or policy submitted to them. It excludes "appointment" of officers and the constitutional power of appointment (see Officers; Constitutional Law), the induction and status and rights of the officer (see Officers), the trial of title to office (see Officers; Quo Warranto), and the election by supervisors or city councils in exercise of their power of appointment (see Counties; Municipal Corporations).

Analysis.

I. In general; time, place and calling.

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§ 3. Notification of election.
§ 4. Sufficiency of notice of special or vacancy election.
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§ 6. Implied, constructive or presumptive notice.
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§ 8. Conduct of and facilities for elections.
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II. Officers and attendants at polls.

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§ 11. In general.
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§ 23. Voting and ballots at primaries.
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§ 27. Nominations by petition.
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§ 29. Official ballot.
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§ 31. ——Candidates of minor parties.
§ 32. Position or column on official ballot.
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§ 91. In general.
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X. Misfeasance and malfeasance about election or voting.

§ 95. In general; liability for.

XI. Privileges of electors and secrecy of ballot.

§ 96. In general.
§ 97. Exclusion of evidence violating secrecy.

[Note. Because of the statutory changes in the systems of balloting and elections, some of the earlier decisions collected herein are doubtless obsolete. Nevertheless they have been retained in order that the searcher may make his own selections, and also in order that historical and analogical values may not be lost.

The references herein to the statutes are not copious or detailed, for the reason that to have made them so would have produced a confusing mass of details. But references general in nature have been freely made.]

Constitutional and suffrage and validity of laws under them, see Constitutional Law, XII.

Validity, construction and effect of statutes relating to elections, see Constitutional Law; Statutes.

Submission of matters of public action, such as location and removal of county seats, issuance of bonds or creation of public debt, adoption locally of legal regulations, or the like, see Counties §§ 2, 16, 27, 42; Municipal Bonds, I; Public Contracts, I; Municipal Corporations, III; Schools, III; Townships, II; Intoxicating Liquors, III, A.

Submission of constitutions or of amendments thereto, see Constitutional Law, I.

Initiative and referendum of statutes, see *Statutes*, VIII.

Matters peculiar to elections in municipalities and townships, see also Municipal *Corporations*, XV; Townships, V; *Schools*, III.

Meetings of townships and school districts, see Schools, III; Townships, II.

Corporate elections by stockholders and members, see Corporations, IX.

General and special election statutes, see Comp. L. 1915, chap. 80; and see Pub. Acts 1917, No. 203.

Party committees and how composed, see Pub. Acts 1917, No. 203, chap. XXIII.

1. IN GENERAL; TIME, PLACE AND CALLING.

§ 1. In general; nature and kinds.

Provisions for "election" of officers, see Constitutional Law § 265.

Power to make interim or provisional appointments, see Constitutional Law § 266.

For first county officers, see Counties § 2.

Statutory meanings of "election," see Pub. Acts 1917, No. 203, chap. I.

¶ 1. By general election, as the term is used in the constitution and statute with reference to the office of probate judge, is meant the biennial election held in November; and an election at any other time to fill that office is a special election.—People v. Palmer, 91 Mich. 283.

¶ 2. How. St., § 2, subd. 19, provides that the term "general election" means the election held in November unless such construction would be inconsistent with the manifest intent of the legislation, and there is nothing in Pub. Acts 1895, No. 271, § 14, to indicate that the term "general election" has any

other meaning.—Edgar v. Board of Election Commissioners of Livingston County, 118 Mich. 418.

§ 2. Time for elections; general or special.

What constitutes "special elections," see also ante ¶ 1.
Primaries for special elections, see post § 21.
Sufficiency of notice of election, see post §§ 3, 4, 6.
Separate ballot boxes for different elections held simultaneously, see post § 36.
Effect of election in fact to validate insufficiently called special election, see also post ¶ 261.
Changing time for elections as changing terms, see also Constitutional Law § 270.
Time for submission of amendments to constitution, see Constitutional Law § 5.
Time for election on proposal to change county seat, city elections and township meetings at different times, see Counties § 16.
Special elections, statutory provisions, see Pub. Acts, 1917, No. 203, chap. III.
Statutory times for elections and offices to be filled at the several elections, see Pub. Acts 1917, No. 203, chap. II.
Recall elections and ballots, see Comp. L. 1915, chap. 82.

¶ 3. The term "organized townships," used in Const., art. 2, § 1, which provides for the annual election in such townships of certain officers, including constables, does not embrace organized or incorporated cities and villages.—White v. Manistee County Sup'rs, 105 Mich. 608.

¶ 4. Where a vacancy occurs in the office of county prosecuting attorney after the commencement of a term of service and more than six months before the next general election, it is proper to fill the vacancy at a special election as provided by 1 Comp. Laws, 1897, § 5936, subd. 4, or at the coming general election as provided by 1 Comp. Laws, 1897, § 3597.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 5. An election to fill a vacancy in office of probate judge can take place only at the general biennial election in November or at a special election ordered, under the statute, by the governor or board of supervisors.—People v. Palmer, 91 Mich. 283.

¶ 6. Comp. L. 1871, § 34 (How. St., § 146), in providing that vacancies in certain offices, if not supplied before the next general election, may be filled then, is merely permissive.—Secord v. Foutch, 44 Mich. 89.

¶ 7. Where an election of county auditors for unexpired terms is ordered for the general spring election at which state officers are elected, a call by the board of supervisors for a special election is unnecessary; nor would a two-thirds vote be required for such call.—Attorney-General v. Trombly, 89 Mich. 50.

§ 3. Notification of election.

Call for special election, see also ante ¶ 7.
Of special or vacancy election, see post §§ 4, 5.
Implied or constructive notice, see post § 6.
Statutory provisions as to notices, see Pub. Acts 1917, No. 203, chap. V.

¶ 8. In general, notice of an election is indispensable and an election held without it is void where the time and place thereof are not fixed by law and in cases of special elections which do not occur at fixed or regular periods but only on the happening of a contingency.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 9. Laws 1891, Act No. 50, providing for the election of presidential electors, cannot be regarded as inoperative and void because it does not require notice of election of the district electors provided for; How. St., § 147, which requires the secretary of state to give notice that presidential electors are to be chosen at the general election, remains in force.—McPherson v. Secretary of State, 92 Mich. 377, affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

¶ 10. Statutory notice of an election was held to be dispensed with, in the particular instance, where the statute was so amended as to require the election of an officer not previously provided for, but the amendment went into effect too late to give the statutory notice before the election.—Powell v. Jackson Common Council, 51 Mich. 129.

§ 4. Sufficiency of notice of special or vacancy election.

Necessity of call for special election, see ante § 2, ¶ 7.
Implied or constructive notice, see post § 6.
Naming or describing office in notice, see post § 5.
Notice of election on proposal to remove county seat, see Counties §§ 15, 16.

¶ 11. An election to fill a vacancy in the office of judge of probate, though held at the same time as a general election of other officers, is void unless some distinct and public notice was so given that voters might clearly understand that it was to be held.—Secord v. Foutch, 44 Mich. 89.

¶ 12. Where there is no statute requiring that a vacancy in the office of prosecuting attorney be filled at the next general election and no special election had been held, an intention to supply the vacancy either at a special or general election must be evidenced by the statutory notice or such a general understanding of the electors as to take the place and accomplish the same purpose of the statutory notice.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 13. If it is intended to fill a vacancy in the office of prosecuting attorney which oc-

curred more than six months before the next general election, at such election notice thereof should be given before the primary election is held.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 14. Form of notice under statute for a special election ordered by board of supervisors to fill a vacancy, held sufficient. Such notice need not copy the preamble of the order of the board.—People ex rel. Andrews v. Lord, 9 Mich. 227.

§ 5. ——Specification of office to be filled.

¶ 15. Where a city charter required a vacancy in a city office to be filled at the next general election, and directed the city clerk to give notice of the election, and of the offices to be filled, and the notice actually given by him took no notice of the vacancy, it was held that this default of the clerk did not invalidate the election for the vacancy.—People ex rel. Speed v. Hartwell, 12 Mich. 508; People ex rel. Moore v. Witherell, 14 Mich. 48.

¶ 16. An election to fill a vacancy is invalid, if held at a general election for city officers, where no notice of the election for filling such vacancy was given, and where a charter provision requiring the filling of vacancies at the next general election and the giving of notice specifying the offices did not apply to the particular office under which charter provision the clerk's omission to mention the vacancy in the notice would have amounted to a mere irregularity not invalidating the election to such office.—People ex rel. Moore v. Witherell, 14 Mich. 48.

§ 6. Implied, constructive or presumptive notice.

¶ 17. Where a statute makes the time and occasion of an election imperative, requiring it to be at the next general state election, the election cannot be made nugatory by any failure to give notice.—Attorney-General v. Iron County Board of Canvassers, 64 Mich. 607.

¶ 18. Where a statute makes the time and occasion of an election imperative, the election is not void because of failure to give notice. Every one is bound to take notice of what the statute requires.—Adsit v. Osmun, 84 Mich. 420.

¶ 19. An election to fill a vacancy, of which no notice is given, and which is in fact known to but few of the voters, is void. But though the official notice was not given, or, if given, not in the prescribed form, yet if the election has been held, and the great body of the voters had notice in fact of the vacancy, this, coupled with the fact that they are presumed to know that the law requires the vacancy to be filled at the next election, is sufficient, even though many refrained from voting because of a difference of the construction of the law.—Adsit v. Osmun, 84 Mich. 420.

¶ 20. Act 97 of Laws 1889, creating the office of additional circuit judge for Kent county, declared such office vacant and authorized the governor to appoint a person to fill the vacancy, who was to hold the office after the general spring election in 1893. The democratic party, claiming that the person so appointed could not constitutionally hold office after the general fall election in 1890, nominated, prior to such fall election, relator for the unexpired term. Unofficial notices of election were posted in every precinct, and relator received the average vote of his party, which carried the county by a considerable plurality. The other political parties made no nomination for this office and refrained from voting. Held, that the refusal of the secretary of state to give the statutory notice did not invalidate the election.—Adsit v. Osmun, 84 Mich. 420.

¶ 21. Electors of a city are presumed to have notice of the proceedings of the common council, which are published in the official paper of the corporation. They are therefore presumed to have notice of a vacancy which has been declared by the council.—People ex rel. Speed v. Hartwell, 12 Mich. 508.

¶ 22. In the absence of a statute requiring that a vacancy in the office of prosecuting attorney shall be filled at the next general election where there has been no special election, there is no public duty to take notice that such an election will be held.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 23. A judge of probate having moved from the county during his term, the governor appointed another to fill his place. In giving notice of the next general election, it was intimated in two notices that an election would be held to fill the vacancy, but this intimation was afterwards omitted. At the election there was no competition, and the number of votes cast for the one candidate indicated that it was not generally understood a probate judge was to be chosen. Held, on quo warranto proceedings against the governor's appointee, that the election was void, as held without sufficient notice, and the respondent was entitled to the position.—Secord v. Foutch, 44 Mich. 89.

¶ 24. Where no notice is given of an intention to fill a vacancy in the office of prosecuting attorney at the coming general election and no general public understanding of such an intention exists, no election can be held, and votes cast at the primary before such election for a person as a candidate for the vacancy are without significance in fact or in law.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 25. It would seem that the number of votes cast for candidates for nomination to fill a vacancy in the office of prosecuting attorney at a primary election before a general election is conclusive of the general

understanding as to an intention to fill the vacancy at the general election.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

¶ 26. Where no notice is given of an intention to fill a vacancy in the office of prosecuting attorney at the next general election, no general understanding by the electors that such an intention exists is manifest where only three votes are cast for the nomination of persons to fill the vacancy at the primary before the general election, and such votes were cast for a candidate whose name was written on the ballot by the voters.—Board Election Com'rs Wayne Co. v. Wayne Circuit Judges, 172 Mich. 430.

§ 7. Place or district for elections.

Place of residence as voting qualification, see post §§ 13, 14.

Invalidity of vote on right district after erroneous vote in wrong one, see post ¶ 243.

Irregularity in place or adjournment as affecting result, see post § 75.

Constitutional requirements as to districts and changes, see also Constitutional Law § 255.

Apportionment of the state into representative and electoral districts, see Constitutional Law §§ 258-260.

Certainty, validity and effect of statutes not specifying voting place or district, see also Statutes, V.

Statutory provisions as to election precincts, see Pub. Acts 1917, No. 203, chap. VI.

Election districts in townships and villages, see Comp. L. 1915, chap. 79.

¶ 27. A legislative act authorizing the annual meeting of the township of Pontiac to be held within the city of Pontiac would not authorize the polls for said township, for a general election, to be held in the city.—People v. Knight, 13 Mich. 424.

¶ 28. Laws 1891, Act No. 50, providing for the election of presidential electors, held not inoperative on the ground that no means are provided for canvassing votes in Wayne county; in such county the inspector should designate the district in which the elector is voted for.—McPherson v. Secretary of State, 92 Mich. 377, affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

¶ 29. While the apportionment act of 1901 was supplanted by the apportionment act of 1905 it must be presumed that the legislature in passing the apportionment act of June 16, 1905, had in mind the local act of June 8, 1905 (Local Acts 1905, No. 627) which had been given immediate effect, and by the provisions of which certain territory annexed to the city of Detroit was not to be annexed until the first Monday of April, 1906. Construing the two acts together it was the intention of the legislature that the new act should not supplant the old as to the territory annexed until the arrival of the time of the actual annexation, and during the interval the rights of the electors in such territory should be determined by the old law.—Attorney General ex rel. Battishill v. Township Board of Springwells, 143 Mich. 523.

¶ 30. An election of senators must be called under the last enacted valid senatorial apportionment act, where later acts providing for such apportionment have been declared invalid because of unconstitutional inequalities in apportionment; even though, owing to changes of population, equal, if not greater, inequalities may exist under such valid act.—Williams v. Secretary of State, 145 Mich. 447.

§ 8. Conduct of and facilities for elections.

Official ballots, see post § 29.

Ballots and preparation of them, see post, IV.

Ballot boxes and management of voting place during reception of votes, see post §§ 36, 40.

Separate boxes where several votes are taken at one election time, see post § 36.

Voting on machines, see post § 37.

Election officers and attendants, see also post § 10.

Receiving votes, see post, V.

Counting votes, sealing boxes and making returns, see post, VI.

Improper printed instructions as affecting election, see post § 84.

Polling places and their equipment, provisions of the statute, see Pub. Acts 1917, No. 203, chap. VII.

¶ 31. The provisions of Laws 1889, Act No. 263, regulating the conduct of elections, do not apply to municipalities whose elections are governed by special enactment, except in so far as they relate to the ballots and booths to be used.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 32. The provisions of the election law of 1889, Act No. 263, with reference to the construction of booths, the admission of voters within the railing, the stationing of gatekeepers and the preparing, depositing, printing, furnishing and filing of tickets, explained.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 33. Under Laws 1889, Act No. 263 it is the duty of the secretary of state to see that tickets are printed and furnished; of the municipal authorities to provide the booths, and have them ready for use the morning of election; and of the election boards to perform the duties imposed upon them.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 34. The printing of election tickets under Laws of 1889, Act No. 263 is not to be done at the expense of the state, and the secretary

of state is not bound to have it done at the state printing-office, but may select his own place of printing.—Common Council of Detroit v. Rush, 82 Mich. 532.

§ 9. Cost and expenses of elections.

Printing costs, see also ante ¶ 34.
Necessity of deposit to have recount, see also post ¶ 193.
Proper county and state charges, see Counties, IV; State of Michigan, IV.
Certainty, validity and effect of statutes silent as to provision for election expenses, see Statutes, V.

II. OFFICERS AND ATTENDANTS AT POLLS.

§ 10. In general.

Relative duties of state and local officers as to preparing and furnishing ballots, etc., see ante ¶ 33.
Ministerial nature of duties of canvassers of primary vote, see post § 28.
Functions of registration officers, see also post ¶ 58.
Function in receiving challenged vote, see post § 38.
Effect of mistakes and misdoings of officers on validity of elections, see post §§ 82, 83.
Effect of illegal appointment and presence of "instructor" on the result, see post ¶ 248.
Canvassing boards and their powers, duties and functions, see post, VI.
Interest of member of canvassing board as reason for inspectors to act as recount board, see post ¶ 192.
Qualifications of recount commissioners, recital in appointment, see post ¶ 198.
United States officers and marshals at elections, see post ¶ 250.
General law of officers, see Officers.
Illegally appointed election officers as officers de facto, see Officers, III, VI.
Provisions as to inspectors and clerks of election, see Pub. Acts 1917, No. 203, chap. VIII.
Boards of election commissioners in townships, cities and villages, see Pub. Acts 1917, No. 203, chap. IX § 28.
Gate keepers at polls, see Pub. Acts 1917, No. 203, chap. VII §§ 8 et seq.
Challengers in polls at election, see Pub. Acts 1917, No. 203, chap. X §§ 27 et seq.
Oaths and compensation of officers, see Pub. Acts 1917, No. 203, chap. XXIV.

¶ 35. The common council, upon redistricting a city for election purposes, may reappoint for undisturbed districts the inspectors of election previously elected and may appoint additional inspectors for the other districts; for it cannot be said that vacancies exist in the new districts, and Laws 1891, Act No. 190 is therefore applicable.—Conely v. Common Council of Detroit, 93 Mich. 446.

¶ 36. Appointment by the village council of its president and one of its trustees as election inspectors, though they were candidates for re-election, was an irregularity and did not invalidate the election, where it was done in good faith and in the belief that the board was to be appointed under How. St., § 2794 and that such section was not repealed by Laws 1893, Act No. 202, which disqualifies a candidate to be inspector.—People ex rel. Hartwick v. Avery, 102 Mich. 572.

III. ELIGIBILITY AND REGISTRATION OF ELECTORS.

§ 11. In general.

Residential qualifications, see post §§ 13, 14.
Registration, see post §§ 15-17.
Registration as prima facie evidence of qualifications, see post ¶ 59.
Duty to receive challenged vote when sworn in, see post § 38.
Actionable rejection of vote, see post § 95.
Privileges of electors and secrecy of ballot, see post, XI.

¶ 37. It cannot be presumed that any legislature means to set up different rules of suffrage in different parts of the state, so as to create inequalities among voters.—Warren v. Board of Registration, 72 Mich. 398.

¶ 38. For a general discussion of the qualifications of electors, see the opinions of the justices in People v. Blodgett, 13 Mich. 127.

¶ 39. A person born abroad of parents of African descent born in this country, and held as slaves until they left it, does not, by removing to the United States, become a citizen.—Hedgman v. Board of Registration, 26 Mich. 51.

¶ 40. All persons in whom white blood so far preponderated that they had less than one-fourth of African blood are within the meaning of that clause of the constitution which limited the elective franchise to "white male citizens," and no other person of African descent could be so regarded.—People v. Dean, 14 Mich. 406.

§ 12. Women as voters.

See Const. art. III, § 1.

¶ 41. While no person can vote for the election of any officer mentioned in the constitution unless he possesses the qualifications of an elector prescribed in that instrument, it does not follow that none but such electors can vote for officers whom the legislature has the right to provide for to carry out the educational purposes declared in that instrument. Provision allowing women to vote at school elections sustained.—Belles v. Burr, 76 Mich. 1.

¶ 42. Laws 1893, Act No. 138, providing that "in all school, village and city elections women shall be allowed to vote for all school, village and city officers," is unconstitutional

as conferring a franchise not given by the constitution.—Coffin v. Board of Election Com'rs of Detroit, 97 Mich. 188.

¶ 43. How. St., § 5049, prescribing who shall be voters at school-district meetings, does not enable women to vote for members of a city board of education, who are to be voted for at the annual city election (How. St., § 781), since the constitution confines the right to vote at such elections to male persons.—Mudge v. Jones, 59 Mich. 165.

§ 13. Residence of voter.

Transients, such as soldiers, sailors and students, see post § 14.
Domicile and changes of domicile, see Domicile.
Registering as voter as evidence of place of residence, see Domicile ¶ 22.

¶ 44. Under Const., art. 7, § 1, no one can vote except in the township or ward where he resides.—People ex rel. Twitchell v. Blodgett, 13 Mich. 127; People v. Maynard, 15 Mich. 463; Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 45. In determining the residence of a voter whose family lives in one place while he works in another, account must be taken of his intention as to where he will fix his residence.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 46. The temporary absence of a person or his family, though extending over a series of years, does not necessarily, without regard to his intentions, make him lose his residence, or deprive him of his right as an elector.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 47. For voting purposes a man who is not a householder and who is unmarried must, if the statute is silent, be regarded as having his residence in the ward where he takes his meals, rather than in that where he lodges and sleeps and keeps his office and library.—Warren v. Board of Registration, 72 Mich. 398.

¶ 48. For voting purposes, the residence of an unmarried nonhouseholder in Detroit, the charter being silent on the subject, is in the ward where he takes his regular meals rather than in that where he lodges and sleeps.—Warren v. Board of Registration, 72 Mich. 398.

¶ 49. Temporary abode in a city or ward does not make a person a resident and an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicile, he gains no rights.—Warren v. Board of Registration, 72 Mich. 398.

¶ 50. The period of residence required of a voter means actual and permanent sole residence, and not a few days' commorancy for the purposes of one election. A temporary resort to a precinct for no other honest purpose of residence is a fraud and no residence, and gives no rights.—Warren v. Board of Registration, 72 Mich. 398.

¶ 51. Though the charter of Detroit contains no clause determining what place is to be regarded as a voter's residence, the rule under former charters applies, that the ward or precinct in which one takes his regular meals rather than that where he lodges should govern.—Warren v. Board of Registration, 72 Mich. 398.

§ 14. ——Students, soldiers and sailors.

¶ 52. The Michigan Constitution of 1908, art. 3, § 2, providing that no elector shall be deemed to have gained or have lost a residence by reason of being a student of any seminary of learning, a person may nevertheless become a citizen at the place of location of such an institution where, having no domicile, he in good faith makes a domicile at such institution.—People v. Osborn, 170 Mich. 143.

¶ 53. Inmates of the Michigan soldiers' home, admitted from other localities than the township in which the home is situated, are not legal voters in said township.—Wolcott v. Holcomb, 97 Mich. 361; People v. Hanna, 98 Mich. 515.

¶ 54. The Michigan Soldiers' Home is an "asylum" within meaning of Const., art. 7, § 5, which provides that "no elector shall be deemed to have gained or lost a residence while kept at any almshouse or other asylum at public expense"; and where a soldier when admitted as an inmate has a legal residence in a township other than that where the Home is located, he does not lose such residence while he remains an inmate, nor is he a legal voter in the latter township (disregarding dictum in Warren v. Board of Registration of Detroit, 72 Mich. 401).—Wolcott v. Holcomb, 97 Mich. 361; People v. Hanna, 98 Mich. 515.

§ 15. Registration.

Examination of the elector, see post § 16.
Effect and validity of the registration, see post § 17.
Validity of registration laws, see Constitutional Law § 253.
General registration law, see Comp. L. 1915, chap. 78.

¶ 55. The statute requiring registration is imperative, and an election cannot be supported where—owing to a failure of the board of registration to meet, or to provide the opportunity for registration—there has been no registration, notwithstanding the persons who voted were legal voters.—People ex rel. Foley v. Kopplekom, 16 Mich. 342.

¶ 56. Previous registration is an indispensable preliminary to the right to take any of the oaths prescribed in 1 Comp. L. 1857, pp. 107, 108, § 25, How. St., § 161, to be administered to a person offering to vote, and until such registry there can be no duty on the part of the inspectors to administer such oath.—Wattles v. People, 13 Mich. 446.

§ 16. Examination for registration.

¶ 57. When an applicant for registration appears to be sworn as to his qualifications, the board should examine him on oath, and, while it would not be absolutely bound by his statements, it has no right to reject him on mere inspection.—People ex rel. Dean v. Nankin Board of Registration, 15 Mich. 156; People ex rel. Wood v. Detroit Board of Registration, 17 Mich. 427.

¶ 58. It is the board's duty to hear any testimony offered by him relative to his right to be registered as a local elector, and to draw a reasonable conclusion from the evidence and to decide the question. A ward board in Detroit cannot reserve the question for the consideration of the city board; that board acts merely as a board of review in specified cases, and cannot entertain cases cognizable in the first place by the ward board.—People ex rel. Wood v. Detroit Board of Registration, 17 Mich. 427.

§ 17. Effect and validity of registration.

¶ 59. Where a person is registered in a ward or precinct he is prima facie entitled to vote there. The presumption is that he is a legal voter where he is registered; and this presumption covers and includes the necessary residence and everything required to make him a qualified voter.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 60. Registration, conducted by illegally appointed officers who were de facto incumbents, was held valid in order that electors might not be disfranchised.—Dingwall v. Common Council of Detroit, 82 Mich. 568.

§ 18. Party enrollments.

Enrollment in party as depriving nominee or right to go on ballot as nominee of other party, see post § 30.

¶ 61. Act 281, P. A. 1909, § 4, as amended by Act 279, P. A. 1911, and § 11 of Act 281, can be harmonized by a literal construction holding that § 4 only provides for the initial enrollment of a person in a political party and that only persons not enrolled may enroll by written request and affidavit, and that § 11 provides that a person who has changed his party affiliation can make personal application for re-enrollment as a member of another party only on enrollment day to the enrollment board whose duty it shall be to re-enroll such voter. DeFoe v. Board Election Com'rs Bay City, 174 Mich. 472.

IV. NOMINATIONS AND PREPARATION OF OFFICIAL BALLOT.

§ 19. Primary election in general.

When dispensed with, see also post §§ 20, 21.

Nominations by convention or petition, see post §§ 25-27.

Primary election law, see Comp. L. 1915, chap. 77.

Times for party caucuses to nominate, see Pub. Acts 1917, No. 203, chap. IX § 29.

¶ 62. A primary election is not an election to public office, but is merely the selection of candidates for office by the members of a political party, in a manner having the form of an election.—Line v. Board of Election Canvassers Menominee Co., 154 Mich. 329.

¶ 63. Act No. 728, Local Acts 1907, amending Act No. 326, Local Acts 1903, which provides for primary elections in Kent County and the City of Grand Rapids, by omitting the provision for a city primary, repeals such provision of the former act, and leaves the law in regard to such elections just as it was before the passage of the Act of 1903.—Ellis v. Boer, 150 Mich. 452.

¶ 64. The general primary election law (Act No. 4 of the Laws of Extra Session, 1907) does not apply to the election of city officers of the City of Grand Rapids, this act expressly exempting Kent County from its operation.—Dykstra v. Holden, 151 Mich. 289.

¶ 65. Act No. 471, Local Acts 1901, was repealed by Act No. 326, Local Acts 1903, providing for primary elections in the City of Grand Rapids, which was in turn repealed by Act No. 728, Local Acts 1907, hence there is no local act regulating primary elections in the City of Grand Rapids.—Dykstra v. Holden, 151 Mich. 289.

¶ 66. The repeal of the local act relating to primary elections in the City of Grand Rapids made the general law (Pub. Acts of 1895, Act No. 135) again operative in that city.—Dykstra v. Holden, 151 Mich. 289.

¶ 67. The fact that the Kent County Primary Law no longer provides for the nomination of city officers cannot prevent the political organization of the City of Grand Rapids from using the ordinary party machinery for making nominations; the provision of section 2 of the Act (No. 326, Local Acts 1903), that the primaries for all parties shall be held upon the same day, having reference only to the primary elections included within the act.—Ellis v. Boer, 150 Mich. 452.

¶ 68. The provision of Pub. Acts 1905, No. 181, chap. 3, § 2, providing that the petition for the submission of the question of a direct primary shall be delivered to the city clerk,

county clerk, or secretary of state at least 30 days before the second Tuesday in June, is mandatory, and the secretary of state cannot be compelled by mandamus where he refuses to consider a petition not presented within the statutory time.—Crampton v. Secretary of State, 144 Mich. 341.

§ 20. ——Unopposed nominations.

¶ 69. Under Pub. Acts 1913, No. 118, § 17, providing that if, upon the expiration of the time for the filing of petitions in any primary for city or county, it appears that there is no opposition to a particular candidate for office upon any ticket, then the city or the county clerk, as the case may be, shall certify to the board of election commissioners the names of all persons whose petitions have been properly filed and the offices for which such petitions were filed and such persons shall be declared by such board of election commissioners as nominees for the respective offices, and such clerk shall give notice to specified officers that the primary will not be held as contemplated, and also give a public notice of such determination by publication in a newspaper published in the county, it is unnecessary to hold a primary election for the office of circuit judge when there is but one candidate from all the political parties who has filed a petition therefor.—North v. Cady, 194 Mich. 561.

§ 21. ——Special elections to fill vacancy.

¶ 70. The provisions of section 16 of the Primary Election Law of 1909 as amended in 1911, relating to special elections called to fill vacancies, are not applicable in case of a vacancy in the office of circuit judge occurring more than thirty days before a general election, and where no special election has been called.—Oren v. Secretary of State, 171 Mich. 590.

§ 22. Time for primaries.

¶ 71. Under Act No. 281, Pub. Acts 1909, the first Wednesday in March must be held as the time fixed for holding primaries for nominating circuit judges and county auditors throughout the state, and the county clerk may be compelled by mandamus to file the petitions of persons seeking to run for these offices.—Mandell v. Farrell, 164 Mich. 585.

§ 23. Voting and ballots at primaries.

Party enrollments, see ante § 18.

¶ 72. Act No. 4, Extra Session 1907, does not expressly authorize the use of voting machines at primary elections, and since it is impossible with them to comply with important provisions of the law, their use is illegal.—Line v. Board of Election Canvassers Menominee Co., 154 Mich. 329.

¶ 73. Voting machines may not be used in primary elections held under Act No. 4, Extra Session 1907, since Act No. 287, Pub. Acts 1907, § 1, authorizing the use of such machines, does not apply to primary elections.—Line v. Board of Election Canvassers Menominee Co., 154 Mich. 329.

¶ 74. Petitioner was a candidate for nomination for prosecuting attorney, at the primary election held under Act No. 4, Extra Session 1907. In one precinct a voting machine was used, and petitioner for a recount asked that a mandamus issue on the county board of election commissioners directing them to disregard the vote of said precinct, and treat it as a nullity. Held, the use of the voting machine was illegal, and that the writ requested should issue.—Line v. Board of Election Canvassers Menominee Co., 154 Mich. 329.

§ 24. Count, canvass, returns and recount of primary vote.

Certifying the nominations, see post § 28.

¶ 75. Under § 41, Act No. 4, Extra Session 1907, giving the board of state canvassers power to make a recount of votes cast at the primary election, the board must proceed in the manner laid down by the statute, and its acts and methods are reviewable by the courts.—Bradley v. Board State Canvassers, 154 Mich. 274; Warner v. Same, Id.

¶ 76. Under § 41, Act No. 4, Extra Session 1907, the board of state canvassers in recounting the votes cast at a primary election are performing not a judicial but a ministerial duty, and cannot compare the enrollment lists with the poll lists, for the purpose of discovering and rejecting votes illegally cast.—Bradley v. Board State Canvassers, 154 Mich. 274; Warner v. Same, Id. (McAlvay, J., dissenting.)

¶ 77. The Primary Election Law, Act No. 279 of Public Acts of 1911, authorizes a recount by the boards of county canvassers of the several counties for candidates for offices in districts comprising more than one county.—Beakes v. Board State Canvassers, 172 Mich. 408.

¶ 78. Under the General Election Law after a primary election a recount can be made only when the canvassing board can determine from an inspection of the ballot box that it has been sealed as the statute requires.—Ritze v. Board Canvassers Iron Co., 172 Mich. 423.

¶ 79. Where the inspectors of primary election have failed to place upon the ballot box the election seal to be furnished by the township clerk as required by the General Election Law, Comp. Laws 1897, § 3617, the board of county canvassers should refuse to make a recount of the ballots in the box, despite the fact that the omission to supply such seal is due to the failure of the clerk to furnish same to the inspectors.—

Ritze v. Board Canvassers Iron Co., 172 Mich. 423.

¶ 80. Where the board of county canvassers at a primary election tallies a vote upon the tally sheet with the purpose of later considering whether it is legally cast, it may, prior to its final adjournment, change its determination to allow such ballot and reject it in making up the count.—Abbott v. Board Canvassers Montcalm Co., 172 Mich. 416.

¶ 81. The county board of canvassers has no authority to take the testimony of the primary election inspectors with reference to the condition of the ballot box involved in a recount, nor are they authorized to compare the poll list with the enrollment book.—Ritze v. Board Canvassers Iron Co., 172 Mich. 423.

¶ 82. Relator, a candidate for the nomination for representative in congress, filed a petition for recount of primary election with the board of county canvassers one day after said board had certified and returned the election of his opponent to the state board of canvassers, but within the time allowed by the statute for the filing of such petition. The county board made a recount resulting in relator's favor and the result was thereupon certified by the county board to the state board. Respondent, state board, had no notice of the recount. Held, the first statement and return of the county board was not conclusive upon relator so as to disentitle him to the benefits of the recount resulting in his favor.—Beakes v. Board State Canvassers, 172 Mich. 408.

¶ 83. Under the Primary Election Law, § 41. providing that "All votes cast for any candidate upon the ballots of one political party, when such candidate is enrolled as a member of another party, shall not be counted," one enrolled as a Republican under the Primary Election Law is not selected as a candidate of the National Progressive Party, and votes cast for him as a candidate of such party at a primary election cannot be counted though he received the highest number of votes for the nomination of that party.—Cook v. Board Election Com'rs Cheboygan Co., 172 Mich. 437.

§ 25. Nominations by convention.

In city elections, see also ante ¶ 67.
Certifying the nominations, see post § 28.

¶ 84. Mandamus will not be granted to compel the election commissioners to place relator's name upon the official ballot as the nominee of a political party where the chairman of the nominating convention ruled that relator had not received a majority of the votes and no nomination had been made, which ruling was not appealed from, and another candidate received a majority upon the next ballot and was declared the nominee of the party.—Jennings v. Board of Election Com'rs of Delta Co., 137 Mich. 720.

¶ 85. Where relator receives six out of eleven votes in a regularly constituted convention, his opponent receiving five votes in a seceding body, mandamus will lie to compel the board of election commissioners to put relator's name on the regular party ticket.—Burns v. Board Election Com'rs, 154 Mich. 471.

§ 26. ——Choice and qualification of delegates and alternates.

¶ 86. A political convention is a law unto itself and as a judge of the qualifications of its own members, its decision is final. —Stephenson v. Boards of Election Commissioners, 118 Mich. 396.

¶ 87. In a nominating convention where a dispute arose as to the right of a delegate to sit, the objection being that he was not qualified, it was proper to refer the matter to a committee on credentials.—Beck v. Board of Election Commissioners of Wayne County, 103 Mich. 192.

¶ 88. In the case of a tie vote there is no election, and, in the absence of statutory authority, neither election officers nor candidates have power to determine the result by lot; so, where at a caucus to choose a delegate to a nominating convention the rival candidates sought to decide a tie vote by "odd or even" coins, it was held that the winner was rightly refused a seat in the convention.—Beck v. Board of Election Com'rs of Wayne County, 103 Mich. 192.

¶ 89. An allegation that a delegate chosen to a nominating convention was absent from the state when the caucus chose him, and that a proxy given by him is irregular and void, is insufficient in a petition for mandamus to compel a board of election commissioners to rescind its action in placing upon the official ballot the name of the candidate nominated at said convention—upon which to base a finding that the committee on credentials erred in determining that the holder of the proxy was entitled to a seat in the convention.—Beck v. Board of Election Com'rs of Wayne County, 103 Mich. 192.

¶ 90. Comp. L. 1897, § 11466, which forbids a delegate elected to any city, county, congressional, or state political convention to give a proxy to any person to represent him at such convention, and requiring vacancies to be filled by the delegation, if it can be said to apply to a meeting of a district committee held for the purpose of filling a vacancy on the ticket, is not violated by the election by the committee in a majority vote of a citizen of an otherwise unrepresented county, although he holds a proxy from the committeeman from such county.—Potter v. Deuel, 149 Mich. 393.

§ 27. Nominations by petition.

¶ 91. A candidate for member of the Charter Commission of Grand Rapids, provided

for by Act No. 279, Pub. Acts 1909, is required to file with the city clerk a petition in accordance with the provision of Act No. 281, Pub. Acts 1909, requiring the signatures of voters equal to at least two per cent of the votes cast for the secretary of state at the last election, before he is entitled to have his name placed on the ballot for nomination.—Meves v. Schriver, 162 Mich. 358; Irwin v. Same, Id.

§ 28. Certification or showing, filing and acceptances of nominations.

Certification without primary where nomination is unopposed, see ante § 69.

Statutory provisions, see Pub. Acts 1917, No. 203, chap. IX.

¶ 92. Before the board of election commissioners places the names of candidates for office on the official ballot, some showing of the right of such candidates to be placed thereon should be in the possession of the Board.—Brown v. Board Election Com'rs Kent Co., 174 Mich. 477.

¶ 93. The courts will not interfere by mandamus to annul ministerial acts of the board of state canvassers in certifying the name of a particular candidate to the Board of Election Commissioners where it does not appear that any one was entitled by a better right to the certificate in question, and such certificate is conclusive until in some proper action or proceeding to contest the right to the election it is decided that another person was in fact nominated.—Withey v. Board of State Canvassers, 194 Mich. 564.

¶ 94. Local Acts 1903, No. 326, § 3 denying a place on the ballot to a candidate for office unless he declare on oath in advance that he is a candidate for such office, violates Constitution, art. 18, § 1, prescribing the oath required of public officers and providing that no other oath, declaration, or test shall be required. It deprives the electorate of the right to vote for a man not seeking the office.—Dapper v. Smith, 138 Mich. 104.

¶ 95. The duties of the board of state canvassers in canvassing returns made to it from the several counties and certifying the nominees shown by such returns to the respective boards of election commissioners are purely ministerial.—Withey v. Board of State Canvassers, 194 Mich. 564.

¶ 96. It must be presumed that the board of state canvassers in canvassing the returns made to it from the several counties and certifying the nominee shown by such returns to the board of election commissioners performed its official duty, where the certificate, when issued, authorized the name certified to be printed on the official ballot.—Withey v. Board of State Canvassers, 194 Mich. 564.

§ 29. Official ballot.

Persons entitled to place on ballot, see post § 30.

Right of minority parties to have nominees on ballot, see post § 31.

Position or column to which party or its nominees are entitled, see post §§ 32, 33.

Party designations and emblems, see post §§ 34, 35.

Practice in case of party splits, see post § 35.

Duties of various officers, see ante ¶ 33.

Effect of informality or irregularity in ballot, see post §§ 76, 77.

Effect of irregularity in initialing, numbering and folding of ballots at polls, see post §§ 78, 82.

Misspelled names or misnomer of candidates, see post § 77.

Name under wrong party enrollment, inapplicability of primary law to official ballot, see also post ¶ 221.

Mandamus to compel preparation of ballot, see Mandamus.

Ballots for constitutional amendments, see Constitutional Law § 4.

Form of ballots on proposal to change county seat, see Counties §§ 15-17.

Sufficiency and certainty of ballots and votes on proposal to remove county seat, see Counties § 16.

Separation of ballots on proposal to change county seat from official ballots, see Counties § 16.

Provisions relating to preparation and printing, see Pub. Acts 1917, No. 203, chap. IX.

Form of official ballot, see Pub. Acts 1917, No. 2003, chap. IX, § 15.

¶ 97. By the term "general ticket" in Const., art. 4, § 3, providing for election of legislators for one district on a general ticket, is meant a ticket which is not "partial" or "special," and it signifies that the whole number of representatives to which the town or city is entitled shall be placed upon the ticket to be voted, though no elector is compelled to vote for every person on the ticket.—Maynard v. Board of Canvassers of Kent County, 84 Mich. 228.

¶ 98. In designating an office on a ballot, nothing is required beyond such a description as leaves no doubt of what is meant. Omitting the word "for" before the name of the office is immaterial.—People v. Cicott, 16 Mich. 283.

§ 30. Persons entitled to place on ballot as nominees.

Nominees of conventions, see ante §§ 25, 26.

Sufficiency of nominating petition, see ante § 27.

Necessity of acceptance or oath of candidacy, see ante § 28.

In cases of factional splits, see post § 35.

Mandamus to compel placing of name on ballot, see Mandamus.

¶ 99. One who has not been selected by some assemblage of the electors of his ward is not entitled as of right to have his name placed as a candidate for alderman upon a ballot by the commissioners, though any one may announce himself as a candidate and may be voted for by writing his name upon the ballot in the blank reserved for the purpose.—Chateau v. Jacob, 88 Mich. 170.

¶ 100. In the case of the split in a convention where two factions nominate candidates, both factions are entitled to places upon the ballot unless there is a statute expressly forbidding it.—Stephenson v. Boards of Election Commissioners, 118 Mich. 396; Jennings v. Board of Election Com'rs of Delta Co., 137 Mich. 720.

¶ 101. A candidate of the National Progressive Party for a city office is entitled to a place on the ticket though he was not entitled to have his name printed on the ballots at the primary because his enrollment as a member of another party was not changed in the manner required by statute where it appears that such candidate was certified to the Board of Election Commissioners by the city committee of such Progressive Party and that he is a member of such party.—DeFoe v. Board Election Com'rs Bay City, 174 Mich. 472.

¶ 102. Mandamus will not issue to compel the board of election commissioners to place the name of a person on the election ballot where by the conceded facts such person is enrolled as a Republican and has received the highest number of votes at a primary election as a candidate of the National Progressive Party, since it is provided by the Primary Election Law, § 41, that such votes "shall not be counted."—Cook v. Board Election Com'rs Cheboygan Co., 172 Mich. 437.

¶ 103. Under Act 281, P. A. 1909, § 4, as amended by Act 279, P. A. 1911, and §§ 11 and 41 of Act 281, where a person enrolled as a member of one political party by request and affidavit seeks to become enrolled as a member of another party and a petition is filed naming him as a candidate for nomination for an office on the ticket of such other party, such person is not entitled to have his name appear on the printed ballots at the primary election.—DeFoe v. Board Election Com'rs Bay City, 174 Mich. 472.

§ 31. ——Candidates of minor parties.

Mandamus to compel omission from ballot, see Mandamus.

¶ 104. If the legislature acting within its authority prescribed an unreasonable regulation of the right of franchise by Act 281, P. A. 1909, § 37, relating to the nomination at a primary election of a candidate whose party cast a vote less than 15 per cent of such party's vote for Secretary of State at the last November election, and to the right of such party to have the names of its candidates printed on the official ballot, the legislature and not the courts must remedy it.—Brown v. Board Election Com'rs Kent Co., 174 Mich. 477.

§ 32. Position or column on official ballot.

Same person nominated by two or more parties, see post § 33.

¶ 105. The supreme court will not, in mandamus proceedings to compel election commissioners to assign to party tickets the positions upon the official ballot to which they are respectively entitled, inquire into the regularity of the certification of a particular ticket, where it appears from the showing of all the parties that the ticket certified is entitled to a place upon the ballot.—Baker v. Board of Election Com'rs of Wayne County, 110 Mich. 635.

§ 33. ——Nominees of more than one party.

Statutory provisions, see Pub. Acts 1917, No. 203, Chap. IX.

¶ 106. Laws 1895, Act No. 17, prohibiting printing in more than one column on official ballot name of candidate nominated by two or more political parties, is not retroactive, and is not applicable where the time within which the candidate is authorized by the act to exercise his choice of tickets had expired before the act took effect.—Todd v. Board of Election Com'rs of Kalamazoo County, 104 Mich. 474.

§ 34. Party designations and emblems on ballot.

Improper vignette as distinctive mark, see post ¶ 265.

Statutory provisions, see Pub. Acts 1917, No. 203, Chap. IX.

¶ 107. Where the vignette adopted by a political party was a part of the certificate and notice served upon the board of election commissioners and combined within it the name of the party or political organization which they represented, and where the name of the party is combined with the vignette, it is not necessary to put another heading below it.—Shields v. Jacobs, 88 Mich. 164.

¶ 108. The provision of Detroit City Charter (Local Acts 1895, No. 468) inserted in the section which provides for the certification of nominations for city officers by the officers of city committees of political parties, that "no vignette shall be furnished or printed on any ballot" (chap. 2, § 28), is not applicable only to ballots to be cast within the city for city officers. The subsequent provision (chap. 2, § 57) requiring the election commissioners of the county to print all ballots intended for use in the city in the manner prescribed for elections of city officers did not forbid the use of party vig-

nettes on state tickets, but the general statute governs with respect to such matters.—Baker v. Board of Election Com'rs of Wayne County, 110 Mich. 635.

§ 35. ——Factional divisions and new parties.

Right of both factions to be on ballot, see ante § 30.

Column or position for double nominations, see ante §§ 32, 33.

Disability of courts to determine factional disputes, see post § 94.

¶ 109. Where there is a divisional split in a party convention and both parties nominate candidates for offices, each of the tickets nominated, containing the names of the persons nominated with the vignette and heading, if any is furnished by the committee should be printed upon the ballot; and it is not within the province of the board of election commissioners to determine which faction represented the regular nominating convention, but the board must print and place upon the ballot the names of the candidates certified by the committee of either branch of the party representing the two conventions.—Shields v. Jacobs, 88 Mich. 164.

¶ 109a. Where a party nominating convention has split into two factions and each side nominated officers it is the duty of the board of election commissioners if the same party name shall be certified by each of the two committees, that the name so certified shall be printed without further addition or distinctive designation than such as is contained in the certificate furnished.—Shields v. Jacobs, 88 Mich. 164.

¶ 110. A state convention of the Democratic party, regularly called, convened on the same day and in the same city with the state conventions of the People's party, a party which had been represented at the last preceding election, and of the Union Silver party, an organization of recent origin. An arrangement was effected whereby the delegates to the three conventions met together and nominated a fusion ticket, under an agreement requiring a majority of all the votes cast to nominate, and giving to the Democratic delegates the right to cast one-half the entire number of votes. The ticket nominated was termed the "Democratic People's Union Silver Ticket," and a new and distinctive vignette was adopted. Held, that the ticket adopted was not the Democratic ticket, and was therefore not entitled to that place on the official ballot which the Democratic party had a right to demand by virtue of the number of votes cast by it at the last preceding election according to Pub. Acts 1895, No. 271, § 14.—Baker v. Board of Election Com'rs of Wayne County, 110 Mich. 635.

¶ 111. After action had been taken by joint convention of Democrats, the People's party, and a newly organized Union Silver party to form a fusion of such parties, a mass convention, composed wholly of Democrats, was held in another city, and this convention placed in nomination candidates for the various offices, and termed its ticket the "Democratic Ticket." The convention was not called by officers having authority from the Democratic party as previously organized. Held, that this party, while it was entirely justified in calling its ticket the "Democratic Ticket," was not the successor of the Democratic party as it had existed in the previous campaign so as to entitle its ticket to the position upon the official ballot which would have been accorded to the ticket of the Democratic party, regularly nominated in a convention called and organized by the proper officers.—Baker v. Board of Election Com'rs of Wayne County, 110 Mich. 635.

¶ 112. In the case of a split in a congressional district convention where two factions of a party nominate candidates, election commissioners are bound to print in adjoining columns the names of both candidates upon the ballots headed by the party vignette and shall decide for themselves which shall be placed upon the general ticket of the party.—Stephenson v. Boards of Election Commissioners, 118 Mich. 396.

V. RECEIVING AND POLLING THE BALLOTS.

§ 36. In general.

Polling places and equipment, see ante § 8.

Eligibility and registration of voters, see ante, III.

Time allowed in booth for voting, see post § 39.

Manner of denoting choice, see post §§ 40-42.

Counting and returning results of the count, see post VI.

Sealing up ballot boxes after counting, see post § 45.

Irregularities in voting and effect on result, see post §§ 78-85.

Allowing voter to withdraw ballot cast by mistake, see post ¶ 255.

Effect of deposit of ballot in wrong box, see post § 85.

Effect of meddling by officers or of improper assistance to voter, see post § 83.

Effect of irregular folding and indorsement of ballots, see post § 78.

Rejection of ballot for disclosure of vote by elector, see post ¶ 277.

Voting at primaries, see ante § 23.

Constitutional requirement of ballot method, see Constitutional Law § 256.

Ballot boxes for votes on proposal to change county seat submitted at general election, see Counties § 16.

Conduct of elections and manner of voting, see Pub. Acts 1917, No. 203, Chap. X.

Provisions for absent voters, see Pub. Acts, 1917, No. 203, Chap. XII.

¶ 113. The provisions of the election law governing custody of ballots and access to

voters while in the voting booths, are mandatory.—Attorney General ex rel. McCall v. Kirby, 120 Mich. 592.

¶ 114. Where state or county measures are to be voted upon, or where state or county officers are to be elected, to fill vacancies at the spring election, the county election commissioners may furnish the ballot, which may be separate from that of the township, and may be cast in a separate box.—Peck v. Berrien County Sup'rs, 102 Mich. 346.

¶ 115. Use of separate ballot-boxes at election to determine county seat of new county under Laws 1885, Act No. 35, was proper.—Attorney-General v. Iron County Board of Canvassers, 64 Mich. 607.

¶ 116. All ballots cast under statutory requirements are formal and final, if there is an election, and cannot be repeated; when the law requires certain officers to be elected by ballot, there can be no such thing as an informal ballot.—People ex rel. Conrad v. Stone, 78 Mich. 635.

§ 37. Voting on machines.

At primary elections, see ante § 23.
Challenges and admission to machine, see post § 38.
Recount or rereading of machine records, see post § 58.
Validity of vote by machine, as vote by ballot, see Constitutional Law § 256.
Sufficiency of voting machine law to be an enforceable certainty, see also Statutes, V.
Partial validity of the law if deemed invalid in part, see Statutes, V.
Voting machine law, see Comp. L. 1915, Chap. 81.

¶ 117. A vote by voting machine is a vote by ballot.—Henderson v. Board of Election Com'rs City of Saginaw, 160 Mich. 36.

¶ 118. Any voting machine may be used at any election where the choice between candidates can be expressed by the use of the machine or by any other method which does not disclose to others the purpose of the voter.—Helme v. Board of Election Com'rs Lenawee Co., 149 Mich. 390.

¶ 119. The fact that the voter cannot have visual evidence at the time of using the voting machine that it correctly records and counts the ballot which he votes does not preclude the use of the machine.—Henderson v. Board Election Com'rs City of Saginaw, 160 Mich. 36.

§ 38. Challenges of voters and action thereon.

Failure to challenge as working estoppel, see post ¶ 262.
Provisions of statute, see Pub. Acts 1917, No. 203, Chap. X.

¶ 120. Inspectors of election cannot reject the ballot offered by a registered voter who tenders the oath prescribed by the statute; the provision that "if the person so challenged shall take such oath, his vote shall be received," is mandatory, and the inspectors' functions are not judicial but only ministerial.—Wolcott v. Holcomb, 97 Mich. 361.

¶ 121. The inspectors cannot reject the ballot of a registered voter who takes the proper oath prescribed in the election law.—People v. Cicott, 16 Mich. 283.

¶ 122. The purpose of Act No. 214, Pub. Acts 1909, providing that a challenged voter taking the statutory oath shall be allowed to use the voting machine is to purify elections.—Henderson v. Board Election Com'rs City of Saginaw, 160 Mich. 36.

¶ 123. Although 1 Comp. Laws 1897, §§ 3720, 3721, providing for the identification of challenged votes is unrepealed, it does not apply to votes cast by voting machines under §§ 11, 12, Act No. 214, Pub. Acts 1909, which provides that a challenged voter may use the machine upon taking the statutory oath.—Henderson v. Board Election Com'rs City of Saginaw, 160 Mich. 36.

¶ 124. Act No. 214, Pub. Acts 1909, provides that a voter who is challenged, and who thereupon takes the statutory oath as to his qualifications, shall be allowed to use the voting machine. Held, the act is not unconstitutional as permitting one not a constitutional elector to vote.—Henderson v. Board Election Com'rs City of Saginaw, 160 Mich. 36.

§ 39. Time for voting.

¶ 125. The provision of Laws 1889, Act No. 263, § 30, authorizing the board of elections to limit the time which a voter may remain in the room or booth while preparing and voting his ballot, is applicable to elections in cities as well as towns, and it is the imperative duty of such boards to limit the time as provided in said section.—Common Council of Detroit v. Rush, 82 Mich. 532.

§ 40. Marking or denoting choice on ballot.

Sufficiency of the ballots, see ante § 29.
Oath of illiterate voter for assistance, see post ¶ 249.
Assistance by United States marshals in voting for congressman, see post ¶ 250.
Erasure as negation of vote, see also post § 80.
Writing or pasting in names, see post § 41.
Effect of irregular marking to invalidate ballot, see post § 79.
Effect of distinguishing marks and what constitute distinctive marks, see post §§ 91, 92.
Provisions of the statute, see Pub. Acts 1917, No. 203, Chap. X.

Assistance to voter, see Pub. Acts 1917, No. 203, Chap. XI.

¶ 126. A ticket bearing no cross but only a blot in the center of the ticket should not be counted.—Attorney General v. Glaser, 102 Mich. 405.

¶ 127. Drawing a straight line beneath one of the tickets on the ballot indicates no choice.—Attorney General v. Glaser, 102 Mich. 405.

¶ 128. Crossing the name of one candidate and drawing a line beneath, but not erasing, the name of the opponent indicates no vote.—Attorney General v. Glaser, 102 Mich. 405.

¶ 129. Drawing a circle around the square and marking the cross beneath the heading of the ticket invalidates the ballot in that it is not marked as required.—Attorney General v. Glaser, 102 Mich. 405.

¶ 130. A ballot whose only mark is two parallel horizontal lines across the circle at the head of the ticket should not be counted. —Christopherson v. Common Council of Manistee, 117 Mich. 125.

§ 41. ——Writing or pasting name of candidate on ballot.

See also ante ¶ 128.

Right to have name written in when not nominated or entitled to be on ballot, see also ante ¶ 99.

Effect of irregular writing, scratching, pasting, or erasure, see post § 80.

Writing or pasting so as to mark ballot distinctively, see post § 92.

§ 131. Where but a single ticket is printed upon a ballot the mere placing of a slip containing the name of a candidate not appearing on the ballot is a sufficient indication of the intention of the voter.—Sawyer v. Hart, 194 Mich. 399.

¶ 132. Under Laws 1889, Act No. 263, a voter desiring to write his ballot may do so; he may erase any or all of the names upon any ticket and write in any names he may choose. If he has no political affiliations he may erase the heading of any ticket and write such a heading as he chooses.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 133. Pub. Acts 1893, No. 202, § 26, provides that, if an elector wishes to vote for a candidate not on any ticket, he must write or paste the name of such candidate on his ticket, opposite the name of the office, and make a cross in the circle under the party name, in which case the name so written shall be counted one vote for the person so mentioned, whether the original name on the party ticket is erased or not, unless there is a cross in the square before the name of some opposing candidate on some other party ticket; that, if no cross is placed in the circle under the party name, a cross in the square before the name of any candidate shall be deemed a vote for such candidate, except in cases where the elector votes for more candidates for the same office than are to be elected. Held, that the pasting of a name, which did not appear on any ticket, over the name of one of the candidates, without designating by a cross the party ticket, or the candidate sought to be voted for, and without erasing the name of a third candidate for the same office, was not a compliance with the law.—Oatman v. Fox, 114 Mich. 652.

¶ 134. The provisions of Pub. Acts 1893, No. 202, § 26, as to pasted names and marks are not modified, so as to make the mere pasting of the name a sufficient indication of the voter's choice, by the printed instructions appended to ballots, in the form provided by statute, that "if you wish to vote for a candidate not on any ticket, write or place the name of such candidate on your ticket, opposite the name of the office," since the instructions contain the further direction: "In all cases stamp a cross in the circle under the name of your party, at the head of the ballot."—Oatman v. Fox, 114 Mich. 652.

§ 42. —— Ballots on submitted question.

Sufficiency of ballots on submitted questions, see specific topics, e. g., Counties § 2; Intoxicating Liquors, III, A.

¶ 135. Where a law submits a question to the vote of the people without prescribing the form of ballot to be used, an elector's ballot must show that he voted upon the specific question or it will be ineffectual.—People ex rel. Colby v. Woodhull Township Board, 14 Mich. 28.

VI. COUNT, CANVASS, RETURNS, CONTESTS, AND DECLARATION OF RESULT.

Count, canvass and return of primary vote, see ante § 24.

Count, canvass and publication of result of elections on submitted questions, see Counties §§ 2, 17 et seq.; Intoxicating Liquors, III; and like topics.

§ 43. Counting the vote.

Irregularities necessitating rejection of ballot, see post §§ 76-85.

Effect of mistake in name as printed on ballot, see post § 77.

Rejection of distinctively marked ballots, see post § 91.

Canvass of the vote as returned, see post § 50.

Recount and contest, see post § 57 et seq.

Presumption as to time of count and return, see also post ¶ 141.

Precinct count and canvass, provisions of the statutes, see Pub. Acts 1917, No. 203, Chap. XIV.
Precinct counting boards of inspectors, see Pub. Acts 1917, No. 203, Chap. XV.

¶ 136. An official count of ballots not legally made is void, and can neither be received in evidence nor made the ground of an official certificate or return.—Keeler v. Robertson, 27 Mich. 116.

¶ 137. The inspector should not postpone counting the votes where the statute requires an immediate count.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 138. Under the election law of 1891 (Laws 1891, Act No. 190, § 36), which requires the inspector of election immediately on closing the polls to proceed to canvass the votes, and, after the counting of the tickets or ballots has been completed, immediately to publish and to declare the result, neglect to complete the canvass on the night of the election and the dating of the inspector's report on the next day, does not invalidate the poll.—Attorney General v. Glaser, 102 Mich. 396.

§ 44. ——Excessive number of ballots cast.

¶ 139. Where an excess of ballots is found in the box, and the inspectors fail to draw them out as required by law, they should be apportioned among the candidates respectively in proportion to the whole number of their votes; the probability being that the legal and illegal votes have been cast ratably for the several candidates.—People v. Cicott, 16 Mich. 283.

§ 45. Sealing and custody of counted ballots.

Preservation and custody of boxes as requisite to use of contents in recount, see post § 61.
Effect of improper care or custody on the election, see post § 87.
Presumption as to proper care, see also post ¶ 257.
Of boxes used at primary, see also ante ¶ 79.
Provisions of statutes, see Pub. Acts 1917, No. 203, Chap. XIV, § 5.

¶ 140. The action of the inspectors is final when they have finished their count and sealed up the ballots, all of which the law requires to be done without delay, in public. Every opening of the ballots thereafter, except upon a contest, is unlawful, and cannot be made the basis of official action.—People ex rel. Keeler v. Robertson, 27 Mich. 116.

§ 46. Returns by inspectors.

Time for count and return, see ante § 43.
Dating on day after election, see also ante ¶ 138.
Amended and further returns, see post § 49.
Uniformity in returns, see Pub. Acts 1917, No. 203, Chap. XIII.

¶ 141. Where the returns by the inspectors of election bear date as of the day on which the election was held, it will be presumed that the inspectors prepared the same "without recess or adjournment" as required by the statute.—Giddings v. Wells, Van Buren County Treas., 99 Mich. 221.

§ 47. Conclusiveness and finality of returns.

Amended and further returns, see post § 49.
Conclusiveness of recount, see post § 67.
Conclusiveness and effect of certificates or statements of results, see post §§ 69-73.
Presumption from return as to time thereof, see ante ¶ 141.

¶ 142. The ultimate determination of a right to an elective county office is by the ballots themselves. But the law makes certain official counts and returns presumptive evidence of the number of votes cast, and such official counts will prevail if lawfully and regularly made, until overthrown by county of the ballots.—Keeler v. Robertson, 27 Mich. 116.

§ 48. ——Of state canvass.

Recanvass of state returns after change in returns from counties, see post § 56.

¶ 143. There can be no judicial inquiry into the decision of the board of state canvassers in cases where the board determines, under the statute, the result of an election; and, if contested, it can be examined only by the legislature in joint convention.—People ex rel. Royce v. Godwin, 22 Mich. 496.

¶ 144. Where mandamus is brought to compel the state board of canvassers to issue a certificate of nomination to relator, the respondent may not resist the writ on the ground that there are affidavits filed with it showing the casting of illegal votes in relator's favor, which if rejected would result in his defeat, since such a question can only be raised upon a recount.—Beakes v. Board State Canvassers, 172 Mich. 408.

§ 49. Amended and further returns.

Amended returns from counties as ground for recanvass by state, see post § 56.

¶ 145. When inspectors of election have completed their count, and have executed and delivered the returns to the canvassing board, their legal powers end, and any attempt on the part of these inspectors thereafter to change or modify the original returns, except by way of correcting a clerical error, is beyond their powers.—Roemer v. Board of Canvassers of Detroit, 90 Mich. 27.

¶ 146. Whether a clerical error patent upon the face of the papers may not be corrected by a board of inspectors after the returns have been made up and signed, quære.—Roemer v. Board of Canvassers of Detroit, 90 Mich. 27.

¶ 147. Three of the inspectors signed the original canvass of the votes given in their township, and apparently all joined in the returns that were canvassed by the board of supervisors. Held, that the board had power to require an amended return if the one made was incomplete, and might, in certain cases, proceed and complete the canvass without a return.—Thomas v. Abbott, 105 Mich. 687.

§ 50. Canvass of the votes and the returns.

Recount and contest, see post § 57 et seq.
Recanvass after invalid recount, see post § 68.
Statement or certification of the results of the election, see post §§ 69-73.
Conclusiveness of the returns, see ante §§ 47, 48.
Effect of illegality to avoid entire election or district, see post § 88.
County canvass, see Pub. Acts 1917, No. 203, Chap. XVI.
District canvass for senators and representatives, see Pub. Acts 1917, No. 203, Chap. XVIII.
State canvassing board, see Const., Art. VI. § 20.
State canvass, see Pub. Acts 1917, No. 203, Chap. XIX.

¶ 148. A board of canvassers cannot dissolve its meeting or go out of office without completing its work; and it can be compelled by mandamus to proceed to canvass the votes.—Attorney General v. Iron County Board of Canvassers, 64 Mich. 607.

¶ 149. The common council of the city of Marquette is a board of canvassers within the meaning of Comp. L. 1897, § 3725, under the city charter which provides that on the Thursday following election day the common council shall meet at the recorder's office and determine who are elected.—Ward v. Culver, 144 Mich. 57.

§ 51. Votes necessary for choice.

In primary election, see ante § 24.
Casting off tie, see post § 52.
Majority or number requisite to adopt submitted proposal, see specific topic treating of the matter proposed, e. g., Constitutional Law, I; Counties § 2; Highways, VII; Intoxicating Liquors, III, A.

¶ 150. No person is elected at a popular election unless he has more votes for the office than any other person. A minority candidate can never be deemed elected, notwithstanding the person receiving the greatest number of votes is ineligible, or cannot be installed.—People ex rel. Crawford v. Molitor, 23 Mich. 341; People ex rel. Attorney General v. Van Cleve, 1 Mich. 362.

¶ 151. In the absence of any statutory provision expressly requiring more, a plurality of the votes cast will elect.—People ex rel. Conrad v. Stone, 78 Mich. 635.

¶ 152. In this state no one is elected who receives only the vote of a minority of the electors voting; no matter whether he who receives a majority of the votes is ineligible, or whether an elector votes more than once for a candidate.—Maynard v. Board of Canvassers of Kent County, 84 Mich. 228.

¶ 153. Under a law authorizing the election of two circuit court commissioners an election was held, but it was conducted in all respects as if one only was to be chosen; two persons were opposing candidates, and each elector voted for one of the two, but in no instance did a ballot contain more than one name for this office. It was held that only the one receiving the highest number of votes was chosen, and as to the other there was a failure to elect.—People ex rel. Rogers v. Kent County Canvassers, 11 Mich. 111.

§ 52. ——Casting off or deciding tie votes.

Conclusiveness of the lot, see post § 73.
Estoppel after lot to contest election in courts, see Officers, III.
Provisions of statute, see Pub. Acts 1917, No. 203, Chap. XVII.
Decision by legislature of tie vote, see Const. Art. XVI, § 4.

¶ 154. The provision of Comp. L. 1871, § 136, How St., § 188, for drawing lots for an office when the number of votes received by the candidates is equal cannot be construed as a regulation under the power granted to the legislature by the constitution (art. 4, § 37), to declare and fill vacancies; it applies where no vacancy exists, and the power given is subject to an express qualification, excluding its exercise where the constitution provides, as in art. 10, § 3, for filling vacancies.—Keeler v. Robertson, 27 Mich. 116.

¶ 155. Under Comp. L. 1871, § 137, How. St., § 188, providing that in case of a tie vote for the office of county clerk lots should be drawn before the sheriff, the deputy-sheriff may act in case of the sheriff's inability.—Evans v. Sutherland, 41 Mich. 177.

§ 53. Powers, functions and duties of board of canvassers.

Power to make recount, see post §§ 57-60.
Disability to correct errors as part of canvass, see post § 54.
Powers and functions of state canvassers, see post § 55.
Interest of member of canvassing board in result as affecting capacity of board to conduct recount, see post ¶ 192.

¶ 156. Canvassing boards, as such, may not exercise judicial functions.—Attorney General v. Board Sup'rs Genesee Co., 166 Mich. 61.

¶ 157. The duties of the county and district boards of canvassers are wholly ministerial, and consist in determining who are

elected and in authenticating and preserving the evidence of such election.—People ex rel. Attorney General v. Van Cleve, 1 Mich. 362.

¶ 158. A county board of canvassers charged with the duty of canvassing the votes certified by the election officers at an election to determine the location of a county seat can make no inquiry beyond the returns of the local boards.—Attorney General v. Iron County Board of Canvassers, 64 Mich. 607.

¶ 159. When the board of county canvassers has completed its count, and has executed and delivered the returns, its legal power ends; and it cannot change or modify the original returns except in the performance of a mere clerical duty.—Belknap v. Board of Canvassers of Ionia County, 94 Mich. 516.

¶ 160. The duty of the city board of canvassers of election in Detroit is purely clerical—to foot up the returns of the boards of inspectors, and declare result and issue certificate accordingly; mandamus was therefore issued.—Coll v. City Board of Canvassers, 83 Mich. 367.

§ 54. ——Correction of errors and rejection of ballots.

Powers of board on recount and contest, see post § 65.
On report of recount commission, see post §§ 66, 71.
Avoidance of entire vote by irregularities, see post § 88.

¶ 161. Canvassing boards act ministerially and cannot go behind inspectors' returns to determine questions of fraud in the election. —McQuade v. Furgason, 91 Mich. 438.

¶ 162. Its power being ministerial and not judicial, the board of canvassers cannot on a recount throw out the votes of a ward or precinct for fraud alleged to have been committed at the election.—May v. Board of Canvassers of Wayne County, 94 Mich. 505.

¶ 163. The duties of a canvassing board are purely ministerial, and such board should issue a certificate of election to the person having the largest number of votes on the face of the returns; but where relator admits that he is not entitled to the certificate unless votes can be counted for him cumulatively, and that a less number of electors voted for him than for those whom the canvassing board declared elected, mandamus will not be granted to compel the board to reverse its action.—Maynard v. Board of Canvassers of Kent County, 84 Mich. 228.

§ 55. ——Of state board of canvassers.

Duty of succeeding board to make recanvass after canvass by predecessors, see post § 56.
Effect of informal return of vote on constitutional amendment, see post ¶¶ 205, 206.

¶ 164. Where there is no contest over the election of a circuit judge it is the ministerial duty of the state board of canvassers under Pub. Acts 1913, No. 320, to canvass the returns and issue to the officer elected a certificate of election.—Dingeman v. Board of State Canvassers, 198 Mich. 135.

§ 56. Recanvass of state returns.

Of primary vote, see ante § 24.
Conclusiveness of state canvass, see ante § 48.
Recount of state canvass, see Pub. Acts 1917, No. 203, Chap. XXI.

¶ 165. The state board of canvassers, after its predecessor has canvassed the vote for an office from the returns before it, and after the result of a recanvass made by a county board of canvassers under a mandamus from the supreme court has been reported to the secretary of state, is compellable by mandamus to recanvass the returns as they appear from the recanvass by the county board; the case being treated as though the returns had not been received until the new board had entered upon its duties.—Belknap v. Board of State Canvassers, 95 Mich. 155.

¶ 166. Where, after the board of state canvassers has canvassed the votes cast for and against the adoption of a constitutional amendment, and after the officers composing the board have gone out of office, it is made to appear that a palpable mistake was committed, due in part to the unauthorized rejection of the returns from one county, and in part to a fraudulent and criminal alteration of the returns from another county, thereby changing the result of the vote in the state, the succeeding board has authority to right the wrong thus committed by a recanvass of the vote, and may be required by mandamus to do so.—Rich v. Board of State Canvassers, 100 Mich. 453.

§ 57. Recount and contest.

Of primary vote, see ante § 24.
Rereading record of machines, see post § 58.
Petition and showing for recount, see post § 62.
Resolution or order for recount, see post § 63.
Notice of recount and time for and conduct of same, see post § 64.
Scope of recount and matters investigated, see post § 65.
Report of recounting officers, see post §§ 66, 71.
Powers and functions of canvassers as recount board, see also ante § 54.
Cessation of canvassers' functions on making canvass, see ante § 53.
Conclusiveness and effect of recount and certificate thereof, see post §§ 67, 68, 71, 72.

Legislative power to recount or conduct contest on members' election, see post § 59.
Council as judge of election of members, see post § 60.
Power of new or old council to judge of qualifications and election of members, see Municipal Corporations, XV.
Mandamus to compel recanvass or recount, see Mandamus.
Recount under statutes as incident of quo warranto, see Quo Warranto, IV.
Decision by legislature on tie or when state canvass is contested, see Const. Art. XVI, § 4.
Provisions as to reopening boxes and examining ballots, see Pub. Acts 1917, No. 203, Chap. X, § 24 et seq.
Provisions as to recount of returns by county, city, village, or township boards, see Pub. Acts 1917, No. 203, Chap. XX.

¶ 167. The proceedings for a recount of votes cast in an election are purely statutory, and the statute requirements must be observed.—Wheeler v. Coleman, 176 Mich. 285.

¶ 168. A candidate for a state office is not entitled to a recount under Pub. Acts 1897, No. 125, which provides that "any candidate voted for at any election at which state, county or district officers are voted for" may file a petition for a recount, the act being no broader in this regard than Pub. Acts 1887, No. 208, under which no recount was permitted in case of candidates for state office.—Pound v. Board of Canvassers of Wayne Co., 120 Mich. 181.

¶ 169. Laws 1887, Act No. 208 (How. St., § 234a), providing for a recount of ballots, on petition of an aggrieved candidate, does not apply to elections for circuit judges, inasmuch as the determination of the result of such elections is by law referred to the state board of canvassers; and, therefore, a county board which has recounted the ballots cast for circuit judge will be compelled by mandamus to canvass the returns as filed in the office of the county clerk, and to make return thereof to the state treasurer.—Vance v. Board of Canvassers of St. Clair County, 95 Mich. 462.

¶ 170. The legislature has exclusive jurisdiction of a recount contest on the election of a circuit judge.—Dingeman v. Board of State Canvassers, 198 Mich. 135.

¶ 171. A candidate whose election is shown by the face of the returns to the canvassing board is not estopped to question the authority of the board under Pub. Acts 1887, No. 208, to recount the votes in certain precincts upon the petition of his rival, because he petitioned for a like recount in some of the other precincts.—Hilton v. Common Council of Grand Rapids, 112 Mich. 500; Belknap v. Board of Canvassers of Ionia County, 94 Mich. 516.

§ 58. ——Of vote taken by machines.

¶ 172. The legal presumption, based upon the statutory provisions for returning the ballots to boxes by the inspectors and the sealing and custody of the boxes, that such ballot boxes had been preserved, after an election, in their integrity, does not warrant a presumption that voting machines, authorized to be used by Comp. L. 1897, §§ 3804-3823, remained unchanged after an election; since there is no similar law to insure such machines from change after an election.—Trumbull v. Board of Canvassers of City of Jackson, 140 Mich. 529.

¶ 173. The rereading of the totals of a voting machine is not provided for in Comp. L. 1897, § 3725, which provides for a recount of the votes by the board of canvassers in the event of fraudulent or illegal voting, and contestant's remedy, if any he had, in a city election in which such machines were used, was by quo warranto proceedings and not mandamus to compel the board of canvassers to make such recount.—Trumbull v. Board of Canvassers of City of Jackson, 140 Mich. 529.

§ 59. ——Of vote for congressmen or senators or state legislators.

¶ 174. Pub. Acts 1887, No. 208, providing for a recount does not apply to a candidate for the federal house of representatives, that house being the judge of the election and qualifications of its own members.—Belknap v. Board of Canvassers of Ionia County, 94 Mich. 516.

§ 60. ——Of vote for city aldermen, councilmen or other officers.

¶ 175. Laws 1887, Act No. 208 (How. St., § 234a), providing for recount of ballots in cases of fraud or mistake, does not apply where office sought is membership in a body that is made by law absolute judge of election and right to office of its own members; recount not compelled of votes for member of common council.—Naumann v. Board of City Canvassers of Detroit, 73 Mich. 252. Or for member of state senate.—Wheeler v. Board of Canvassers of Manistee County, 94 Mich. 448.

¶ 176. Laws 1887, Act No. 208 (How. St., § 234a), which provides for the correcting on petition of the aggrieved candidate, of frauds and mistakes in the canvass and returns made by inspectors of elections, does not cover village elections.—Johnson v. Board of Canvassers of Village of Casnovia, 101 Mich. 187.

¶ 177. Laws 1887, Act No. 293 (How. St., § 234b), providing for preservation of evidence of error or fraud in counting ballots, etc., does not apply to the election of officers in cities where the charter makes it the common council's duty to canvass the votes and gives it the exclusive right to determine the qualifications of its officers and the election

of its members, and where it has discharged that duty; so held in regard to election of mayor who is also member of council.—Weston v. Kent Probate Judge, 69 Mich. 600.

¶ 178. Where the city charter contains no provision making either the board of city canvassers or the common council judges of the election or qualifications of aldermen, Laws 1887, Act No. 208, entitles a candidate for the office of alderman to a recount.—McKenzie v. Board of Canvassers of Port Huron, 70 Mich. 147.

¶ 179. Under Laws 1887, Act No. 208, it is the duty of the board of city canvassers on a proper petition being filed, and the other requisites being complied with, to grant a recount of the votes cast for alderman, there being no provision making the board or common council judges of the election and qualifications of aldermen; and the board of canvassers cannot refuse to do so on the ground that it is satisfied that the count made was correct, or because the applicant does not charge fraud or intentional error.—McKenzie v. Port Huron City Canvassers, 70 Mich. 147.

¶ 180. Pub. Acts 1887, No. 208, providing for recount of votes on a contest, does not apply to a contest over the office of alderman of the city of Grand Rapids, since the common council of that city is by the charter thereof made the judge of the election and qualification of its own members.—Hilton v. Common Council of Grand Rapids, 112 Mich. 500.

§ 61. Preservation of ballots and boxes as requisite of recount.

Sealing up of boxes after count, see ante § 45.

Presumption as to machines remaining as voted, see ante ¶ 172.

For purposes of quo warranto, see also Quo Warranto, IV.

¶ 181. A recount of votes can be had under Comp. L. 1897, § 3725 only in cases when the recount board can find from an inspection of the ballot box that the statutory requirements for the preservation of the ballots as cast have been observed, the test being, have the ballots been preserved as the law directs?—Keith v. Wendt, 144 Mich. 49.

¶ 182. Under Pub. Acts 1913, No. 327, evidence of the lack of statutory sealing of the ballot boxes is not conclusive against the right of the board of supervisors to recount the votes, as it was the intention of the legislature to abolish the test as to whether the ballots were preserved as the law directs and to substitute one of fact as to whether the ballots have been in fact preserved notwithstanding the failure to observe the legal requirements for preservation, so as to authorize a recount if the board is satisfied that the original ballots canvassed by the inspectors of election, and all of them, and no others, are in fact in the box.—Baldwin v. Board Sup'rs of Alger County, 189 Mich. 372.

¶ 183. A failure to cause the ballot-boxes to be brought before the board for a preliminary investigation is not fatal to a recount, where no suggestion has been made to the board that the ballot-boxes have been tampered with prior to the opening thereof and to the recount.—May v. Board of Canvassers of Wayne County, 94 Mich. 505.

¶ 184. Under How. St., § 234a, the purpose for which the board of canvassers has power to cause the ballot-boxes to be brought before it is not to ascertain whether a recount shall be made, but of ascertaining by a recount whether there was fraud or mistake in the original count.—May v. Board of Canvassers of Wayne County, 94 Mich. 505.

§ 62. Petition and showing for recount.

Resolution or order allowing recount, see post § 63.

Time for recount and conduct of it, see post § 64.

Scope and matters investigated, see post § 65.

Invalidity of recount had without petition and statutory deposit, see post ¶ 193.

¶ 185. Resort to the proceedings for a recount under How. St., §§ 234b-234i, should be speedy, and one who delays until December 26 before petitioning for a recount of ballots cast November 6 is guilty of inexcusable laches.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

¶ 186. An application for recount, under How. St., § 234a, of votes cast at an election for a state office is too late if not filed with the board of county canvassers until the last day on which, under section 217, the state board can canvass the returns; the remedy in such case being with the legislature, under Const., art. 8, § 5, which empowers the legislature in joint session to decide when the determination of the state board is contested.—Newton v. Board of Canvassers of Wayne County, 94 Mich. 455.

¶ 187. Under Pub. Acts 1887, Act No. 208 (How. St., § 234a), a candidate desiring a recount of the votes cast at an election must apply therefor on or before the last day of the regular session of the board of canvassers, and by merely filing a protest on the last day, and thereby securing an adjournment, he cannot extend the time within which to file his petition.—Drennan v. Common Council of Wyandotte, 106 Mich. 117.

¶ 188. A petition to the judge of probate by a candidate desiring a recount, under How. St., §§ 234b-234i, must show who has

been decided by the board of canvassers to be elected to the office, in order that notice of the contest may be given to him.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

¶ 189. A petition for the recount of votes in a mayoralty election case is sufficient, although it does not assert upon the knowledge of the relator any errors in the count of the votes where it does aver that relator received 1001 votes and his opponent received 1008, because slight changes in one or all of the wards specified if in his favor would be sufficient to change the result as announced.—Ward v. Culver, 144 Mich. 57.

§ 63. Resolution or order for recount.

¶ 190. A resolution by the board authorizing a recount of all the ballot-boxes must be construed as limited to the ballot-boxes in the precincts for which the petition asks a recount; and by proceeding under such resolution the petitioner is not estopped from denying the board's authority to recount the votes cast in a precinct not named in his petition.—May v. Board of Canvassers of Wayne County, 94 Mich. 505.

§ 64. Notice, time and conduct of recount.

Time for application for recount, see ante § 62.

Showing in petition as to person to be notified, see ante ¶ 188.

¶ 191. Under Comp. L. 1897, §§ 3671, 3672, governing election recounts, requiring that 12 hours' notice be given whereupon the board shall proceed to open the ballot-boxes and make the recount, a candidate does not lose his right to have a recount by the fact that the board after receiving the petition adjourned for 12 days, and a recount made after such adjournment is valid where notice was given to the other party who was present with counsel at the recount.—Attorney General ex rel. Garthe v. Campbell, 130 Mich. 283.

¶ 192. The fact that a party interested in a recount of votes for the office of supervisor is a member of the canvassing board does not render it necessary that the recount should be taken before the inspectors of election.—Miner v. Beurmann, 165 Mich. 672.

¶ 193. Where election inspectors allow a recount of votes cast in an election for township treasurer, without the contestant filing a written petition therefor, and making a deposit as provided by Comp. Laws 1897, § 3725, How., 2nd Ed., § 322, and a recount is had in the absence of the opposing candidate, the contestor and his brother handling the ballots and advising as to them, such proceeding is illegal.—Wheeler v. Coleman, 176 Mich. 285.

¶ 194. Where a recount in the absence of the contestee of votes cast in an election is illegal for a failure to comply with statutory requirements, the fact that the contestee appeared the same afternoon and participated in a second recount without protest, is of no effect.—Wheeler v. Coleman, 176 Mich. 285.

§ 65. Scope of recount and matters investigated.

Order as fixing which boxes to be reopened, see ante ¶ 190.

Rereading machine records, see ante § 58.

Reopening ballot-boxes and recounting ballots, see ante § 61.

Estoppel to question result after failing to challenge at polls, see post ¶ 262.

¶ 195. Pub. Acts 1913, No. 327, is intended to give a board of supervisors greater power in recounting votes canvassed by the board than is conferred by previous statutes, inasmuch as the board is given the right to subpoena witnesses, and take all necessary proceedings to insure a correct count of votes.—Baldwin v. Board Sup'rs of Alger County, 189 Mich. 372.

¶ 196. No judicial powers are given to the board of supervisors by Pub. Acts 1913, No. 327, providing for a recount of votes, but the power to determine facts finally.—Baldwin v. Board Sup'rs of Alger County, 189 Mich. 372.

¶ 197. A recount before a board of canvassers under 1 Comp. Laws 1897, § 3725, is properly limited to the ballot box named in the petition for recount.—Miner v. Beurmann, 165 Mich. 672.

§ 66. Recount commission and report by it.

Validity of certificate by recount board of which contestant was passive member, see post ¶ 207.

Discretion of examiners in contest as involving judicial power, see Constitutional Law § 35.

¶ 198. A statement that the persons selected are "citizens" of the county does not show that they are electors, within How. St., § 234g, which requires that the board of examiners in a contested election shall consist of three persons who are electors of the county.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

¶ 199. Pub. Acts 1897, No. 267, providing that the board of canvassers on receiving the report of a recount committee "shall accept the same as correct, anything in the previous declaration, certificate or returns to the contrary notwithstanding" deprives the board of any duty to correct any errors made by the committee but not shown in the report; and accordingly mandamus to compel issuance of a certificate based on such errors will be denied. The case of Christopherson v. Common Council of Manistee, 117 Mich. 125, in so far as it appears to sanction the

duty or power to correct such errors, is not to be followed as a precedent, because the point was not raised.—Atwood v. Mayor, etc., of Sault Ste. Marie, 141 Mich. 295.

¶ 200. Under Comp. L. 1897, § 3725, providing that the board of canvassers upon receiving the report of the committee to recount votes shall accept the same as correct, the common council acting as a board of canvassers must adopt the majority report and cannot adopt a minority report of the committee.—Ward v. Culver, 144 Mich. 71.

§ 67. Conclusiveness of recount.

Of precinct and state canvass and returns, see ante §§ 47, 48.
Of the certificate issued on the returns or on the recount, see post § 72.
Recanvass after invalid recount, see post § 68.

¶ 201. Under Laws of 1887, Act No. 293 (How. St., §§ 234b-2341), a recount by the board of examiners is not conclusive evidence of the ballots cast at the election; nor does the act prevent a party in a subsequent contest from showing that ballots were illegally cast, or that the boxes had been tampered with since the result was officially declared.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

§ 68. Recanvass after invalid or defective recount.

¶ 202. Where the board of canvassers has recounted the votes of a precinct not included in the petition, its action is so far unauthorized and void and it will be compelled to make a recanvass.—May v. Board of Canvassers of Wayne County, 94 Mich. 505.

§ 69. Statements or reports and certification of results.

Necessity of legal count as basis for certificate, see ante ¶ 136.
Of vote on constitutional amendments, see post § 70.
Of result of recount, see post § 71.
Conclusiveness and effect of the certificate, see post § 72.
Conclusiveness of lot casting off tie, see post § 73.
Conclusiveness and finality of returns by inspectors, see ante § 47.
Conclusiveness of state canvass, see ante § 48.
Ministerial nature of duties and functions, see ante § 53.
Duty to issue certificate where no contest was made, see ante ¶ 164.
Duty to issue certificate where illegal voting is claimed, see also ante ¶ 144.

¶ 203. How. St., § 130, providing for the consolidation of reports of elections, is superseded by Pub. Acts 1891, No. 190, so far as it relates to the manner of the return by the inspectors of elections of the result of an election to the federal house of representatives.—Belknap v. Board of State Canvassers, 95 Mich. 155.

¶ 204. The county board of canvassers in canvassing the returns from a township, that is divided into two or more election districts, should, in congressional elections, canvass the returns from such districts as certified by the inspectors of election thereof; since Laws 1891, Act No. 190, makes no provision for the consolidation of the returns of the district inspectors of election where a township is so divided.—Belknap v. Board of State Canvassers, 95 Mich. 155.

¶ 204a. A certificate of election may be ordered issued by the new body (common council) where the old one has become functus officii.—Christopherson v. Common Council of Manistee, 117 Mich. 125.

§ 70. ——Of vote on amendments to constitution.

¶ 205. Failure to comply with the provision of How. St., § 187, requiring the number of votes cast for and against the adoption of a constitutional amendment to be written out in words at length in stating the result of the canvass (numerals being used instead), does not justify the board of state canvassers in excluding the returns from a county.—Rich v. Board of State Canvassers, 100 Mich. 453.

¶ 206. How. St., § 205, which provides that, in case no certified copy of the statement of the votes cast for and against the adoption of a constitutional amendment shall have been received from any county clerk by the secretary of state, governor, or state treasurer, within the time limited therefor, such secretary shall forthwith send a special messenger to obtain such statement, evidences the intention of the legislature that the error or omission of duty by the clerk should not result in disfranchising the voters of any county, and, if the instrument returned by the clerk is not conceived to be a sufficient return, it is the duty of the board of state canvassers to dispatch a messenger to obtain a correct copy of the canvass.—Rich v. Board of State Canvassers, 100 Mich. 453.

§ 71. ——Of result of recount.

Duty to issue certificate on report regardless of extraneous errors in recount, see ante ¶ 199.
Duty to issue certificate on strength of majority report of recount officers, see ante ¶ 200.
Conclusiveness of certificate based on recount, see post § 72, ¶ 209.

¶ 207. Respondent, running for the office of supervisor, demanded a recount before the board of canvassers of which he was a mem-

ber. The recount, resulting in his favor, was made by a majority of the board, respondent taking no part therein. He did, however, sign the final certificate along with the majority of the board. Held, the recount was valid and the decision of the board in respondent's favor final, under 1 Comp. Laws 1897, § 3725.—Miner v. Beurmann, 165 Mich. 672.

§ 72. ——Presumptions, conclusiveness and effect.

Of statements and returns of primary vote, see ante § 24.
Of the returns of the election, see ante §§ 47, 48.
Of the recount, see ante § 67.
Of certifications of nominations, see ante § 28.
Certificate issued to person receiving less than majority, see also ante ¶ 163.
Duty of supervisors to admit properly certified member elect, power to judge of qualifications and election, see also Counties § 49.

¶ 208. The evidence contained in the ballots is the foundation of the statements to be prepared both by the inspectors and by the county canvassers; and also of the certificates of election issued by the latter. A party may go behind the canvass and certificate to the ballots to show the number of votes cast for him.—People ex rel. Attorney General v. Tisdale, 1 D. 59; People ex rel. Attorney General v. Van Cleve, 1 Mich. 362; People ex rel. Lake v. Higgins, 3 Mich. 233.

¶ 209. The public declaration of the count of ballots by the board of canvassers is an official act, and will prevail over any statement or certificate founded upon a subsequent and unlawful recounting.—Keeler v. Robertson, 27 Mich. 116.

¶ 210. The statement required by law to be made out by the canvassers, showing the votes given for the respective offices, is prima facie evidence only of the facts stated in it. The county canvass may be corrected by the township canvasses, and these by the ballots themselves.—People ex rel. Attorney General v. Van Cleve, 1 Mich. 362.

¶ 211. The determination by the board of county canvassers as to the persons elected is only prima facie evidence of election.—People ex rel. Attorney General v. Van Cleve, 1 Mich. 362.

¶ 212. When, in proceedings in the nature of quo warranto, the right of the respondent is referred by a verdict entirely to a county canvass, and the verdict finds facts which invalidate the returns on which the canvass was founded, the canvass is thereby prevented from being conclusive.—Keeler v. Robertson, 27 Mich. 116.

¶ 213. The board of education of Grand Rapids cannot go behind the canvassers' statements of election of one of its members.—People ex rel. Godwin v. Grand Rapids Board of Education, 38 Mich. 95.

§ 73. ——Conclusiveness of tie vote cast off by lot.

¶ 214. A trial by lot, under C. L. 1871, § 136 (see How. St., § 188), for an office for which the candidates have received an equal number of votes, does not preclude the attorney general from inquiring, at the relation of the losing party, into the legality of the votes counted by the board of canvassers for the respondent.—Keeler v. Robertson, 27 Mich. 116.

¶ 215. The certificate granted under the statute providing for drawing lots for an office in case the candidates have an equal number of votes is no more conclusive than a regular certificate of election, and leaves the public at liberty to inquire into the anterior proceedings.—Keeler v. Robertson, 27 Mich. 116.

VII. IRREGULARITIES IN VOTING AND CONDUCT OF ELECTION.

§ 74. In general.

Sufficiency of notice of election, see ante §§ 3-6.
Effect of want of notice, see also ante ¶ 8.
Failure to give notice where notice is implied by law, see also ante § 6.
Appointment of candidate as election inspector, see also ante ¶ 36.
Failure to register voters, see ante ¶ 55.
In place or time of election, see post § 75.
In the ballots or markings, see post §§ 76-83.
In the instructions to voters, see post § 84.
In deposit of the ballot or matters thereafter, see post §§ 85-87.
Avoidance of entire vote or single ballots only, see post § 88.
Cure or validation of the election or ballots or waiver of objections, see post §§ 89, 90.
Effect of majority for ineligible person, see ante ¶ 152.
Disability of canvassers to correct errors in making canvass, see ante § 54.
Balance or neutralizing effect of errors as making question immaterial on quo warranto, see Quo Warranto, IV.

¶ 216. An election in favor of a loan for the erection of county buildings is not invalid for corruption because of the use of posters urging working men to vote therefor on the ground that it would furnish them employment.—Wayne County Sup'rs v. Wayne Circuit Judges, 106 Mich. 166.

§ 75. In place of election or adjournment.

¶ 217. The adjournment of an election in good faith from one polling-place to another is at most an irregularity, unless it prevents

persons from voting or prejudices the rights of candidates; and such an irregularity will not sustain proceeding in the nature of quo warranto against the successful candidate, in the absence of any showing that if the change had not been made the result would have been different.—Farrington v. Turner, 53 Mich. 27.

§ 76. Irregularity or informality in ballot in general.

¶ 218. A voter has a right to presume that officers have done their duty in placing tickets upon election ballots, and therefore irregularities do not vitiate his vote.—Bragdon v. Navarre, 102 Mich. 259.

¶ 219. A ticket is not to be rejected from the count because the candidate voted for was not the nominee of any party, and because such ticket was not properly certified and so not entitled to a place upon the official ballot. A voter is not required to determine at his peril the regularity of a ticket which he finds upon such ballot.—Bragdon v. Navarre, 102 Mich. 259.

¶ 220. The general law prohibiting the printing of the name of a candidate on the ballots more than once, is in force under section 4, Act No. 272, Pub. Acts 1907, notwithstanding the provision in a different section of such act that the names of the candidates nominated shall be printed upon the official ballots of the various political parties.—Helme v. Board Election Com'rs Lenawee County, 149 Mich. 390.

¶ 221. Act 281, P. A. 1909, § 41, providing that votes shall not be counted which are cast for a candidate on the ballots of one political party when such candidate is enrolled as a member of another party, is expressly limited to acts of the board of election inspectors in the counting of votes at the primary election.—DeFoe v. Board Election Com'rs Bay City, 174 Mich. 472.

§ 77. ——Misnomer and misspelling.

¶ 222. Ballots that give initials only for the candidate's Christian name cannot be counted as if giving the full name.—People ex rel. Attorney General v. Tisdale, 1 D. 59; People ex rel. Lake v. Higgins, 3 Mich. 233; People ex rel. Williams v. Cicott, 16 Mich. 283.

¶ 223. Where the designation of an individual upon a ballot is by an abbreviation sanctioned by common usage and universally understood—as Geo. for George, Jas. for James, or Thos. for Thomas—the ballot may be counted for the person for whom it was evidently designed.—People ex rel. Attorney General v. Tisdale, 1 D. 59.

¶ 224. A slight error in the spelling of a name should not prevent the vote from being counted for the person for whom it was evidently intended.—People ex rel. Attorney General v. Tisdale, 1 D. 59.

¶ 225. An error in spelling the name does not prevent the ballot being counted for the person for whom it was designed—the rule of idem sonans applying.—People ex rel. Finnegan v. Mayworm, 5 Mich. 146.

¶ 226. Where a portion only of the candidate's surname is given, the ballot cannot be counted unless such portion is idem sonans with the whole.—People v. Cicott, 16 Mich. 283.

¶ 227. Ballots for Michael Finnegan and Michael Finegan should be counted for the same person.—People ex rel. Finnegan v. Mayworm, 5 Mich. 146.

¶ 228. A ballot for Samuel Toley cannot be counted for Samuel Tobey.—People ex rel. Tobey v. McNeal, 63 Mich. 294.

¶ 229. Where John W. Jochim was a candidate for election in a district in which there was no other John Jochim, ballots cast for John Jochim were presumptively intended for John W. Jochim, and should have been counted for him.—Jochim v. Kennedy, 37 Mich. 67.

¶ 230. Christian Ott was a candidate for township supervisor and through error his name was printed on the ballots as O. H. Christian, and 22 votes were cast before the error was discovered. In an action to try title to the office, held that the votes cast for O. H. Christian, though there was no person by that name in the township, should not be counted for Christian Ott, even though it appeared that the ballots had not been filed with the township clerk for inspection two days before election as required by Comp. L. 1897, § 3660.—Ott v. Brissette, 137 Mich. 717.

§ 78. Indorsement and folding of ballots irregularly.

¶ 231. The statute (Act No. 55, Pub. Acts 1905, § 22) requiring election inspectors to initial ballots and making ballots not correctly initialed void, is in accordance with the Constitution.—People ex rel. Anderson v. Rinehart, 161 Mich. 585.

¶ 232. An election inspector failed to initial the ballots on the lower left-hand corner as required by Act No. 55, Pub. Acts 1905, § 22, but initialed instead the perforated corners and tore off such perforated corners after he received the ballots from the electors and before depositing them in the box. Held, the ballots were void.—People ex rel. Anderson v. Rinehart, 161 Mich. 585.

¶ 233. Where the indorsements of the initials of an inspector of election were made upon such ballots in all respects as required by law, except that instead of being in the

upper left-hand corner as required by Pub. Acts 1891, Act No. 190, § 22, they were in the lower right-hand corner; and where the ballots when folded could not be told from folded ballots with the initials in the upper left-hand corner; and where no wrong was intended by the inspectors, and the electors who were all qualified voters, voted them in good faith without objection or challenge, they should be counted.—Horning v. Board of Canvassers of Saginaw County, 119 Mich. 51.

¶ 234. If two or more ballots are so folded together as to present the appearance of a single ballot, both must be destroyed, thus depriving the person casting them of any vote, whether so folded by mistake or intentionally.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

§ 79. Irregular marking of ballots.

See also ante ¶ 129.

Marks coupled with erasures, writing, pasting, etc., see post § 80.

Distinguishing marks and their effect, see post, VIII.

Peculiar cross marks or additions to marks as distinctive, see post § 92.

¶ 235. A ballot is not spoiled because the voter has indicated in more than one authorized way for whom he desires to vote. —Sawyer v. Hart, 194 Mich. 399.

¶ 236. An elector casting at the polls a ballot with a single ticket upon it containing the name of but one candidate for each office and without making any cross in the circle at the head of the ballot legally votes the ticket.—Sawyer v. Hart, 194 Mich. 399.

¶ 237. In an election contest ballots are properly counted where one bears a cross in blue pencil apparently retraced and in the other the cross looks as if it were made with a blue pencil with a double point or by both a down and an up stroke for each line in the cross.—People ex rel. DeJonge v. Kamps, 129 Mich. 217.

¶ 238. Where the official ballot used at a village election in 1894 contains but one name for each office, the failure of electors to stamp their ballots in exact compliance with the statute, will not authorize the rejection of the ballots.—Johnson v. Board of Canvassers of Village of Casnovia, 101 Mich. 187.

§ 80. ——Erasure, scratching, writing, or pasting.

¶ 239. Under Pub. Acts 1901, Act No. 214, § 26, a ballot with a cross placed under the party emblem or name, and from which the name of a candidate was erased and the name of the candidate on the opposing ticket written in, could not be counted for such opposing candidate.—People ex rel. Anderson v. Byers, 135 Mich. 45.

¶ 240. Under Laws 1893, No. 202, § 26, How., 2nd Ed., § 236, the erasure of a candidate's name is to be recognized as an appropriate manner of expressing the voter's intent not to vote for such candidate, and where the elector, casting a ballot containing but one ticket, desires to vote for some and not for all of the candidates whose names appear thereon he may effectually and lawfully so indicate by erasing or striking off the name of any candidate for whom he does not desire or intend to vote.—Sawyer v. Hart, 194 Mich. 399.

¶ 241. When a slip is placed on a ballot so that it contains two names for an office when but one is to be voted for, the ballot cannot be counted for either.—People ex rel. Williams v. Cicott, 16 Mich. 283.

¶ 242. Where, on a ballot, a slip is pasted over a name so as to partially obliterate it, the slip should be counted.—People ex rel. Williams v. Cicott, 16 Mich. 283; People ex rel. Keeler v. Robertson, 27 Mich. 116.

§ 81. Voting in wrong district or repeating.

¶ 243. One who has first by mistake voted in the wrong precinct, and upon discovering his mistake has requested and procured the inspectors to withdraw and cancel a ballot such as he asserted he had voted, has no right afterwards to vote again in his proper precinct, and his second ballot is illegal.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

§ 82. Mistakes and misdoing of officers.

Placing ballot in wrong box, see post § 85.

¶ 244. Irregularities on the part of election officers do not of necessity defeat the election, though they may require it to be subjected to severe scrutiny.—People ex rel. Dickinson v. Sackett, 14 Mich. 320.

¶ 245. Electors are not to be deprived of the result of their votes by the mere mistakes of election officers which do not appear to have affected the result. But, on the other hand, where fraud appears upon the part of the inspectors, the voter must sometimes be deprived of his vote; and this must always be the case where mandatory provisions of the election law are disregarded, if the result would thereby be changed.—Attorney General v. Stillson, 108 Mich. 419.

¶ 246. The failure of the clerk of the board of election inspectors properly to place the numbers of ballots opposite the names of the voters in the poll book as required by Act No. 281, § 35, Public Acts of 1909, does not invalidate the ballots cast by said voters.—Abbott v. Board Canvassers Montcalm Co., 172 Mich. 416.

§ 83. ——Improper assistance or meddling.

¶ 247. In quo warranto proceedings to try title to a county office, it appeared that, out-

side of one township, the relator received a plurality of the votes cast; that, including the vote of said township, as canvassed, respondent had a plurality of 33; that, of the voters in said township who voted at said election, 150 were Hollanders, who were able to converse in their own language; that, before the polls were opened, the inspectors of election appointed a Hollander, who was opposed to the election of relator, to act as interpreter, and he was sworn to perform that duty; that he was thereupon permitted to be and remain, throughout the day, within the railing of the polling place, and to converse freely, in his own language, with said electors, after they had received their official ballots, and before depositing or marking the same, although none of them had requested an interpreter, and the inspectors had not called upon him to act as such. Held, that the vote of the township should be thrown out.—Attorney-General v. Stillson, 108 Mich. 419.

¶ 248. The vote of a township should be excluded where it appears that a person was appointed "instructor" and permitted to distribute ballots to the voters in the polling place and to instruct them how to vote, there being no provision in the election law for any such official, though the election officers acted in good faith and there is no showing that voters were influenced in any way.—Attorney General ex rel. McCall v. Kirby, 120 Mich. 592.

¶ 249. Under Laws 1891, Act No. 190, an inspector of elections cannot lawfully assist in marking a ballot for an elector who claims to be unable to read English, until such elector shall have made oath to the fact; and the ballots cast by assisted voters not so sworn cannot be counted.—Attorney-General v. May, 99 Mich. 538.

¶ 250. Deputy United States marshals are not authorized under the federal law (Rev. St. U. S. §§ 2017, 2019, 2021, 2022) to mark ballots, or see them marked, for the purpose of seeing that the election of a member of congress is fairly and properly conducted; whatever might be the authority of United States supervisors of elections thereunder.—Attorney-General v. May, 99 Mich. 538.

§ 84. Improper printed instructions.

¶ 251. The posting of notices in the nature of instructions to voters, which conform to those provided for by the election law of 1891, instead of 1893, under which latter law the election is to be held, are irregularities, and will not invalidate the election; it appearing that in making and acting under such appointments the council and members of the board of election inspectors acted in good faith.—People v. Avery, 102 Mich. 572.

§ 85. Deposit of ballot in wrong box.

¶ 252. An elector is not to be deprived of his vote, either by the mistake or fraud of the inspector in depositing it in the wrong box, if the intention of the voter can be ascertained with reasonable certainty.—People ex rel. Hayes v. Bates, 11 Mich. 362.

¶ 253. Ballots should not be rejected because of being put in the wrong box by the honest mistake of the voters themselves.—People ex rel. Hayes v. Bates, 11 Mich. 362.

¶ 254. Where a city and state election were both held at the same time, under the charge of the same inspectors, and seven ballots for city officers were found at the closing of the poll in the state box, and the circumstances of the case made it reasonably certain that these ballots were in good faith put in by electors who did not put in other ballots for city officers at the same election, it was held that they were properly counted by the inspectors.—People ex rel. Hayes v. Bates, 11 Mich. 362.

§ 86. Tampering with or changing ballots cast.

¶ 255. Inspectors of election have no authority, on the assertion of one who claims to have voted by mistake in the wrong precinct, to withdraw from the ballot-box and destroy a ballot which he identifies as the one, or similar to the one, which he voted.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

§ 87. Improper care and custody of ballots.

Allowing ballot to be withdrawn after deposit, see ante ¶ 255.

¶ 256. The failure of the inspectors to keep the ballots in the manner pointed out by the statute will not affect the rights of persons for whom they were cast; the statute is directory merely.—People ex rel. Lake v. Higgins, 3 Mich. 233.

¶ 257. The ordinary presumption that a public officer has performed his duty leads to the conclusion that ballots found in the money box were deposited there by the electors.—People ex rel. Hayes v. Bates, 11 Mich. 362, 368.

§ 88. Avoidance of entire vote or election.

Election for one where two should have been chosen, see ante ¶ 153.

Effect of failure of county board to return vote on constitutional amendment, see also ante ¶ 206.

Apportionment of excessive votes, see also ante § 44.

Improper use of voting machine in primary, see ante ¶ 74.

¶ 258. Illegal votes do not avoid an election unless it is shown that they affect the result.—People v. Cicott, 16 Mich. 283.

¶ 259. The entire vote of an election district must be rejected if it appears that ballots of unregistered persons and ballots

shown after being marked were put into the ballot-box, and that third persons were allowed to enter the polling booths with the electors.—Attorney-General v. McQuade, 94 Mich. 439.

¶ 260. Relator and respondent were opposing candidates for the office of justice of the peace at the spring election of 1892 in the township of Grand Rapids. The township is divided into two election precincts, in one of which the Michigan Soldiers' Home is situated. The face of the returns showed a majority of three for the respondent, but 82 inmates of the home, who were not legal voters in the township, voted at the election, and it was impossible to ascertain for which candidate they voted. Held, that the vote of the precinct must be excluded.—People v. Hanna, 98 Mich. 515.

§ 89. Cure or validation of irregularities.

Cure of illegal recount by appearance at later recount, see also ante ¶ 194.

Equalizing or neutralizing effect of invalid ballots as rendering error harmless, see also Harmless Error.

Neutralized or balanced errors and irregularities as eliminating questions on quo warranto, see Quo Warranto, IV.

¶ 261. A special election for probate judge, invalid as not called by the proper authorities, is not validated by the fact that the people voted for the several candidates put in nomination.—People v. Palmer, 91 Mich. 283.

§ 90. Estoppel or waiver of question.

Admission of question as to votes as affecting prima facie right to certificates, see ante § 163.

Estoppel or disability to question right to office in general, see Officers, III.

¶ 262. The failure of a candidate for office to be present and to challenge the voters personally will not estop him from attacking his opponent's title on the ground that illegal votes were cast, contestant having sent an inspector to challenge any disqualified persons.—People v. Hanna, 98 Mich. 515.

VIII. DISTINGUISHING MARKS ON BALLOTS.

Sufficiency of marks to denote choice, see ante §§ 40-42.

§ 91. In general.

Irregular markings not distinctive in character, see ante §§ 79, 80.

Marks regarded as distinctive, see post § 92.

¶ 263. Election ballots are not invalidated by distinguishing marks fraudulently placed upon them after they have been deposited in the ballot box.—Attorney-General v. Howcroft, 107 Mich. 85.

¶ 264. The provision in Pub. Acts 1891, No. 190, § 36, that in the canvass of votes any ballot which shall bear any distinguishing mark shall be void, and shall not be counted, applies to a distinctive mark made by the voter, and an unauthorized vignette printed by the election commissioners on all the ballots does not invalidate them.—Lindstrom v. Board of Canvassers of Manistee County, 94 Mich. 467.

¶ 265. Where the ballots furnished by the election commissioners as provided by Pub. Acts 1891, No. 190, bore an unauthorized vignette, a voter who voted such a ballot was not disfranchised because of such "distinguishing mark," and a candidate who received a plurality of the votes cast, and who was not a party to the placing of such vignette upon the ballots, was not defeated in consequence thereof.—Lindstrom v. Board of Canvassers of Manistee County, 94 Mich. 467.

§ 92. What constitute distinguishing marks.

See also ante ¶ 129.

¶ 266. The rule that any mark on a ballot not necessary and appropriate to express the voter's intention shall be regarded as a "distinguishing mark" and the ballot rejected is too rigid in view of a well settled practical construction of the statute otherwise (Laws 1891, Act No. 190); and marks needlessly made to indicate that candidates running on two tickets were voted for, both tickets having the same candidates, were not to be regarded as distinguishing.—Attorney General v. Glaser, 102 Mich. 405 rev'g on rehearing 102 Mich. 396.

¶ 267. A ballot with the name of a candidate on the ticket voted erased and the bare surname of the opposing candidate written in is not thus distinguished, and is valid.—Attorney General v. Glaser, 102 Mich. 405, rev'g on rehearing 102 Mich. 396.

¶ 268. Marks like commas under another ticket than that marked with a cross at the head are distinguishing.—Attorney General v. Glaser, 102 Mich. 405, rev'g on rehearing 102 Mich. 396.

¶ 269. Half circling a cross on one ticket and writing a figure 9 on another ticket constitute distinguishing marks.—Attorney General v. Glaser, 102 Mich. 405, rev'g on rehearing 102 Mich. 396.

¶ 270. Using more than a single cross under one heading of the ballot is a distinguishing mark.—Attorney General v. Glaser, 102 Mich. 405, rev'g on rehearing 102 Mich. 396.

¶ 271. Needlessly erasing the name of a candidate and marking a cross opposite the name of his opponent on the other ticket is not a distinguishing mark.—Attorney General v. Glaser, 102 Mich. 405, rev'g on rehearing 102 Mich. 396.

¶ 272. Marking the head of the ticket, partly erasing one of the names thereon, and writing in another name in pencil indicates a vote for the name written in, and is not a distinguishing mark.—Attorney General v. Glaser, 102 Mich. 405, rev'g on rehearing 102 Mich. 396.

¶ 273. Imperfect cross marks in the circle at the head of the ticket, whose imperfection consists apparently in an attempt to make a more distinct mark, or with a pencil having a split or broken point, or by making the strokes with an up and down movement of the pencil, should not be rejected for that reason if there is nothing distinctive about the marks.—People ex rel. DeJonge v. Kamps, 129 Mich. 217.

IX. REVIEW AND SUPERVISION BY COURTS.

§ 93. In general.

[Note. Generally speaking the remedies of mandamus and quo warranto and that by injunction have nothing peculiar to elections in them, even though resorted to for relief in election cases. Topics treating of those remedies should be consulted. The right to and the remedies for trial of rights in office are also treated in Officers, III.]

Mandamus to compel official action in preparing ballot or counting vote or certifying result, see Mandamus.

Nonjudicial contest or review of vote, see ante, VI.

Finality of state canvass, see ante § 48.

Trial of title to office, see Officers, III; Quo Warranto.

Power to judge of qualifications and election to office, see Officers, III.

When mandamus and when quo warranto is proper remedy, see Mandamus, I, III; Quo Warranto, I.

Judicial and jury questions and evidence on quo warranto, see Quo Warranto, IV.

Certiorari or quo warranto to review contest, see Certiorari § 7.

Certiorari to review official recounts, see Certiorari § 17, ¶ 59a.

Service and time to make return to certiorari to review official recount, see Certiorari § 33.

Finality of canvass of votes on proposal to change county seat, judicial review, see Counties § 17.

Disability of courts to judge of election and qualification of officers in legislative body, see Constitutional Law § 42.

Nonjudicial nature of canvassing boards' functions, see ante § 53.

Ballots as best evidence, see Evidence, IV.

Incompetency of parol evidence to explain ballot, see Evidence, V.

Inadmissibility of opinions or conclusions as to how elector voted, see Evidence, VI.

§ 94. Internal affairs of party.

Political convention as judge of qualifications of members, see ante § 26.

Rights of factions to party name or emblems on ballots, see ante § 35.

Inquiry into regularity of factions to assign place on ballot, see ante ¶ 105.

Mandamus to control certification of nominee by convention, see also ante ¶¶ 84, 85.

Rule of judicial noninterference in internal affairs of societies, see Associations; Religious Societies.

¶ 274. In the absence of controlling legislation, the composition of a political committee according to the custom and usage of the party, with the sanction of the conventions of the party will not be disturbed by the courts.—Potter v. Deuel, 149 Mich. 393.

¶ 275. It is not the province of the courts to determine upon technical grounds which portion of a convention represents the political party, when there is a split in the convention and a considerable faction leaves the meeting and nominates other candidates.—Stephenson v. Boards of Election Commissioners, 118 Mich. 396.

X. MISFEASANCE AND MALFEASANCE ABOUT ELECTION OR VOTING.

§ 95. In general; liability for.

Effect of official mistake or misdoing on election, see ante §§ 82, 83.

Effect of appeals to personal motive as corruption, see also ante ¶ 216.

Offenses against election laws, see Crimes § 67; Indictment.

Actionable misfeasance or malfeasance of officers generally, see Officers, VI.

Offenses against Corrupt Practices Act, see Crimes § 67.

Police power to regulate campaign contributions, see Constitutional Law § 100.

Prohibition of campaign contributions as invasion of right of freedom of speech and of the press, see Constitutional Law § 186.

Validity of law regulating campaign contributions, see Constitutional Law § 254, ¶ 1094.

Evidence of conspiracy to deprive of office by miscounting vote, see Conspiracy ¶ 21.

Offenses under Michigan Election Law, see Pub. Acts 1917, No. 203, chap. XXV.

Corrupt practices law, see Comp. L. 1915, § 3828 et seq.

¶ 276. Inspectors of election act judicially in determining whether a person offering to vote has the requisite qualifications as to color or descent to entitle him to vote as a "white male citizen," under the constitution; and they are not liable to an action for improperly refusing a vote because the person offering it was partly of African descent.—Gordon v. Farrar, 2 D. 411.

Liability of election officers to candidate for office for negligence depriving him of rights in election laws, see note 7 N. C. C. A. 384-387.

XI. PRIVILEGES OF ELECTORS AND SECRECY OF BALLOT.

§ 96. In general.

Effect of officer's meddling on validity of the vote, see ante § 83.

Use of machine as denying constitutional right to see vote cast, see ante ¶ 119.

Validity of law as impairing secrecy of ballot, see Constitutional Law, XII.

Privilege of electors against service of civil process on election day, see Pub. Acts 1917, No. 203, chap. XXIV, § 4; Jud. Act, chap. XIII, § 25; Comp. L. 1915, § 12428.

¶ 277. The provision of Laws 1891, Act No. 190, § 26, that if the elector shows his ballot or any part thereof to any person other than one lawfully assisting him in the preparation thereof, after the same shall have been marked, it shall not be received or deposited in the ballot box is mandatory.—Attorney General v. May, 99 Mich. 538.

§ 97. Exclusion of evidence violating secrecy.

Sealing, preservation and custody of ballot boxes requisite to use in recount or contest, see ante §§ 45, 61.

¶ 278. The election law of 1891 is designed to secure absolute secrecy to the elector, and thus to prevent all opportunity for corrupt practices; and no voter can be compelled to remove the secrecy of his ballot and state how he voted.—Attorney General v. McQuade, 94 Mich. 439.

¶ 279. A legal voter cannot be compelled to disclose for whom he voted, and no one else can give testimony upon that point unless the voter himself has at the time of voting made the contents of his ballot public by his own consent. No knowledge of its contents obtained without his consent is admissible.—People v. Cicott, 16 Mich. 283.

¶ 280. What the voter may have said, either before or after voting, not accompanied by an exhibition of his ballot, is not admissible to prove for whom he voted. Nor can the appearance of his ticket be shown for the same purpose.—People ex rel. Williams v. Cicott, 16 Mich. 283.

¶ 281. One who has voted, but whose qualifications are disputed, is entitled to the same privilege of secrecy as any other; but when the illegality of his vote is not in controversy the immunity ceases, and the contents of his ballot may be shown.—People ex rel. Williams v. Cicott, 16 Mich. 283.

¶ 282. Testimony that witness saw ballots cast folded and that he was confident that they were straight tickets does not violate the rule against evidence impairing the secrecy of the ballot without the voter's consent, where it does not appear how or by what means witness became confident of the fact.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

ELECTRICITY.

TREATS of the generation and use of electricity, of service of the public with electric current, and of injuries to persons or property in such use, except injuries to servants (see Master and Servant, III; Workmen's Compensation Law) or to passengers (see Carriers, IV), and further excepting injuries by electric car lines to persons not servants or passengers and not due to the use of electricity but rather to the operation of cars and trains (see Street Railways, IV; Railroads, VIII).

Analysis.

§ 1. In general.
§ 2. Franchises and service to the public.
§ 3. Rates, charges and service.
§ 4. Liability for injuries to person and property.
§ 5. ——Wires crossed or falling on other conductors.
§ 6. ——Injuries to trespasser or licensee.
§ 7. ——Person or corporation responsible.
§ 8. Contributory negligence.
§ 9. Actions, pleading and evidence.
§ 10. ——Questions for jury.
§ 11. ——Instructions.

§ 1. In general.

Franchises and service to public, see post § 2.

Rates, charges and service, see post § 3.

Liability for injuries to person or property, see post §§ 4-7.

Law of electric railways in general, see Street Railways.

Power of cities and villages to light streets or to engage in generating and distributing electric current, see Municipal Corporations, III.

Necessity of approval of corporation by public authority, see Corporations § 24.
General law of corporations, see Corporations.
Propriety of receivership in corporate foreclosure, see Corporations ¶ 867.
Regulations of transmission of current and of wires, see Comp. L. 1915, §§ 4842-4850, 8365-8371.
Incorporation of electric companies, see Comp. L. 1915, § 8920 et seq.

§ 2. Franchises and service to the public.

Franchises in general, see Franchises.
Power to grant franchises, see Franchises.
Public control over and regulation of highways and streets, see Highways, IX.
Certiorari to review order for removal of wires, see Certiorari § 18.
Public contracts for municipal electric lighting, see Public Contracts; Municipal Corporations, XI.
Right to use highways and streets for transmission, see Comp. L. 1915, § 4841.

¶ 1. Under a contract for the lighting of streets of a city, made with individuals who had bought their dynamo and prepared to erect their plant three months prior to such contract, followed by new contracts for over ten years, during which time no extensions were made except as required by the contracts and a few buildings were lighted along the used streets without protest from the city, the status was merely that of furnishing lights for the city, and the furnishing of light to private citizens was merely incidental; no vested rights were created, and the granting of a new contract to other parties could not be enjoined.—Horner v. City of Eaton Rapids, 122 Mich. 117.

¶ 2. A contract by the city of St. Clair, a city of the fourth class, to purchase electric power to be generated at Port Huron, for a period of ten years, and wherein there is granted to a contractor permission to erect and maintain poles, wires, conduits and other appliances necessary for the transmission of electricity in and through the city of St. Clair, and it was further agreed that the furnisher of the electricity should not sell or supply electricity or power to purchasers within a certain named restricted district without the permission of the city of St. Clair, is the grant of a franchise through the city and not merely the grant of a permission to erect poles and other appliances for the transmission of electricity through the streets, and where entered into by the tie vote of the aldermen, with the affirmative vote of the mayor, is void under Comp. L. 1897, § 3111 providing that no franchise shall be granted except by a two-thirds vote of the aldermen.—Vossen v. City of St. Clair, 148 Mich. 686.

¶ 3. It is immaterial that a franchise to an electric light company, attaching as an incident to the incorporation of such a company, specifies no time for the existence of the franchise, as in such case the grant would be limited to the period of existence fixed by the charter.—Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43.

¶ 4. How. St., § 4191, provides that electric-lighting companies shall have power to lay, construct and maintain conductors for conducting electricity through the streets, etc., "with the consent of the municipal authorities, under such reasonable regulations as they may prescribe." An ordinance of the city of Manistee provides that all poles erected for electric lighting shall be and remain under the council's control so far as to permit their use by other parties for lighting purposes on payment of the reasonable portion of their cost. Held, that after a company had erected poles the council could not by resolution allow another to use such poles unless the manner of such use were first definitely fixed and regulated.—Citizens' Electric Light & P. Co. v. Sands, 95 Mich. 551.

¶ 5. Rights acquired in the public streets of a city by an electric lighting and power company under Act No. 264, Public Acts 1909, How. St., 2nd Ed., § 2941, constitute a franchise and not a mere license.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

¶ 6. An electric light and power company using the streets of a city under a franchise granted by the latter need not expressly disclaim its rights thereon in order to acquire rights subsequently conferred on such companies by Act No. 264, Public Acts 1909, How. St., 2nd Ed., § 2941.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

§ 3. Rates, charges and service.

General public service regulations and practice before Railroad Commission, see Public Service.

¶ 7. In an action for breach of a contract whereby plaintiffs were to put into defendant's store an electric apparatus and furnish defendant light, defendant to pay at a certain rate and give up gas and other lights, so as to enable plaintiffs to make a public trial and exhibition of their light, held, that the inferior or worthless quality of the light furnished by plaintiffs would constitute a breach of contract; that defendant was not held for the expense of experiments that failed on other grounds than his fault, and that he was not bound to keep and pay for material used in abortive experiments.—Brush-Swan Light & Power Co. v. Gardiner, 59 Mich. 424.

¶ 8. The user of electricity furnished by a public service corporation which has filed a schedule of rates with the railroad commission has no right to transform high tension current into light voltage where the charge made for the two services differs.—Alpena Electric Light Co. v. Kline, 180 Mich. 279.

§ 4. Liability for injuries to person and property.

Wires crossed or falling on other conductors, see post § 5.

Injuries to trespassers or licensee, see post § 6.

Persons or corporations responsible, see post § 7.

Contributory negligence, see post § 8.

Actions, pleading and evidence, see post §§ 9-11.

Liability for injuries to passengers of electric railways, see Carriers, IV.

Liability of masters towards servants injured by electric current, see Master and Servant, III; Workmen's Compensation Law.

Liability of electric companies for injuries caused by dangerous street conditions other than from electric current, see Highways, XII.

Liability for injuries by electric car lines to persons not servants or passengers and not due to electricity, see Street Railways, IV; Railroads, VIII.

Liability of municipal corporation for injuries caused by its employees in operation of electric light plant, see Municipal Corporations, XII.

Adequacy or excessiveness of damages for injuries, see Damages § 236 et seq.

¶ 9. An electric light company maintaining an electric arc street lighting system is relieved from liability for the loss of a team electrocuted and burned by coming into contact with an arc and its connections which have fallen as a result of the natural parting of the rope used to elevate and lower the lamp, where the rope had been previously inspected on the day of the accident and found to be sound.—Sumner v. Eastern Michigan Edison Co., 187 Mich. 169, 12 N. C. C. A. 84.

§ 5. ——Wires crossed or falling on other conductors.

Injury by contact with or fall of arc lamp, see note, 12 N. C. C. A. 84-98.

Liability of electric company for fires caused by defective insulation or installation, see note, 12 N. C. C. A. 209-218.

Liability of electric light companies for injuries to employees of third persons, see note, 7 N. C. C. A. 466-484.

Injuries by electric shock while using telephone, see note, 1 N. C. C. A. 675-685.

Injuries to telephone operators by electric current, see note, 12 N. C. C. A. 328, 329.

Duty to cut off electric current at time of fire, see note, 1 N. C. C. A. 349-353; 8 N. C. C. A. 884-887.

Liability of electric company for personal injury caused by overcharged service wire, see note, 14 N. C. C. A. 253-280.

Liability of street railroad company for injuries caused by charged rails, see note, 9 N. C. C. A. 25-36.

¶ 10. The same duty devolves upon a municipality furnishing light for commercial purposes to properly inspect and maintain its wires so they may not become loose and dangerous as rests upon a private corporation, and where a telephone company has placed its wires in dangerous proximity to those of the city's electric light wires, proper inspection should be made and the telephone company improperly maintaining its wires, should be directed to remedy the defect.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 11. A municipal electric light wire defectively insulated came into contact with a wire of a telephone company subsequently installed in dangerous proximity, burnt through and caused the death of a boy passing by. Reasonable inspection would have discovered the condition and ordinary prudence would have required precautions by both city and company to prevent accidents. Held, the accident was the result of concurring causes and the city cannot urge that as they were first on the ground the proximate cause was the negligence of the telephone company.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 12. A telephone company which permits a loose guy wire to remain in such a condition that it may be either blown or thrown so as to come into contact with a live third rail on a railroad right of way, after notice of its condition, is guilty of negligence.—Kruis v. Grand Rapids, G. H. & M. Ry. Co., 190 Mich. 105. (Ostrander, Brooke, Person, Steere, and Bird, JJ., concurring in result.)

¶ 13. Allowing a trolley span wire to become charged was the proximate cause of injury from electric shock though the train of causation was that of a storm broke a limb of a tree, which pressed down a telephone wire on the hot span wire, that the telephone wire was thus burned off permitting the end to fall on the ground charged with a current, and that plaintiff there came in contact with it while in a public street.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 14. There was no negligence on the part of an electric company where a boy and his mates while playing broke down a telephone line carried on the same poles with the electric wires, and then still in play threw the broken wire while holding the end of it over the electric wires carried above the telephone wires and was shocked, the occurrence being within an hour after the first break.—Stark v. Muskegon Traction & Lighting Co., 141 Mich. 575.

¶ 15. The fact, if it was a fact, that wires of defendant were defectively insulated was not the proximate cause of shock to a boy, who with his mates broke a telephone wire in play, which was carried below on the same poles, and then still in play threw the broken wire while holding the end of it over the electric wire and was shocked.—Stark v. Muskegon Traction & Lighting Co., 141 Mich. 575.

¶ 16. Stringing electric light wires about twenty feet from the ground, when a city ordinance required them to be at least twenty-five feet, is not presumably the cause of a shock incurred by a boy throwing a broken end of a telephone wire up and catching it on the light wire while playing. —Stark v. Muskegon Traction & Lighting Co., 141 Mich. 575.

¶ 17. The failure for three months to repair a "pull off" wire, which, when in its proper place, ran from the top of an electric railroad line pole to the trolley wire over the center of the track, but the end of which attached to the trolley wire had in some way become detached and fallen and become entangled with a wire fence along the railroad right of way, and the other end of which remained attached to the eye bolt of a span wire on the pole connected with the trolley wire by an insulated "hanger" or circuit breaker, which became charged during an electrical storm, communicating electricity to the fence and killing some horses, is the proximate cause of the death of such horses, and not the electrical storm, since the danger of charging the wire by an electrical storm was a danger which should have been foreseen and guarded against.—Wilmarth v. Michigan United Traction Co., 198 Mich. 428.

Injuries to pedestrians caused by charged guy wires, see note, 12 N. C. C. A. 447-467.

§ 6. ——Injuries to trespasser or licensee.

¶ 18. An electric company owes no duty to make railway premises traversed by its wires safe for trespassers, even though others traveled that way, and there can be no recovery for wrongful death of one electrocuted by a live brace wire negligently attached to a pole where the plaintiff is a trespasser.—McCaughna v. Owosso & Corunna Elec. Co., 129 Mich. 407.

Liability for injury to or death of volunteer attempting to adjust lights used for street lighting, see note, 11 N. C. C. A. 1063-1071.

§ 7. ——Person or corporation responsible.

¶ 19. The fact that an electric light and power company is the owner of a light fixture on the premises of another does not determine the question of liability of the company for personal injuries sustained by a third person through negligent insulation. —Griffin v. Jackson Light & Power Co., 128 Mich. 653.

¶ 20. An electric light and power company is not liable to a third person for injuries sustained through the defective insulation of a fixture owned by it where the fixture was located on the premises of another who knew of the defect and danger and continued to use it.—Griffin v. Jackson Light & Power Co., 128 Mich. 653.

¶ 21. In an action for the wrongful death of a telephone lineman caused by coming in contact with high tension wires of a power company, the latter is not relieved from liability because under its contract with an interurban railroad company the power was sold to the latter at a point reached before the place of the accident, thereby making the current the property of the interurban road where the power company was also using the line to transmit electricity to others than the railroad company.—Teachout v. Grand Rapids, G. H. & M. Ry. Co., 179 Mich. 388.

¶ 22. Quære, whether electricity transmitted through a fixture on the premises of another is a dangerous substance within the meaning of the rule that one transmitting such dangerous substance shall be liable to third persons for injuries sustained thereby. —Griffin v. Jackson Light & Power Co., 128 Mich. 653.

Liability of electric company for injury growing out of defective appliance installed by another, see note, 12 N. C. C. A. 346-360.

Liability of generating company for negligence of electric distributing company, see note, 12 N. C. C. A. 1038-1048.

§ 8. Contributory negligence.

Question of contributory negligence for jury, see also post ¶ 36.

Child's touching fallen wire as contributory negligence, see Negligence, IV.

Presumption of due care by person killed by current from 'crossed current, see Death by Wrongful Act § 18.

¶ 23. An employee of a telephone company required to climb a pole to repair telephone wires situated within fifteen inches of uninsulated high tension wires of a power company, is not guilty of contributory negligence as a matter of law, although he knew that the wires were highly charged.—Teachout v. Grand Rapids, G. H. & M. Ry. Co., 179 Mich. 388.

§ 9. Actions, pleading and evidence.

Questions for jury, see post § 10.

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Judicial notice of dangerous character of electricity, see Evidence, I.

Pleading negligence towards passenger in protection from charged wire, see Carriers ¶ 597.

Judicial notice of dangerous qualities of electricity, see Evidence, I.

Sufficiency of evidence of shock to passenger as cause, see also Carriers ¶ 665.

¶ 24. In an action for injuries incurred from escape of an electric current over trolley

span wires, claimed to be improperly insulated, and thence through a telephone wire, it is proper to introduce the insulator in evidence.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 25. Evidence in an action against an electric light company for damages for the loss of a team electrocuted and burned by coming into contact with a fallen street arc lamp and connections, held to sustain a finding that the rope used in elevating and lowering the lamp parted because of old age and wear and from the weight to which it was attached.—Sumner v. Eastern Michigan Edison Co., 187 Mich. 169, 12 N. C. C. A. 84.

¶ 26. In an action against a village and a telephone company for personal injuries caused by coming in contact with a fallen electric light belonging to the village, and alleged to have been maintained by the village in too close proximity to those of the telephone company, as a result of which they came in contact, causing the electric light wire in question to burn off and fall, evidence that the village on the day following the accident, installed a new electric light wire in place of the one which caused the injury and secured it with brackets which would make it impossible for the wires to come together, is competent to show that the wire burned off, about to be introduced in evidence, had not been marked as a result of coming in contact with any other wires since the accident, and such evidence is admissible for that reason, although it might be incompetent for another purpose.—Sykes v. Village of Portland, 193 Mich. 86.

Application of doctrine of res ipsa loquitur in action for injuries caused by electricity and electric wires, see note, 5 N. C. C. A. 51, 52.

§ 10. ——Questions for jury.

Questions for jury in general, see Trial, VI.

¶ 27. It is a jury question whether inspections of trolley span wires was sufficiently frequent as proved in view of the character of electricity and the risk that span wires might become live by reason of poor insulation.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 28. Evidence in an action by the owner of a team against an electric light company for damages for the loss of a team which was electrocuted and burned as a result of coming into contact with an arc lamp and connections which had fallen to the highway, held to present a disputed question of fact as to the condition of the rope used to elevate and lower the lamp so as to necessitate a submission of such question to the jury.—Sumner v. Eastern Michigan Edison Co., 187 Mich. 169, 12 N. C. C. A. 84.

¶ 29. On evidence which presented a disputed question of fact as to the sufficiency of the rope used to elevate and lower the light which fell, a reference of such question to the jury is necessary.—Sumner v. Eastern Michigan Edison Co., 187 Mich. 169, 12 N. C. C. A. 84.

¶ 30. It cannot be said as matter of law that a street railway company had not had time to discover the danger and make repairs where a limb of a tree broken in a storm pressed a telephone wire upon a trolley span wire which was charged, and so carried a current injuring plaintiff, where there was evidence to go to the jury on which it might find that previously the span wires were poorly insulated and carried currents.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 31. A verdict is properly directed for the defendant in an action against a street railway company for the death of a person by coming in contact with a telephone wire heavily charged with electricity, which was blown down during a heavy storm, where it is not shown that the deadly current escaped from the defendant's trolley wire, and it was reasonably probable that it might have escaped from wires owned by other companies.—Broudy v. Detroit, J. & C. Ry. Co., 184 Mich. 330.

¶ 32. Where a telephone company was negligent in leaving a guy wire in a loose condition so that it might be blown or thrown so as to come into contact with a live third rail on a railroad right of way, and where it appeared that children frequently passed at that point on the adjoining highway, and that the wire was thrown on the rails by one of three boys, held that it was a question for the jury whether defendant's negligence was the proximate cause of the death of a person on the highway due to the carrying of the current from the rail to a fence on the highway.—Kruis v. Grand Rapids, G. H. & M. Ry. Co., 190 Mich. 105. (Ostrander, Brooke, Person, Steere, and Bird, JJ., concurring in result.)

¶ 33. Where a defectively insulated municipal electric wire comes into contact with a telephone wire subsequently installed in dangerous proximity, burns through and causes the death of a boy passing by, and neither city nor company inspect or take precautions to avoid accident, whether they acted as ordinarily prudent men would have acted is properly submitted to the jury.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 34. In an action against a village and a telephone company for personal injuries resulting from a shock received by a woman when she attempted to rescue her child from contact with a charged electric wire belonging to the defendant village, and which had fallen as a result of coming in contact with wires of the defendant telephone company because of an insecurely fastened telephone pole which swayed in the breeze and permitted the telephone wire to sag down upon

the electric light wire in question, and there was a sharp conflict in the evidence, held the trial court properly refused to direct a verdict for either defendant.—Sykes v. Village of Portland, 193 Mich. 86.

¶ 35. Where high-tension, uninsulated wires of a power company were strung on cross arms within fifteen inches of telephone wires, which employees of the telephone company were required to repair, it was held that the power company's negligence was for the jury.—Teachout v. Grand Rapids, G. H. & M. Ry. Co., 179 Mich. 388.

¶ 36. In an action against a village and a telephone company for personal injuries received by a woman when, under circumstances of great haste and excitement, she attempted to rescue her 10-year-old son from contact with a charged electric light wire maintained by the defendant village, and it was alleged that the boy was apparently alive and so seemed to her, and that she did not then know that it was dangerous to touch his body, held, under the evidence, it could not be said that the plaintiff's attempt to rescue her son was so rash as to entail certain injury to her, and the question of her contributory negligence was one of fact to be submitted to the jury.—Sykes v. Village of Portland, 193 Mich. 86.

§ 11. ——Instructions.

¶ 37. A charge that the duty requisite in respect to use of electricity is such as ordinarily careful and prudent persons would exercise in dealing with it under similar circumstances, is sufficiently favorable to the user sued for escape of a current and injury to plaintiff.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 38. Where there is evidence that a defectively insulated municipal electric light wire came into contact with a telephone wire maintained in dangerous proximity and caused the death of a boy, an instruction as to the duty of the city to request the telephone company to remove the danger is not improper.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 39. In an action against a village and a telephone company for personal injuries alleged to have resulted from a shock received when a woman came within the circuit caused by a fallen charged wire maintained by the village, charge to the jury stating, "It is for you to say whether the village was negligent, and in what way," but calling the jury's attention, in other parts thereof, to the declaration and the negligence there alleged, and the necessity of evidence to support it, is not objectionable for lack of limitation or qualification of matters of negligence to those specified in the declaration and supported by the evidence.—Sykes v. Village of Portland, 193 Mich. 86.

ELEEMOSYNARY INSTITUTIONS to EMERGENCIES.

Cross-References.

Eleemosynary Institutions—
See Charities; Asylums and Hospitals; Schools, X, XII.
Exemption from taxation, see Taxes, III.

Elevators—
In buildings, liability for injuries from, see Buildings.
Liability of master to servant injured by or because of elevator, see Master and Servant, III; Workmen's Compensation Law.
Grain elevators, see Warehousing.

Elopement—
Validity of marriage, see Marriage.
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On or near highways as defects or dangers, liability for injuries, see Highways, XII.
Against surface or stream waters, see Waters, II, V.
Of railroads, mode of construction and liability for injuries, see Railroads, III, IV, VIII.

Embezzlement—
See Crimes, II; Indictment.

Emblements—
See generally Agriculture § 2.

Emblems of Political Parties—
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See Crimes § 50; Indictment.

Emergencies—
Acts in emergency amounting to care or neglect, see Negligence; and see specific topics treating of particular negligence, e. g., Carriers, II, IV, E; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV.

EMINENT DOMAIN.

TREATS of the appropriation of private property to the use of the public, either by the public itself or by corporations or persons to whom the power is delegated by the state, of the scope and limitations of the right, the occasions for its exercise, the procedure, the rules of compensation, and the title and rights attendant thereon. It excludes various specific condemnations (see Highways, II, B, and other topics referred to below) and acquisitions of property by the public without condemnation against the private owner's will (see Dedication; Highways, II; Parks; etc.).

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I. POWER IN GENERAL AND EXERCISE OF DELEGATED RIGHT.

§ 1. Nature and source of power.

Distinction from taxing or police power, see post § 2.
Scope and limitations of power, see post § 3.
State and federal powers, see post § 4.
Delegation of power, see post §§ 5-9.
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Constitutional provisions for eminent domain, see Const. Art. XIII, §§ 1, 2.

¶ 1. Eminent domain is that sovereign power vested in the people by which they can, for any public purpose, take possession of the property of any individual, upon just compensation paid to him.—Board of Health of Township of Portage v. Van Hoesen, 87 Mich. 533.

¶ 2. Each state by virtue of its statehood has the right to exercise the power of eminent domain.—Loomis v. Hartz, 165 Mich. 662.

¶ 3. General nature of the right of eminent domain considered.—People ex rel. Detroit & H. R. Co. v. Salem Township Board, 20 Mich. 452.

¶ 4. The right of eminent domain is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.—Woodmere Cemetery v. Roulo, 104 Mich. 595.

¶ 5. Eminent domain is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand. It has its foundation in the imperative law of necessity which alone justifies and limits its exercise.—People ex

rel. Trombley v. Humphrey, 23 Mich. 471; Woodmere Cemetery v. Roulo, 104 Mich. 595.

¶ 6. The right of eminent domain cannot be bartered away and any contract by the legislature or any agencies of the state having such effect is ineffectual and void.—Leggett v. City of Detroit, 137 Mich. 247.

§ 2. Distinction from taxing or police power.

Taxing power in general, see Taxes, I.

Eminent domain distinguished from police power, see also Constitutional Law § 99.

Power to make local improvements and assess cost of same locally, see Local Improvements.

Paramount right and control of navigable waters by public, see Navigable Waters, II.

¶ 7. The distinction between the exercise of the right of eminent domain in taking private property for a public use and the injury, damage, and loss to property incidental to the exercise of the police power of the state in the promotion of the public welfare, is well defined.—People v. Eberle, 167 Mich. 477. Affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 8. The terms "private property," and "the property of individuals," in the constitutional provisions prohibiting the taking of private property for public use without compensation, etc., were not intended to include money raised by assessment for the purpose of paving streets. Money attempted to be raised for that purpose is not sought to be taken by virtue of the sovereign right of eminent domain, but in the exercise of the sovereign power of taxation.—Williams v. City of Detroit, 2 Mich. 560.

§ 3. Limitations and scope of power.

Federal and state powers, see post § 4.

Public use as a limitation on power, see post ¶ 28.

Relative provinces of legislature and judiciary in exercise of right, see Constitutional Law § 48.

Constitutionality of acts for condemning property assailed on grounds other than limitations of the power of eminent domain, see Constitutional Law; Statutes, II, III.

¶ 9. The exercise of the power of eminent domain is entirely under the control of the legislature, subject to such restrictions as are found in the Constitution, and the necessity, the occasion, time, and manner of its exercise are wholly legislative questions, with the exception stated.—Loomis v. Hartz, 165 Mich. 662.

¶ 10. The clause in the Ordinance of 1787 that no man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land, and that should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular service, full compensation should be made for the same, was not designed to restrict, legislative or judicial authority, but rather to limit and confine the power over persons and property to those authorities.—Swan v. Williams, 2 Mich. 427.

§ 4. ——Federal and state powers.

¶ 11. The right of eminent domain in any sovereignty exists only for its own purposes. The states of the Union cannot, even within their own territorial limits, exercise that right for purposes which, under the division of powers between the United States and the individual states, lie within the sovereignty of the United States. Laws 1867, Act No. 119, authorizing the governor to condemn private lands in Michigan, that they might be turned over to the United States for the erection and maintenance of light-houses thereon, was accordingly unconstitutional, as appropriating the property of individuals without due process of law. Such aid is not analogous to that rendered in making the war power of the government effectual.—Trombley v. Humphrey, 23 Mich. 471.

¶ 12. The United States, in providing for the regulation, control and protection of commerce, erects light-houses, and may, in the exercise of its eminent domain, by observing the constitutional requirement of making due compensation therefor, seize and condemn the property of individuals for that purpose. The consent of the state is not a condition precedent to such taking, but is required only for the purpose of a transfer of jurisdiction.—People ex rel. Trombley v. Humphrey, 23 Mich. 471.

¶ 13. The United States has never conferred authority upon any of the states to judge of its need of land for national purposes, or to assess the compensation it should pay, and any such judgment and assessment must be wholly provisional, and subject to its acceptance and ratification.—People ex rel. Trombley v. Humphrey, 23 Mich. 471.

§ 5. Delegation to public corporations, officers and agencies.

To private corporations and individuals, see post § 6.

Subdelegation and exercise through agents, see post § 7.

Existence and legality of corporate delegate, see post § 8.

Germaneness to corporate objects and powers, see post § 9.

Upon whom authority is conferred to bring proceedings in behalf of the State, see Comp. L. 1915, § 349.

"Public corporations" and "state agencies" entitled to bring proceedings defined, see Comp. L. 1915, § 353.

Right of public corporation or state agency to institute proceedings, see Comp. L. 1915, §§ 355, 356.

Power of council to institute village proceedings, see Comp. L. 1915, § 2786.

¶ 14. Proceedings by a village to condemn land outside of its jurisdiction for water supply purposes are unlawful unless the village charter expressly gives the power to do so; the general act (Sess. L. 1883, p. 554, Act No. 124, p. 115) does not permit it.—Houghton Village Common Council v. Huron Copper Min. Co., 57 Mich. 547.

¶ 15. A city of the fourth class cannot take land by condemnation proceedings for the enlargement of a harbor upon navigable water, under Pub. Acts, 1899, No. 136, chap. 25, § 1, which provides for the "improvement of water courses"; since it has no authority to enlarge or maintain a harbor on navigable water.—City of South Haven v. Van Buren Probate Judge, 140 Mich. 117.

¶ 16. Since Act No. 149, Pub. Acts 1911, How. Ann. St., 2nd Ed., §§ 10155-10175, providing for the condemnation of private property by state agencies and public corporations, does not contain a repealing clause, it does not repeal Act No. 541, Local Acts 1903, empowering the city of Detroit to take private property for public use.—City of Detroit v. Weil, 180 Mich. 593.

¶ 17. Const., art. 10, § 11, giving boards of supervisors power, "under such restrictions and limitations as shall be prescribed by law," to provide for laying out highways, etc., does not preclude the legislature from conferring power over this subject to township highway commissioners.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 15 Mich. 347.

§ 6. ——To private corporations and individuals.

Power of corporation in receivership to exercise right of eminent domain, see Corporations ¶ 894.

Power of railroad bridge and tunnel companies to bring eminent domain proceedings, see Comp. L. 1915, § 8251.

¶ 18. The union railroad depot law of 1881, Act No. 244 (How. St., §§ 3458-3494) is not unconstitutional in conferring the power of eminent domain on the corporations organized under it.—Fort-Street Union Depot Co. v. Morton, 83 Mich. 265.

¶ 19. The territorial legislature had power to incorporate railroad companies, and to authorize the appropriation of private property for their purposes, without the consent of the owner; and an act to that effect was not repugnant either to the constitution of the United States or the ordinance of 1787.—Swan v. Williams, 2 Mich. 427; Mercer v. Williams, W. 85.

¶ 20. The territorial legislature had power to appropriate private property for public use on securing proper compensation, and could lawfully authorize a railroad corporation to take such property for such use.—Swan v. Williams, 2 Mich. 427.

¶ 21. The act of March 7, 1834, incorporating the Detroit & Pontiac Railroad Co., in so far as it authorized the appropriation of private property for the purposes contemplated in the act, without the owner's consent, was not repugnant to the constitution of the United States or to the ordinance of 1787.—Swan v. Williams, 2 Mich. 427.

¶ 22. A railroad company has the right to proceed to condemn land for railroad purposes in a street under the eminent domain statute, independently of a city franchise.—Horton v. Grand Rapids & I. Ry. Co., 199 Mich. 472.

§ 7. ——Subdelegation and exercise through agents.

¶ 23. A contractor employed by a railroad company to secure the right of way, and to construct a railroad, and authorized by such company to use the company's name in condemnation proceedings where necessary, could maintain a suit in such condemnation proceedings, under the right of eminent domain as conferred upon railroad companies by statute; since a corporation must act through individuals as agents, and such contractor was such agent.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

§ 8. Existence and legality of corporate delegate.

¶ 24. The power of a railroad company to begin proceedings for the condemnation of lands within the state is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same state as the original company.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 25. A de facto railroad company can maintain condemnation proceedings, since the state only can raise the question of the validity of such corporation.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

§ 9. Germaneness to corporate objects and powers.

Corporate purposes and powers in general, see Corporations, XI, XIII; Railroads, III, IX; Street Railways, I.

¶ 26. A water power company organized to construct and maintain a dam across a navigable river and operate and maintain water power appurtenant to such dam and to sell water and water power and do a transportation business, has not the power to condemn lands to improve the navigability of such river for the double purpose of carrying on a public transportation business and a private water power business.—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48.

§ 10. Loss, bar or forfeiture of delegated right.

¶ 27. That a railroad company has taken possession before filing a petition for condemnation does not, where there was no criminal entry, justify a refusal to award an inquest of damages.—Grand Rapids, L. & D. R. Co. v. Chesebro, 70 Mich. 466.

II. PUBLIC USES AND NECESSITIES, AND PROPERTY SUBJECT TO APPROPRIATION.

§ 11. Public uses and necessity in general.

Water power plants as public use, see post § 12.
Depots, branch lines, sidings and other accessories, see post § 13.
Criteria of necessity, see post § 14.
Necessity of particular parcel, see post § 15.
Averments in petition as to public use and necessity, see post § 62.
Evidence as to necessity of taking, see post § 98.
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Necessity of compensation, see post § 32.
Presumption on appeal of showing of public necessity where record is incomplete, see post ¶ 431.
Conclusiveness of finding of public necessity on appeal, see post ¶ 439.
Public uses and purposes supporting exercise of the taxing or disbursing power, see Taxes, I; Counties § 37; Municipal Corporations, XIII; Townships, VI, VII; Constitutional Law § 275.
Purposes for which proceedings may be brought by villages, see Comp. L. 1915, § 2784.

¶ 28. The exercise of the right of eminent domain is limited to cases in which the public has an interest.—Board of Health of Township of Portage v. Van Hoesen, 87 Mich. 533.

¶ 29. Property of individuals, taken by railroad corporations for the purpose of constructing their roads, is, in legal contemplation, taken not for private but for public use. The tenure of the corporations in the land is in the nature of a trust for public use, subject to the supervision of government.—Swan v. Williams, 2 Mich. 427.

¶ 30. Land can be taken under the power of eminent domain for a legitimate public purpose, even though a private purpose will be thereby incidentally subserved.—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48.

¶ 31. A statute authorizing rural cemetery associations to acquire land by exercising the right of eminent domain is unconstitutional and void, the use being private. So held of Laws of 1875, Act No. 219 (How. St., §§ 4778-4787), which seeks to amend the act of 1869 authorizing the formation of corporations to establish rural cemeteries (How. St., §§ 4763-4777), and which provides for the condemnation of land by such corporations and by boards of health, etc.—Board of Health of Township of Portage v. Van Hoesen, 87 Mich. 533.

¶ 32. Independent of the consideration of necessity on account of the public health the legislature cannot enact laws for the condemnation of private property and levy taxes for the construction of drains.—Attorney General ex rel. Alexander v. McClear, 146 Mich. 45.

¶ 33. The necessity for taking property for public must be real; and in estimating such necessity it makes no difference to the public who owns the land. The necessity must be as great where the land is owned separately as where it is part of a larger property.—City of Detroit v. Daly, 68 Mich. 503.

§ 12. Water power plants.

Authority of water power company to condemn lands to improve navigation, see ante ¶ 26.

¶ 34. Laws 1873, Act No. 196 (vol. 1, p. 486), in providing for condemnation proceedings whenever the proprietors of water-power manufactories wish to overflow the lands of others, is unconstitutional, because the exercise of the right to condemn is not clearly made to depend on public necessity, nor is it so restricted that the use to which it may be put must necessarily be a public use, either as regards the kind or manner of manufacture. Whether the acquisition of water-power can be a proper subject for the exercise of eminent domain, so long as other motive forces are to be had, quære.—Ryerson v. Brown, 35 Mich. 333.

¶ 35. Public Acts 1887, No. 202, § 9, subd. 6 (Comp. L. 1897, § 6814) providing that corporations organized under the act shall have power to condemn lands needed in constructing a navigable waterway with or without water power appurtenant thereto, and to sell water and water power, and do a transportation business upon such waterway, is unconstitutional, in that it grants the right to take such land as is necessary to make a navigable waterway with private water power appurtenant thereto, without limiting the taking to the public necessities.—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48.

§ 13. Depots, branch lines, sidings, and other accessories.

Right of railroad company to institute proceedings to acquire land for spur tracks or branches, see Comp. L. 1915, § 8262.

¶ 36. Taking is for public use in condemnation proceedings if necessary for branches that will reach freighting business not attainable by main line.—Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

¶ 37. Where a railroad company seeks to condemn a right of way for a spur to be built to serve a single party, and to carry off mill products not necessary to public use, and it appears that said party is to advance the money for construction, and the sole purpose of the spur is to accommodate his business, and build up the railroad's traffic, the proposed use is not a necessary public use entitling the railroad company to exercise the power of eminent domain.—Pere Marquette R. Co. v. United States Gypsum Co., 154 Mich. 290.

¶ 38. That portion of land used to provide for the public the means of ready access to the depot to be built by a railroad for the accommodation of the public is devoted to a railway purpose no less than that portion actually covered by the structures of the railroad, and the condemnation of land for such purpose may be made on the ground of public necessity.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

§ 14. Criteria of necessity.

See also ante ¶ 33.

¶ 39. The damaging effect of a public improvement upon any portion of the public is competent for the jury to consider in determining whether there is a public necessity for making the improvement.—Board of Education City of Grand Rapids v. Brown, 159 Mich. 148.

¶ 40. The fact that the taking of land by a water company would result in improving the navigability of a river, did not of itself prove the public necessity, and under Const. art. 18, § 2, the necessity for the taking must be determined by a jury, and not by the legislature.—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48.

§ 15. Necessity of particular parcel.

¶ 41. Whether or not the property of a railroad is not in use and not needed, so as to be condemnable for depot and terminal facilities by another railroad under How. St., § 3357, cannot be tried collaterally in order to show that the property of other parties not affected with any railroad ownership is being needlessly condemned because the property of the other railroad could be taken instead.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

§ 16. Property and titles subject to appropriation.

Property already in or affected by public use, see post §§ 17, 18.

Area, width or estate which may be taken, see post § 19.

Impairment of interests of mortgagees, lienors and others in secondary right as "taking," see post § 21.

Nature of ownership or title in public properties, see Highways, X; Parks; Municipal Corporations, X.

Private property subject to condemnation by public corporations defined, see Comp. L. 1915, § 354.

¶ 42. If necessary, intangible rights may be condemned provided compensation is made.—Dunlap v. Toledo, A. A. & G. T. R. Co., 50 Mich. 470.

¶ 43. Whether a homestead entryman's inchoate title is such an interest as can be appropriated under the general railroad law by adverse proceedings, quære.—Flint & P. M. R. Co. v. Gordon, 41 Mich. 420.

¶ 44. A leasehold is property for which compensation must be made if damaged.—City of Detroit v. C. H. Little Co., 141 Mich. 637.

¶ 45. All contracts are subject to the power of eminent domain whenever the public necessity requires its exercise.—In re First Street (City of Grand Rapids v. Grand Rapids & I. R. Co.), 66 Mich. 42.

§ 17. Property already in or affected by public use.

See also, post ¶ 52.

Admission on pleadings as to property of one railroad company being subject to condemnation by another, see post ¶ 339.

Extent and measure of servitudes imposed by existing uses, see Highways, X; Railroads, III; Navigable Waters, II.

When railroad company may take unused right of way of roadbed of another company, see Comp. L. 1915, § 8251.

¶ 46. Neither under the Union Depot Act (How. St., chap. 93), which expressly limits the right to "crossings," nor under the general statutes relating to condemnation is there any power in a union depot company to condemn lands and property of another railroad company in actual use for railroad purposes; but How. St., § 3357, provides that railroad property "in or adjacent to its depot grounds * * * not in actual use for depot or other purpose pertaining to the operation of a railroad, and * * * not needed * * * for depot or other terminal facilities" by such railroad, may be condemned by any other railroad for such purposes.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 47. In a railroad's petition for the condemnation of land for a depot, it appeared that the depot itself was not to be built upon respondent's land, but half of said ground was to be covered by tracks and the train shed, a further portion to be occupied by a private driveway to the baggageroom, and the balance to be used for a "Depot Esplanade," a way for the use of the public generally in reaching the depot. The petitioner had acquired and paid for all the lands lying between its original right of way and respondent's prop-

erty. Held, respondent's land was "adjacent" to the main line of the railroad within the meaning of the condemnation statute.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

§ 18. ——Cemetery lands.

Cemetery as public use, see ante ¶ 31.

Answer and objections in suit for condemnation of lands for cemetery, see post ¶¶ 244, 245.

¶ 48. How. St., § 4772, which provides that no streets, highways, railways, sewers, or canals shall be opened or constructed through the grounds of rural cemetery associations without the assent of the board of directors, if of any validity whatever, must be construed as no more than an assurance of immunity from unnecessary interference by local officers, by precluding action on their part, without such assent, until the legislative will is manifested by further legislation.—Woodmere Cemetery v. Roulo, 104 Mich. 595.

§ 19. Area, width or estate which may be taken.

¶ 49. Since under How. St., §§ 3568, 3577, 3578, 3581, plank road companies have power to condemn a right of way 66 feet wide, and after constructing a roadway upon one side, they would have a strip of land 50 feet in width, upon which to construct a gate-house and keeper's residence: there is no absolute necessity or express authority for them to go outside the limit which the law allows. —Detroit & Saline Plank Road Co. v. Detroit, 81 Mich. 562.

III. TAKING OR DAMAGING.

§ 20. What constitutes "taking" in general.

Impairment of interest of mortgagees, lienors and others in secondary right, see post § 21.

Impairment of interest of railroad in land devoted to prior use, see post § 22.

Impairment of property by railroad on adjacent highway, see post § 23.

Impairment of property restriction or of highway use or access, see post §§ 24, 25.

Interference with drainage riparian or navigation rights, see post § 26.

Imposed liability, tax or assessment, see post §§ 27, 28.

Repeal or amendment of charter or franchise, see post § 29.

Onerous police or sanitary regulations, see post § 30.

Loss of rights through fish and game laws, see post § 31.

Taking and condemnation of lands for public highways in so far as the procedure is peculiar or distinctive, see Highways, II, B.

Alterations, extensions and changes of grade of highways, see Highways, V.

Appropriation of property for drains under drain laws as a taking, see Drains, II, A.

Whether cleaning out drain constitutes a "taking," see Drains § 87.

Appraisements and assessments incident to making of public local improvements, see Local Improvements, III, V, VI.

¶ 50. A taking for public use exists not merely where property is absolutely converted, but also where value is destroyed or serious injury done to the property, or where the owner is excluded from the enjoyment thereof or of any of its appurtenances.—Pearsall v. Eaton County Sup'rs, 74 Mich. 558.

§ 21. Interests of mortgagees, lienors and others in secondary right.

Necessity in award or verdict of specification of shares of mortgagees, lienors and lessees, see post § 106.

Right of mortgagee to appeal, see post ¶ 406.

Necessity of making mortgagees parties defendant and adjudicating their rights, see post ¶¶ 241, 243.

¶ 51. In condemnation proceedings for a railroad right of way over certain mortgaged land, where the jury found that the loss of the land for the right of way did not impair the security, held that an award of damages for such land taken, would not be warranted where the mortgagor had released same.—Detroit, B. C. & W. R. Co. v. First Nat. Bank of Yale, 196 Mich. 660. (Fellows, Stone, Ostrander and Bird, JJ., dissenting.)

§ 22. Interest of railroad in land devoted to prior use.

Proceedings necessary where one railroad seeks to acquire property of another, see post ¶ 169.

Averments in petition to condemn crossings on other railroads, see post § 67.

Laying drain across railroad right of way as "taking," see Drains § 56.

¶ 52. One railroad company has no right to appropriate, without compensation, the franchises or property of another for the construction of its road; the fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use as is afforded by the constitution and laws in the case of the private property of an individual.—Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co., 35 Mich. 265.

§ 23. "Adjacent" or adjoining property damaged by railroad on highway.

Title and estate of public in highways and rights of abutters in general, see Highways, X.

Obstructions, encroachments and unauthorized uses of highways, see Highways, XI.

¶ 53. Where a railroad track has been laid in a public street without authority to use the street for that purpose, any adjacent proprietor who has not consented to such use is entitled to damages for such injury as he may have suffered in consequence thereof.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 54. Under Comp. L. 1897, § 6234, subd. 5, providing that no road shall be constructed upon any public street, etc., until compensation shall be made by the railroad to owners of property adjoining such street, and opposite where the road is to be constructed; property on the north side of a street was adjoining property within the act, although the road to be constructed was south of the center line of the street.—Marquette & S. E. Ry. Co. v. Longyear, 133 Mich. 94.

¶ 55. Under Comp. L. 1897, § 6234, subd. 5, providing that no road shall be constructed upon any public street, etc., until compensation shall be made to owners of property adjoining such street and opposite where the road is to be constructed, property a considerable distance away, with a street and other space intervening, was not adjoining property that damages thereto should have been awarded, although other land involved was used in connection therewith.—Marquette & S. E. Ry. Co. v. Longyear, 133 Mich. 94.

¶ 56. Under section 6234, Comp. Laws 1897, subd. 5, providing that a railway company shall not construct a railroad on a private way without compensation to the adjoining owners, the intention of the legislature was to include all private roads and ways, however created, and not to restrict the meaning to those roads laid out as "private roads" under statutory provisions.—Detroit Leather Specialty Co. v. Michigan Cent. R. Co., 149 Mich. 588.

¶ 57. The right of way of an abutting owner in a public alley is a "private way," within the terms of the statute which provides that a railroad company cannot construct a railroad on a private way without making compensation to the owners of property adjoining such way.—Detroit Leather Specialty Co. v. Michigan Cent. R. Co., 149 Mich. 588.

§ 24. Impairment of building or property restriction.

¶ 58. Building restrictions are private property, are an interest in real estate in the nature of an easement, go with the land, and are a property right of value, which cannot be taken for the public use without due process of law and compensation therefor; the validity of such restriction not being affected by the character of the parties in interest.—Allen v. City of Detroit, 167 Mich. 464; Frumveller v. Post, Id.

¶ 59. A city under its general police power cannot ignore a building restriction and erect its fire engine house within the restricted district, because it is necessary for the public good and to protect the lives and property of citizens in that locality, for since such action deprives the individual of a vested right in property, it goes beyond regulation under police power, and becomes an act of eminent domain, governed by the appropriate condemnation laws.—Allen v. City of Detroit, 167 Mich. 464; Frumveller v. Post, Id.

§ 25. Impairment or vacation of highway use or access.

See also post ¶ 240.

Alterations, extensions and changes of grade of highways in general, see Highways, V.

Abandonment, vacation or diminution of highways, see Highways, VI.

Title and estate of public in highways and rights of abutters in general, see Highways, X.

Obstructions, encroachments and unauthorized uses of highways, see Highways, XI.

¶ 60. The grading of a city street in such a manner as to throw the foot of an embankment on the front of plaintiff's premises, casting earth upon such premises to a depth of many feet and burying a part of complainant's dwelling, is a taking of private property for public use within the meaning of the constitution.—Vanderlip v. City of Grand Rapids, 73 Mich. 522.

¶ 61. There has been a "taking" of plaintiff's property where it appears that a city has constructed approaches to a bridge built above the grade of the street so that access to his property by driving is entirely cut off and those traveling on foot must descend from the street by a flight of steps.—Ransom v. City of Sault Ste. Marie, 143 Mich. 661.

¶ 62. A statute giving a city power to separate the grades of its streets from those of railroads, and prescribing the measure of damages to abutting owners, is not unconstitutional as contravening the constitutional provisions relating to the exercise of the right of eminent domain.—City of Detroit v. Grand Trunk Ry. of Canada, 163 Mich. 229.

¶ 63. The act of a city in separating the grades of railroads and streets is not a taking of private property for public uses within the meaning of the Constitution.—City of Detroit v. Grand Trunk Ry. of Canada, 163 Mich. 229.

§ 26. Interference with drainage, riparian or navigation rights.

Petition for condemning dam and flowage rights, see post § 68.

Assertion of paramount right of public in navigable waters without notice or compensation, see also Constitutional Law ¶ 602.

Injury to adjacent property by construction of bridge, see Bridges § 22.

¶ 64. Riparian rights cannot, without compensation, be taken for the purpose of making a non-navigable stream a public highway.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 65. Unless compensation is made riparian rights cannot be taken for the purpose of making a stream that is only periodically navigable a public highway at all times.—Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336.

¶ 66. The state cannot interfere with a riparian's profitable enjoyment of the shore without compensating him.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 67. The state has no more right to interfere with private property, without compensation, to make or improve a canal, than it has for a road upon land.—Ryan v. Brown, 18 Mich. 196.

¶ 68. Without compensation to or consent from the riparian owners, a dock-line cannot be drawn outside of navigable water, thus taking private property for public use.—City of Grand Rapids v. Powers, 89 Mich. 94.

¶ 69. Depriving a riparian proprietor of the beneficial use and enjoyment of his lands, e. g., by flowing them against his consent and without making compensation, is as much an unconstitutional appropriation of his property as the taking of the land itself without compensation; without the beneficial use, and the right to control the lands with reference thereto, the mere right to dispose of the land would be worthless to the owner.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

¶ 70. Act No. 189, Pub. Acts 1905, making it lawful for individuals charged with no public or quasi public duties to temporarily boom and assort logs along the shores, and for that purpose to secure booms at points along the shore, thus giving the right of entry upon the land of others without compensation, is unconstitutional.—Garth Lumber & Shingle Co. v. Johnson, 151 Mich. 205.

¶ 71. A ditch which has been recognized by the township authorities for 20 years, cannot be legally condemned by a road proceeding in which only nominal damages were awarded, and wherein there was no pretense that the right to maintenance of the ditch was condemned, nor that any payment was made for the lowering of certain lakes in question.—Chase v. Middleton, 123 Mich. 647.

¶ 72. A stream capable in its natural condition of floating logs at some seasons of the year was made navigable for a steamer of more than fifteen tons burden, belonging to the owner of a flouring mill, by the erection of the dam which furnished the water-power for the mill. Two bridges spanning the stream above the dam were, under an arrangement with the township authorities, furnished by the owner of the mill with draws for the accommodation of the steamer, which was used to transport the products of the mill up the stream, and through the lake in which it had its rise, to a railroad station near the lake, for shipment. The bridges were afterwards rebuilt, and placed sufficiently high above the stream to permit the steamer to pass under them, the extra expense being borne by the mill-owner. One of the bridges broke down, and the township authorities prepared to rebuild it in such a way as to prevent the passage of the steamer, and the mill-owner filed a bill to enjoin such action on their part. No testimony was offered upon the hearing of the cause tending to show that complainant's right of flowage was in any way limited, or that he had not the right so to run his boat at all seasons. Held, that complainant cannot be thus deprived of his right to navigate the stream without compensation or condemnation.—Stoffiet v. Estes, 104 Mich. 208.

¶ 73. The legislature cannot extend dock-lines upon the natural bank of a river, or authorize a municipality to establish such a line so as to pass across the bank at certain points; such action would be unconstitutional as taking private property for public use without compensation.—City of Grand Rapids v. Powers, 89 Mich. 94.

§ 27. Imposed liability or burden.

Abatement of nuisance by chancery decree as imposed liability, see post ¶ 86.

Imposed liability of opening and maintaining highway across railroad, see also post ¶ 140.

¶ 74. A railroad company whose road is crossed by another's cannot be compelled to pay any part of the expense of making a crossing; and How. St., § 3350, as amended by Laws of 1883, p. 187, § 36, is unconstitutional in so far as it contemplates this.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

¶ 75. Laws 1873, Act No. 198, art. 4, § 15, as amended by Laws 1889, Act No. 165 (How. St., § 3377), which requires a railroad company, whose track is immediately adjacent to or laid upon a highway, to provide open, unobstructed, residence crossings, suitably

guarded, substantially as are provided for highway and street crossings, on the same being so ordered by the railroad commissioner, is unconstitutional and void in so far as it provides for taking the property of a railroad company for public use without compensation.—People v. Detroit, G. H. & M. R. Co., 79 Mich. 471.

¶ 76. Comp. L. 1897, § 11653, which provides among other things that any person negligently or wilfully permitting fire to escape from his premises to those of another, shall be liable to the party injured in double the amount of damages sustained, is not unconstitutional, as taking the property of one person and giving it to another without any compensation; since the statute recognizes that where one has been damaged by the negligent act of another, compensation should follow.—Allen v. Bainbridge, 145 Mich. 366.

§ 28. Tax or assessment.

¶ 77. An assessment for the expense of constructing a drain is not such a taking of private property as entitles one who is subjected to such assessment but whose land is not taken for the drain, to a hearing upon the question of the public necessity for the drain; and the drainage law of 1895 (Pub. Acts 1895, No. 217) is not therefore unconstitutional because it does not provide for a hearing upon the question of necessity except in condemnation proceedings.—Roberts v. Smith, 115 Mich. 5.

¶ 78. Pub. Acts 1897, No. 254, Chap. 6, § 16, providing that in case any drain tax shall be set aside except for causes that would deprive the county drain commissioner of jurisdiction to control the drain, he may begin proceedings anew at the stage where they shall be correct, is not unconstitutional on the ground of subjecting persons to assessment to pay for the mistakes of the commissioner in the first proceeding; since the increased expense must be borne by those who are benefited by the drain, as a part of its costs.—Anketell v. Hayward, 119 Mich. 525.

§ 29. Repeal or amendment of charter or franchise.

Provisions in corporate charter for compensation on amending or repealing it, see Corporations, § 29.

¶ 79. Repealing the charter of a corporation franchised for a public service does not take private property for public use.—People ex rel. Ellis v. Calder, 153 Mich. 724, affirmed 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122.

¶ 80. Where a street railway company gets its franchise from a village whose charter does not expressly confer power to authorize the use of streets for street railways without compensating adjoining owners, it accepts such franchise subject to the right of the legislature to prescribe such compensation as a condition precedent to the use of streets for the construction of new lines of road.—Taylor v. Bay City Street R. Co., 80 Mich. 77.

¶ 81. A statute repealing the charter of a corporation engaged in municipal water supply, giving it the right to present a claim for its tangible property to the common council of the city, is not unconstitutional as permitting property to be taken for public use without the determination of the necessity therefor, or because the compensation provided is unlawful and inadequate, where the provision has no force unless the corporation chooses to accept it.—People ex rel. Ellis v. Calder, 153 Mich. 724. Affirmed in 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122.

§ 30. Onerous police and sanitary regulations.

Stopping trains at crossings and opening trains so as not to obstruct streets as police regulations, see also post ¶¶ 147, 148, 150.

Compensation for destruction of diseased live-stock, see Animals § 21.

¶ 82. A municipal regulation of the use of property, or a prohibition of its repair when partially destroyed, is not a condemnation to public use.—Brady v. Northwestern Ins. Co., 11 Mich. 425.

¶ 83. A city ordinance providing that bread shall be manufactured into loaves of certain weights and prohibiting the sale of bread deficient in weight does not authorize the seizure of short-weight bread, and does not constitute a taking of private property without compensation.—People v. Wagner, 86 Mich. 594.

¶ 84. An ordinance regulating the disposition and removal of garbage or refuse from the tables of hotels was not unconstitutional as an attempt to take private property without compensation, since it is preventive of nuisances.—People v. Gardner, 136 Mich. 693, affirmed in 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106.

¶ 85. There is no deprival of a hotel keeper of his property without compensation, in violation of the 14th Amendment to the Federal Constitution, by the enactment of an ordinance by a large city providing for the making of a contract by the city for the exclusive collection and removal of garbage from required and specified receptacles within the city limits and forbidding removal by anyone else or interference with the work of the contractor, under penalty, even though the garbage may be valuable, for the purpose of feeding animals, or for the manufacture of grease or other merchantable products.—Gardner v. Michigan, 199 U.

S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106, affirming 136 Mich. 693.

¶ 86. Private property of the city of Detroit is not taken without just compensation by a decree requiring the abatement of a nuisance by the enlargement of a sewer into which the Village of Highland Park has emptied sewage for fifteen years under a decree of a court of chancery and the payment of annual rentals.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

§ 31. Loss of rights through fish and game laws.

¶ 87. Local Acts of 1885, Act No. 329, prohibiting the taking or catching by spears, etc., of fish in the waters of Gun lake, which lake is connected with other lakes and streams where fish migrate, even though it interferes with the catching of fish by one who owns the soil under the water, does not take his private property without compensation.—People v. Collison, 85 Mich. 105.

IV. NECESSITY, TIME AND MEASURE OF COMPENSATION.

Admissibility of opinions as to necessity, see Evidence, VI.
Compensation for property taken for drains under drain laws, see also Drains §§ 55, 56.
Damages for statutory destruction by public of diseased animals, see Animals, § 21.

§ 32. Constitutional right and necessity.

See also, ante ¶¶ 42, 44.
Public property and property in public use, see post § 33.
Incidental damages without such a "taking" as to require compensation, see post § 34.
Waiver or loss of right, see post § 35.
Necessity of compensation for interference with drainage riparian or navigation rights, see also ante § 26.
Necessity for public use, see ante §§ 11-15.
Presumption of compensation in collateral proceedings, see post § 147.
Previous decisions as law of the case on lawfulness of taking precluding recovery of damages, see also Courts ¶ 105.

¶ 88. The legislature has no power to create any exception to the rule of "just compensation."—Chicago & G. T. R. Co. v. Hough, 61 Mich. 507.

¶ 89. Compensation is a constitutional condition of the taking of private property for public use.—Sheldon v. Village of Kalamazoo, 24 Mich. 383.

¶ 90. There is no case where the actual taking of private property is damnum absque injuria.—Sheldon v. Village of Kalamazoo, 24 Mich. 383.

¶ 91. The condemnation statute as to railroads seeks to and does protect the owner in the possession of his property until it is shown that his private rights must yield to a larger public necessity; when such private rights are made so to yield, just compensation must be made.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

¶ 92. Comp. L. 1897, § 4334, providing that whenever it is necessary to run a drain across the right of way or roadbed of a railroad, the proceedings shall be the same as in cases for obtaining private lands for drains, and making it the duty of the railroad company upon notice to maintain the necessary opening and build and maintain a culvert, is unconstitutional in so far as it requires the improvement to be made without compensation for the benefit of those to whom the drain is an advantage.—Chicago & Grand Trunk R. Co. v. Chappell, 124 Mich. 72.

§ 33. ——Public property and property in public use.

See also ante ¶ 52.
Necessity of compensation for damage to "adjacent" or adjoining property by railroad on highway, see ante § 23.
Right of railroad to compensation for drain crossing right of way, see Drains § 56.

¶ 93. How. St., § 1476 et seq., permitting courts to vacate city streets, cannot be regarded as unconstitutional as taking property from the city without compensation; for a city has no proprietary interest in the public streets that entitles it to compensation when a street is vacated on petition of the abutting owners.—In re Albers' Petition, 113 Mich. 640.

¶ 94. Railroad property is so far public in its nature as to be subject at all times to reasonable legislative regulation, and, on the other hand, is so far private in its character that its owners cannot be deprived of any part thereof without just compensation. —Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

§ 34. Damages for injury without "taking."

Damages for closing street or destroying access as damages without "taking," see also post § 49.
Inconvenience caused by closing of street as damage without a "taking," see also post ¶ 240.

¶ 95. Under the right of eminent domain, where there is no other limitation of the power than such as is contained in our Constitution, which provides that private property shall not be taken for public use without just compensation, it is competent for the legislature to provide for a public improvement which may work incidental damage to property without providing compensation for property not actually taken.—

Buhl v. Fort Street Union Depot Co., 98 Mich. 596.

¶ 96. The diminution in value of adjoining property from maintenance of public market is not an element of damage to be paid for.—Henkel v. City of Detroit, 49 Mich. 249.

§ 35. Waiver or loss of right.

¶ 97. The rules in regard to waiver, recognized in ordinary actions, are not rigidly applied in proceedings to condemn private property for public use.—Specht v. City of Detroit, 20 Mich. 168.

¶ 98. Where a contract between the city and a railroad for the separation of grade crossings provides that the city shall pay all abuttal damages to parties other than the railroad, and that the railroad waives any and all claim for damage by reason of change of grade of streets to abutting property owned or controlled by it, the railroad is not entitled to any damages for property owned by it, regardless of whether such property is used in the operation of its road at street intersections or for other independent purposes.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

§ 36. Time for compensation.

Time for recovery of past and prospective damages, see post ¶ 160.

Constitutional necessity for payment for land condemned before it is taken, see post ¶ 267.

Right of subsequent action for damage not covered in original condemnation proceedings, see post ¶ 161.

§ 37. Measure and elements in general.

[Note. Though the underlying principle of damages for wrong to property is compensation, yet it has been deemed better digesting to maintain a strict separation between this topic and Damages. For precedents on the measure of damages for tort, see Damages, III. The measure of damages for appropriation of land to public use without compensation, usually recovered in an action of trespass is treated here for the reason that although sounding in tort, the damages being permanent are measured as in condemnation cases.]

Injury to remainder, severance of tract, see post § 38.

Depreciation in rental or business value, see post § 39.

Business loss, see post § 40.

Illegal occupancy before condemnation, see post § 41.

Costs in other actions or proceedings, see post, § 42.

Valuation of property, see post §§ 43-45.

Setting off benefits against damage, see post § 46.

Speculative, punitive or vindictive damages, see post § 47.

Damages for street openings, highways and railroads, see post §§ 48-53.

Specification of amounts or gross award in determination of compensation, see post § 105.

Measure and determination of damages by jury, see post ¶ 342.

Necessity of money basis of compensation, see post ¶ 346.

Propriety of instructions as to measure and elements of compensation, see post § 93.

¶ 99. Just compensation upon the appropriation of private property involves making good all the pecuniary loss or outlay which it causes the owner.—Chicago & G. T. R. Co. v. Hough, 61 Mich. 507.

¶ 100. Compensation for, rather than the value of, the land taken is what should be allowed in condemnation proceedings, and includes more.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 101. When land is taken for public use the whole public, or the allotted district, or both, must pay for all that the public appropriates; the damage to property by the establishment of a public way can never be less than the value of the property taken, though it may be more.—City of Detroit v. Daly, 68 Mich. 503.

¶ 102. The condemnation statute is not intended to aid an owner in enhancing his claim for damages against the railroad to the end that he may receive a sum much in excess of the true value of the land.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

¶ 103. When proceedings are had to condemn land for railway use, the damages awarded should include all the consequences of the appropriation of the land in the manner in which the company will use it. The company cannot be required to resort to a new condemnation whenever some new expenditure is to be made or change effected, unless it is something so plainly repugnant to or varying from the purpose originally contemplated as to amount to a change of user.—Barnes v. Michigan Air Line Ry., 65 Mich. 251.

¶ 104. An instruction that the jury must "award to the owners of the land the full value of the land to be taken and all additional expenses entailed upon said owners in opening said street" covers all damages to which these owners are entitled.—City of Detroit v. Beecher, 75 Mich. 454.

§ 38. ——Injury to remainder; severance of tract.

Raising question of injury to contiguous lands by answer that they with land taken constitute homestead, see post ¶ 246.

¶ 105. Where proceedings are taken to condemn a portion of a city lot for a rail-

road right of way, and the lot is part of a homestead lying on both sides of an alley, the award of damages cannot be confined to the land actually taken, but must cover such actual injury as is done to the entire homestead, including the easement in the alley.—Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

¶ 106. Where, by the construction of a railroad, a tract of suburban land is made unsuitable for a single farm, and a part of it made inaccessible for that purpose in whole or to some extent, it is error to confine the damages of the owner to the proportionate value of the part taken to that of the entire tract for farming purposes, but he is entitled to such damages as will fully make good all that results, directly or indirectly, to his injury in the whole premises and interests affected.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

§ 39. ——Depreciation in rental or business value.

See also post ¶ 159.

Depreciation of adjoining property through the maintenance of public market as element of damage, see also ante ¶ 96.

Illegal occupancy of street by city in changing grade before instituting condemnation proceedings, see also post ¶ 139.

Instruction as to depreciation of rental value as measure of compensation, see post ¶ 323.

¶ 107. Adequate compensation for land actually taken under proceedings for its condemnation includes its value or the amount to which the value of the property from which it is taken is depreciated. Where the injury affects the rental value or enjoyment, the same principle applies.—Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 108. Where a railroad has been laid in a city street without the authority of the abutting owners, such an owner, who does not own the soil in the street may recover such damages as result from the interference with the natural advantage of the frontage, and for actual injuries from unusual annoyances from unusual management; and the reduction of rental value during the years sued for is a reasonable test of damage.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62.

¶ 109. The measure of damages to an abutting lot-owner against a railroad company which, under a mere license from the city has laid its tracks in the street, is the depreciation in the rental value of the premises by reason of the company's occupancy of the street during the time the cause of action covers.—Hoffman v. Flint & P. M. R. Co., 114 Mich. 316.

¶ 110. Under Comp. Laws 1897, § 4244, authorizing an award of damages to abutting property owners on separation of railroad and highway grades, which, with other sections of the act of which it is a part, contemplates that such damages shall be awarded in gross before the improvement is made, there can be no recovery for damages to a business, as such, carried on upon the land by the owner or by a tenant.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

¶ 111. The owner of an apartment house abutting on a street on which a railroad is laid is awarded just compensation under the Constitution, art. XIII, § 1, where he is allowed as damages the depreciation in rental value for residence purposes only, although the property is more valuable than before the building of the railroad because it can be used for factory purposes.—Piantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661. (Kuhn and Bird, JJ., dissenting.)

§ 40. ——Business loss.

Presumption on appeal as to damages for loss of business where award exceeds value of land taken, see post ¶ 430.

¶ 112. Where land used as a business stand is taken, the owner of the business is entitled, apart from the money value of the property itself, to compensation for the interruption of such business and its damage by the change.—Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390.

¶ 113. One whose land whereon stands a building, occupied by him as his place of business, is taken for public use should be compensated for such loss as he is able to show, with reasonable certainty, he will suffer during the time his business is thereby necessarily interrupted.—Commissioners of Parks of City of Detroit v. Moesta, 91 Mich. 149.

§ 41. ——Illegal occupancy before condemnation.

Trespass and action for damages for illegal occupancy, see post § 145.

¶ 114. In probate court proceedings for condemnation the land-owner may have damages assessed for a previous illegal occupancy by the company; but he is not bound to do so, and he may bring suit therefor.—Callanan v. Port Huron & N. W. R. Co., 61 Mich. 15.

¶ 115. Where land has been injured by a railroad company that has gone upon it under void condemnation proceedings, the owner's right to recover damages is unaffected by his having sold it to a third person, for the depreciation would have been taken into account in fixing the price.—Dunlap v. Toledo, A. A. & G. T. R. Co., 50 Mich. 470.

§ 42. ——Costs in other actions or proceedings.

¶ 116. The damages recoverable for laying a car track fronting on abutters cannot include costs and solicitors' fees incurred by plaintiffs in a previous suit to enjoin the laying of such track, or compensation for the time spent in such suit.—Taylor v. Bay City St. R. Co., 101 Mich. 140.

§ 43. Valuation of the property.

Comparisons with other values or damages, see post § 44.

Condemnor's improvements, see post § 45.

Excessiveness or inadequacy of compensation as determined from valuation of property taken, see post § 112.

Admissibility and competency of opinions and conclusions as to values, see post § 97.

Values and evidences of value in general, see Values.

¶ 117. The value of land for farm use is a proper subject of inquiry in proceedings to condemn it for railway purposes.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 118. In street opening proceedings damages on account of the destruction of a vineyard cannot be based upon testimony as to the value of the wine actually produced from the vines, where there is nothing to show the cost of cultivation or of manufacture.—City of Detroit v. Robinson, 93 Mich. 426.

§ 44. ——Comparisons with other values or damages.

¶ 119. Where the statements of the petition that the railroad corporation has sought in good faith to acquire the title, and that the land-owner demanded an exorbitant price, are denied by the answer, and where evidence is given of the sum offered and of the price asked, it is error to exclude testimony of the value of the property and of other lots in the vicinity, offered to support the answer.—Grand Rapids, L. & D. R. Co. v. Weiden, 69 Mich. 572.

¶ 120. In proceedings to determine damages for the separation of railroad and highway grades under Comp. Laws 1897, § 4244, it is not error to exclude testimony of the effect of other separations of grades upon property in the immediate vicinity, and that on other streets the slope or inclination exceeded that upon the street in question after the improvement was completed.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

§ 45. ——Condemnor's improvements.

¶ 121. A railway track or other improvement wrongfully placed upon land by a railroad company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty for the purpose of increasing its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 122. In assessing damages for the taking of land for railroad purposes, work already done by the railroad company upon the land in the reasonable belief that the land would be obtained by amicable means cannot be regarded as part of the realty for the purpose of increasing the damages.—In re Morgan's Appeal v. Chicago & N. E. R. Co., 39 Mich. 675.

§ 46. Setting off benefits against damage.

Setting off increase in factory value against depreciation in residence value, see also ante ¶ 111.

Specification of benefits in verdicts in street opening cases, see Highways, II, B.

Reckoning benefits and damages in fixing amount of assessments for local improvements, see Local Improvements, VI.

¶ 123. In proceedings for condemnation of land for a railroad right of way, benefits cannot offset damages, in the absence of statutory authority.—Detroit, B. C. & W. R. Co. v. First Nat. Bank of Yale, 196 Mich. 660.

§ 47. Speculative, punitive or vindictive damages.

Instruction as to speculative damages, see post ¶ 321.

¶ 124. On an inquest in proceedings for a right of way there can be no treble and no vindictive damages.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 125. A city which has taken possession of and used a house of the plaintiff for a pest house is liable for the reasonable sum which such use is worth under the circumstances, unaffected by the fact that the possession was obtained by a trick practiced by the health officer of the city.—Bodewig v. City of Port Huron, 141 Mich. 564.

§ 48. Damages for highways and street openings.

For closing street or destroying access, see post § 49.

For changes of grades, see post § 50.

For crossing of railroad by highway, see post § 51.

For crossing railroad by railroad, see post § 52.

For railroads on highways, see post § 53.

Instruction as to measure of compensation in street opening, see post ¶ 324.

Alterations, extensions and changes of grade of highways in general, see Highways, V.

Title and estate of public in highways and rights of abutters in general, see Highways, X.

Obstructions, encroachments and unauthorized uses of highways, see Highways, XI.
Dedication as implied waiver of damages for any and all servitudes incident to and contemplated in highways, see Dedication, § 30, ¶¶ 127, 129, 131.
Occupation of street without condemnation as continuous tort admitting of successive recoveries, see Damages ¶ 150.
Instruction as to addition of interest as damages to abutting owners, see also Damages ¶ 1480.

¶ 126. In proceedings for opening a street damages to be awarded a property owner cannot include the cost, of grading and paving the street, that may hereafter be assessed on his adjoining property.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 127. The damages awarded in proceedings to take private property for a public street cover the possible injury from future changes of grade.—City of Pontiac v. Carter, 32 Mich. 164.

¶ 128. Expense of cleaning snow from the prospective street cannot be considered as an item of damage to be allowed the property owner through whose land the streets will pass.—City of Detroit v. Beecher, 75 Mich. 454.

¶ 128a. There being no ordinance requiring streets to be fenced, and no evidence showing necessity for such fencing, the expense thereof cannot be included in the damages to a property owner in proceedings for opening a street.—City of Detroit v. Beecher, 75 Mich. 454.

§ 49. ——For closing street or destroying access.

¶ 129. The inconvenience to a land-owner —whose means of ingress or egress is not thereby cut off but only rendered less convenient—resulting from the closing of a part of a street upon which part his premises do not front is damnum absque injuria.—Buhl v. Fort St. Union Depot Co., 98 Mich. 596.

¶ 130. The injury sustained by a land owner whose land fronts upon a public street, but not upon that part occupied and closed by a union depot company under Laws 1891, Act No. 94, and whose means of ingress and egress are not thereby cut off, but only rendered less convenient, is damnum absque injuria, and damages are not recoverable under said act, which provides that, in case of such occupancy and closing the company shall pay to all parties entitled to the same any and all damages that may accrue to them in consequence thereof.—Buhl v. Fort St. Union Depot Co., 98 Mich. 596.

¶ 131. The injury caused an abutting property owner by the closing of a public street for the construction according to law of a railway station, is damnum absque injuria, where his means of egress and ingress are not completely cut off but merely rendered less convenient.—Sioux City Seed & Nursery Co. v. Detroit & Mackinac Ry. Co., 184 Mich. 181.

¶ 132. Under Comp. Laws 1897, § 4244, authorizing an award of damages to abutting property owners on separation of railroad and highway grades, construed with other sections of the act of which it is a part, inconvenience caused to the general public and to the plaintiff, temporarily or permanently, on account of rendering the street less convenient for use, and injury and inconvenience resulting from closing the street, in whole or in part, to public travel during the progress of the work, does not support a claim for damages.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

§ 50. ——For changes of grades.

See also ante ¶ 110.
Necessity of presenting in lower court material points affecting right to damages for charges of grade, see post ¶ 418a.
Impairment of property rights by separation of street and railroad grades, see ante ¶¶ 62, 63.
Right to damages for separation of crossing grades, see Highways, V.

¶ 133. The award of damages in an action by an abutting owner for injury to his land from a change of grade in the street for the purpose of carrying it across a railroad, made without a prior ascertainment of damages as contemplated by Pub. Acts 1893, No. 92, should be in gross, and not merely for the damage which has already accrued, since the statute contemplates an award in gross in proceedings instituted thereunder.—Harper v. City of Detroit, 110 Mich. 427.

¶ 134. Under Comp. Laws 1897, § 4244, authorizing an award of damages to abutting property owners on separation of railroad and highway grades, abutting property which is not taken, and which is worth no less after the improvement is made than it was worth before, is not damaged, and the owner thereof is entitled to no compensation.—City of Detroit v. Detroit United Ry., 156 Mich. 106.

¶ 135. In proceedings for the determination of damages for the separation of railroad and highway grades, a city is not liable to an abutting owner for expenses incurred by it in removing its business structure to the changed elevation of the railroad tracks, so as to preserve its connection with such tracks.—City of Detroit v. Michigan Cent. R. Co., 156 Mich. 121.

¶ 136. In proceedings commenced under Comp. L. 1897, Chap. 102, for the separation of grades and the abolition of grade crossings damages may be awarded for injuries

to the interest of a tenant of a railroad right of way.—City of Detroit v. C. H. Little Co., 146 Mich. 373.

¶ 137. In proceedings to enforce the separation of grades and to assess damages, a tenant of a railroad right of way can only recover compensation due to improvements upon which his property actually abutted; and as to other improvements on that street, while the damages may have been greater to him than to others having occasion to use the streets the difference was one of degree and not of kind and he cannot recover them. —City of Detroit v. C. H. Little Co., 146 Mich. 373.

¶ 138. In proceedings for the separation of grades under Comp. L. 1897, Chap. 102, the measure of damages to a tenant of a railroad right of way caused by their being compelled to move their warehouses is not the value of the term of the lease less the rent reserved, and the court did not err in refusing to adopt such measure.—City of Detroit v. C. H. Little Co., 146 Mich. 373.

¶ 139. Where a city had begun the tearing up of streets whereby they had become impassable before commencing judicial proceedings for the separation of grades, a tenant of a railroad right of way who has moved his buildings before the judicial proceedings were legally commenced does not lose his right to damages because he has in good faith treated the city's unlawful proceedings as lawful and moved his buildings to lessen his damages.—City of Detroit v. C. H. Little Co., 146 Mich. 373.

§ 51. ——For crossing of railroad by highway.

Necessity of indemnification for expense of maintaining crossing gateman as determined by view, see post ¶ 344.

Condemnation procedure for crossing of railroad by highway, see Highways, II, B.

Condemnation for right to change grades in separating grades of railroads and intersecting highways, see Highways, V.

Duty of railroads to erect and maintain crossings for benefit of individuals, see Railroads, IV.

¶ 140. Laws 1883, Act No. 166, relating to highways over railroad crossings, is invalid in so far as it provides that the expense of opening and maintaining a highway across the track of a railroad company shall rest on the company, while nothing but the actual value of the land shall be paid on condemnation thereof. Private property cannot be appropriated to public use without just compensation.—Chicago & G. T. R. Co. v. Hough, 61 Mich. 507.

¶ 141. Where a boulevard is extended across a railroad company's tracks, the company is entitled to compensation for the expense of maintaining safety-gates at the crossing.—Commissioners of Parks of Detroit v. Michigan Cent. R. Co., 90 Mich. 385; Commissioners of Parks of Detroit v. Detroit, G. H. & M. R. Co., 93 Mich. 58.

¶ 142. Whether the compensation to be made to a railroad company on the opening of a street across its tracks should include the expense of constructing, maintaining and operating a gate or tower, if the jury finds the same to be necessary for the protection of the public is ruled by City of Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641; Commissioners of Parks v. Chicago, D. & C. G. T. J. R. Co., 91 Mich. 291; Commissioners of Parks v. Michigan Cent. R. Co., 90 Mich. 385; City of Grand Rapids v. Bennett, 106 Mich. 528.

¶ 143. In a condemnation proceeding by a park commission as against a railroad company for a boulevard across its right of way whether the erection and maintenance of gates or the employment of flagmen is at the time of condemnation necessary for the proper protection of the railroad company and the public is a question of fact for the jury; and, if such necessity is found, the company is entitled to compensation for the damage consequent upon such erection and maintenance or employment.—Commissioners of Parks of City of Detroit v. Chicago, D. & C. G. T. J. R. Co., 91 Mich. 291.

¶ 144. Where, by reason of the condemnation of a highway crossing over a railroad company's tracks, an adjacent warehouse, and the land on which it stands, are rendered less available and less valuable for warehouse purposes, the company is entitled to be compensated for such damage.—Commissioners of Parks of City of Detroit v. Chicago, D. & C. G. T. J. R. Co., 91 Mich. 291.

¶ 145. Compensation and not the value of the land within the right of way is the measure of damages where a crossing is condemned for a street opening over a railroad. —City of Grand Rapids v. Bennett, 106 Mich. 528, per McGrath, C. J.

¶ 146. The compensation to be made to a railroad company for crossing its right of way for street purposes not only includes the use of the land occupied by the street for such crossing, but any extra expense created by the use of the right of way for the street in the ordinary use of the company's road, and such other damage as it may sustain for injury to its track, right of way and franchise, occasioned by the crossing, and which may properly be considered as the natural and proximate cause thereof. Such compensation does not include expenses required for compliance with the police regulations of the state or municipality, but covers only the expenses that arise in making the structural changes necessary to comply with statutory regulations, and that must necessarily continue in the future operations of the railroad.—In re First St., City of

Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42.

¶ 147. Upon condemnation of a right of way for a street across a railroad, the railroad is not entitled to compensation for expense of observing public regulations.—Village of Plymouth v. Pere Marquette R. Co., 139 Mich. 347.

¶ 148. In condemnation proceedings for a right of way for a street across a railroad tract, compensation should not be awarded because it would be necessary to open certain of the trains at the crossing to avoid obstructing the street for more than five minutes as prohibited by statute, since such five minute rule may be repealed at any time by the legislature and to that extent is a police regulation.—Village of Plymouth v. Pere Marquette R. Co., 139 Mich. 347.

¶ 149. Upon condemnation of a right of way for a street across a railroad, the railroad company is entitled to compensation for structural changes made necessary and for any direct expense made necessary thereby such as maintaining a flagman, or gates or cattle guards.—Village of Plymouth v. Pere Marquette R. Co., 139 Mich. 347.

§ 52. ——For crossing of railroad by railroad.

Imposing part of expense of crossing on established railroad as a "taking," see ante ¶ 74.

Right of condemnor to possession pending vesting of title, see post ¶ 402b.

Estimate of compensation by commissioners for crossing of railroad by railroad illegally made as condition for injunction against interference, see post ¶ 492.

Permit or approval by Railroad Commission or other authority after condemnation as condition precedent to crossing, see Railroads, IV.

¶ 150. The damages to be paid by one railroad company for the right to cross another's track should include the cost of maintaining signals, a crossing system, and a watchman, if necessary; but the value of the land, since it is not acquired, and the cost of stopping trains at the crossing, since that is required as a police regulation are not proper items of damage.—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 151. The compensation to be paid to one railroad where a crossing is effected by another includes the value of the land taken, the damage suffered from the interruption of its business, and the damages accruing from the expense made necessary by such crossing.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 63 Mich. 645.

¶ 152. The compensation to one railroad for a crossing effected by another properly includes the value of the land and any additional expense created in the ordinary use of respondent's road, or any other injury or damage to its track, right of way or franchise occasioned by the crossing, and which may properly be considered as the natural, necessary and proximate cause thereof.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

§ 53. ——For railroads on highways.

See also ante ¶¶ 108, 109, 111.

Right to damages for railroad in highway as affected by transfer of land by abutting owner, see post ¶ 509.

Necessity of presenting in lower court points as to measure of damages for maintenance of crossing, see post ¶ 419.

Rights of abutters for street railways on highways, see Highways, X.

¶ 153. The general principles on which to assess the damages resulting to a freehold from the operation of a railroad on the adjacent highway are the same as if no highway had previously existed; and its existence would only be a circumstance tending to diminish the recovery.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62.

¶ 154. Where a railroad has been laid in a city street without authority and without the consent of, or compensation to, the abutting owners, such an owner who does not own the soil in the street cannot recover damages for permanent diminution in value of his premises or for the appropriation of the soil in such street.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 155. Where a public street is taken by a railroad company for its track, an abutting owner whose ownership does not extend beyond the street line is not entitled to be compensated as owner for the taking of the land, but is confined to such damages as would affect her as adjacent occupant and proprietor.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 156. An owner whose land has been taken for a street, and subsequently appropriated for railroad purposes is entitled to such damages as he would have been allowed to recover on proper proceedings for condemnation.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 157. Where under the law of the case a street railway is liable for all damages resulting to abutters from the construction of the road, damages are included which ensue from the construction of its track raised above the pavement, even though the track was laid on the grade established by the city, and though defendant could not lay its track on any other grade.—Taylor v. Bay City St. R. Co., 101 Mich. 140.

¶ 158. Diminution in value of estate of abutting owner who does not own soil in street from laying track and properly operating railroad in such street is damnum absque injuria.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 159. The measure of damages for the construction of a railroad in a public street opposite an apartment house without previously paying damages as required by Comp. Laws of 1897, § 6234, subd. 5, How. 2nd. Ed., § 6587, is the depreciation in the rental value for residence purposes only, although the property is more valuable than before because it can be used for factory purposes.—Plantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661. (Kuhn and Brooke, JJ., dissenting.)

¶ 160. An abutting owner, suing for damages for the construction of a railroad in the highway without his consent (Comp. L. 1897, § 6234, subd. 5), may recover in one action all damages past and prospective measured by the rule in condemnation cases.—Keyser v. Lake Shore & M. S. Ry. Co., 142 Mich. 143.

¶ 161. For constructing a railroad in a highway on which plaintiff abuts the damages analogous to those in condemnation cases should not include any but permanent damages due to the proper operation of the railroad in the usual way; and others should be left to be recovered in another action.—Keyser v. Lake Shore & M. S. Ry. Co., 142 Mich. 143.

¶ 162. The damages in an action on the case against a railroad company which without consent or condemnation built in a highway on which plaintiff abutted do not include the value of the soil in the highway, where plaintiff's title deed excluded it.—Keyser v. Lake Shore & M. S. Ry. Co., 142 Mich. 143.

V. CONDEMNATION PROCEEDINGS.

Due process in condemnation proceedings, see Constitutional Law § 151.
Street opening proceedings other than matters common to condemnations generally, see Highways, II, B.
Procedure in change of grade cases in so far as peculiar to them, see Highways, V.
Procedure for laying out private roads, see Highways, XV.
Condemnation proceedings for drains, see Drains, §§ 27-45.
Special proceedings to condemn land for school sites, see Schools, II.
Procedure for local improvements, see Local Improvements, III.
General provisions of the constitution, see Const., art. XIII, §§ 1-4.
Condemnation proceedings by the State, see Comp. L. 1915, §§ 349-352.
Condemnation proceedings by state agencies and public corporations, see Comp. L. 1915, §§ 353-373.
Proceedings by cities of fourth class, see Comp. L. 1915, §§ 3136-3164.
Purposes for which proceedings may be brought by fourth class city, see Comp. L. 1915, § 3136.
Proceedings by cities and villages in general, see Comp. L. 1915, §§ 3376-3400.
When and how proceedings by cities and villages commenced, see Comp. L. 1915, § 3377.
General proceedings by cities and villages for property outside their corporate limits, see Comp. L. 1915, § 3395.
Authority of cities and villages to proceed under their charters or under other special acts, see Comp. L. 1915, § 3399.
Proceedings by villages, see Comp. L. 1915, §§ 2784-2819.
Village proceedings before justice of peace, see Comp. L. 1915, §§ 2787-2799.
Village proceedings in circuit court, see Comp. L. 1915, §§ 2801-2814.
Optional right to take fourth class city proceedings or general city and village proceedings, see Comp. L. 1914, § 3137.
Alternative right to condemn under village proceedings or under general proceedings for cities and villages, see Comp. L. 1915, § 2785.
Proceedings by railroad, bridge or tunnel company as lessee, see Comp. L. 1915, § 8253.
Proceedings for acquiring title to state or municipal lands in railroad, bridge or tunnel proceedings, see Comp. L. 1915, § 8261.
Proceedings to acquire unused right of way or roadbed of another railroad company, see Comp. L. 1915, § 8251.

A. IN GENERAL; PRELIMINARIES AND JURISDICTION.

§ 54. Nature of proceedings.

Strictness of procedure, see post § 55.
Validity, effect and application of statutes, see post § 56.
Special nature of proceedings, see also post ¶ 309.

¶ 163. Condemnation proceedings are not judicial in the ordinary sense.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 164. Proceedings to condemn land are special and summary in character, and, while subject to judicial review and supervision for certain purposes, are not judicial proceedings.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

¶ 165. A proceeding for the condemnation of land for railroad purposes is not strictly judicial in character, but is summary rather, and dilatory proceedings are not favored.—Chicago & K. Terminal R. Co. v. Grand Rapids & I. Ry. Co., 153 Mich. 686.

§ 55. Strictness of procedure.

¶ 166. Every material requirement must be strictly observed in carrying out laws for condemning private property to public uses, and the proceedings must show affirmatively on their face a substantial adherence to the course prescribed by the statute.—Kroop v. Forman, 31 Mich. 144; Power's Appeal, 29 Mich. 504; Detroit Sharpshooters' Ass'n v. Hamtramck Highway Com'rs, 34 Mich. 36; Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42.

¶ 167. In proceedings to take private property for public use there can be no substantial departure from any of the fundamental requirements of the statute without vitiating the whole proceeding.—Specht v. City of Detroit, 20 Mich. 168.

§ 56. Validity, effect and application of statutes.

Effect of enactment of general law for condemnation by state agencies and public corporations on local Detroit act, see ante ¶ 16.

Effect on pending proceedings of repeal without saving clause of local Detroit Condemnation Act by enactment of Local Acts of 1895, No. 467, see Statutes, V.

¶ 168. The act of 1869, in providing for condemnation for improvement of navigable waters, was fatally defective in its provisions (adopted by reference to the plank-road act) relating to the inquiry before commissioners and the duties of such commissioners in condemnation since no method for ascertaining necessary facts was provided.—Clark v. Pennoyer Creek Improvement Co., 34 Mich. 204.

¶ 169. The same legal proceedings must be had where one railroad company seeks to acquire the property of another to effect a crossing as in the condemnation of private property for public purposes in other cases.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

¶ 170. An application, under Laws 1885, Act No. 94, for the appointment of a special commissioner to superintend the improvement of Maple river, was void because it was executed before the statute was passed.—Wilcox v. Paddock, 65 Mich. 23.

¶ 171. The right of a street railway company to condemn private property as conferred by Act No. 133, Public Laws, 1905, amendatory of Comp. Laws, 1897, § 6446, is not invalidated by a reference in the act to the provisions of another statute, making it and the procedure indicated by it applicable.—Detroit United Ry. v. Barnes Paper Co., 172 Mich. 586.

¶ 172. Section 2834, c. 87, Comp. Laws 1897, provides that before ordering any public improvement the council shall publish the estimated expense and diagrams thereof. Held, this act does not control steps taken under Act 176, Pub. Acts 1903, concerning condemnation proceedings.—Weber v. City of Detroit, 158 Mich. 149.

¶ 173. The statutes providing for the construction of the state railroads, and constituting a board to which claims might be presented for lands taken, considered.—People ex rel. Green v. Michigan Southern R. Co., 3 Mich. 496.

§ 57. Jurisdiction of courts.

Functions of judge on hearing, see post § 89.

Necessity of proof of service of notice to confer jurisdiction on court, see post ¶ 235.

Jurisdiction of court to grant order allowing possession to condemnor without hearing or notice, see post §§ 402a, 402b.

Jurisdiction for appeal and review, see post § 123.

Want of jurisdiction as ground for review on certiorari, see post ¶ 450.

Jurisdiction of probate court in general, see Probate Courts, I.

General powers of probate court, see Probate Courts, I.

Jurisdiction of recorders' courts under city and village improvement act, see Comp. L. 1915, § 3377.

Jurisdiction of court for proceedings instituted by the State, see Comp. L. 1915, § 349.

¶ 174. The jurisdiction of the probate court in condemnation proceedings is not a part of the ordinary and general jurisdiction of that court.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

¶ 175. Recorder's court has exclusive jurisdiction in City of Detroit, of proceedings to acquire land under Act No. 541, Local Acts 1903, for public use.—City of Detroit v. Weil, 180 Mich. 593.

¶ 176. Whether a railroad company seeking to condemn land is such a public corporation as is authorized to exercise the right of eminent domain cannot be passed upon by the inferior tribunals vested with the power of entertaining condemnation proceedings.—Traverse City, K. & G. R. Co. v. Seymour, 81 Mich. 378.

¶ 177. The probate court cannot direct a continuance in condemnation proceedings before commissioners appointed by it.—Michigan Cent. R. Co. v. Tuscola Probate Judge, 48 Mich. 638.

§ 58. Filing survey and map.

Averments in petition as to location and survey, see post § 63.

Sufficiency of map and survey as subject for special finding, see post ¶ 367.

Map as supplemental to description in petition, see post ¶ 225.

¶ 178. Under Comp. Laws 1897, § 6243, as amended by Act No. 80, Public Acts of 1901, and under Comp. Laws 1897, § 6232, as amended by Act No. 128, Public Acts of 1905, relating to condemnation proceedings for railroad purposes, a proceeding is not defective because of the failure of petitioner to make, certify and file a map.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

¶ 179. The certificate of location of the petitioner's road in condemnation proceedings for a railroad right of way, if expressly under the hands of the company's directors, or a majority of them and which certifies the accompanying map or survey as being descriptive of the proposed line and sets forth the purpose of the filing, is sufficient to comply with the general railroad law.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 180. A map of a proposed railroad on which the center line of the track is designated by a colored line indicates with reasonable certainty the location of the line, and hence the space to be occupied by the standard-gauge road proposed to be laid along the line so designated.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 181. Neither the map nor certificate of location of a railroad stated the gauge or width between the rails, but the articles of association declared the purpose of the company to be to construct a road of the standard gauge. Held, in condemnation proceedings, to be sufficiently definite.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 182. The map and survey required by Laws 1859, pp. 559, 560, must embody or be accompanied by such full and accurate notes and data as will furnish complete means for identifying the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt as to where any portion of it is to be found.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459.

¶ 183. The failure of a plat to conform to the statutory requirements as a good one for all purposes does not prevent it from being the proper legal definition of lands by the act of the parties for purposes of description in condemnation proceedings.—Manistee & N. E. R. Co. v. Fowler, 73 Mich. 217.

¶ 184. If it is to be implied that the filing of a map or survey is a prerequisite to maintaining condemnation proceedings by a railroad company, then a map which points out in a general way the route of the proposed road and the termini, is sufficient, as complying with the statute and it need not contain the description of the particular real estate sought to be condemned (Pub. Acts 1901, No. 80, § 7).—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

¶ 185. Whether the map and survey sufficiently identified the property sought to be acquired in condemnation proceeding is a jurisdictional question to be determined by the court on the application for the appointment of commissioners.—Toledo, S. & M. R. Co. v. Campau, 83 Mich. 33.

§ 59. Previous effort to purchase or obtain consents.

Averments in petition as to negotiations for purchase or consent, see post § 66.

Effect of proceedings where petition was sworn to before effort made to purchase or obtain consent, see post ¶ 466.

Alternative power of purchase of property by village without condemnation proceedings, see Comp. L. 1915, § 2819.

¶ 186. A street-opening law is not made unconstitutional by the omission to provide that before proceedings can be taken thereunder there must be some attempt to get the permission of the owners of property to be effected.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 187. Where it appears that one of the respondents is an infant, that fact alone is enough to save the court's jurisdiction of a railroad company's proceedings for a right of way, though a previous offer of payment made by the petitioner may have been insufficient.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 188. The negotiations required by the statute before instituting condemnation proceedings contemplate knowledge on the landowner's part of the purpose for which the land is wanted.—Fort-Street Union Depot Co. v. Jones, 83 Mich. 415.

¶ 189. All that a statute requires of a railroad before bringing a condemnation proceeding is that a bona fide effort be made to acquire the property by purchase.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

¶ 190. A bona fide offer by a railroad company of the amount which it considers a fair price for land, and the owner's refusal to accept it, are sufficient negotiations even though the agent making the offer did not expect that the offer would be accepted.—Fort-Street Union Depot Co. v. Jones, 83 Mich. 415.

¶ 191. Where prior to bringing a condemnation petition a railroad offers a certain sum for the property, and the testimony of experts at the trial and the amount of the verdict of the jury indicate that the offer was adequate, the petition cannot be defeated on the ground that the offer was not made in good faith.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

¶ 192. Attempts to secure options for the purchase of land do not satisfy the requirement that there must be an attempt to pur-

chase the land before eminent domain proceedings are begun.—Michigan Cent. R. Co. v. Ferguson, 162 Mich. 220.

B. PETITION AND PROCESS, OBJECTIONS AND ANSWERS.

§ 60. Petition.

Jurisdictional facts, see post § 61.
Averments of public use, necessity and intent of condemnor, see post § 62.
Averments as to location, survey and approval, see post § 63.
Description of property and particular uses, see post § 64.
Averments as to lands abutting on street taken, see post § 65.
Averments as to negotiations for purchase of consent, see post § 66.
Averments to condemn crossings on other roads, see post § 67.
Averments for condemning dam and flowage rights, see post § 68.
Lands to be joined in one petition, see post § 69.
Filing survey and map and previous effort to purchase or obtain consent as condition precedent to petition, see ante §§ 58, 59.
Necessity for filing new petition, see post ¶ 210.
Effect of petition sufficient in part and denied in part, see post ¶ 248.
Joint petition as validating a joint award, see post ¶ 360.
Petition for street opening or location or establishment of highway, see Highways, II, B, 1.
Petition for private way, see Highways, XV.
Averments of petition in proceedings instituted by the State, see Comp. L. 1915, ¶ 350.
Petition in proceedings brought by state agency or public corporation, see Comp. L. 1915, § 357.
Amendment of petition, process, record or proceedings in suit by public corporation or state agency, see Comp. L. 1915, § 364.
Petition in general city and village proceedings, see Comp. L. 1915, § 3378.
Petition in fourth class city proceedings, see Comp. L. 1915, § 3139.
Petition in village proceedings before justice of peace, see Comp. L. 1915, § 2787.
Petition in village proceedings in circuit court, see Comp. L. 1915, § 2801.
Petition in proceeding by railroad, bridge or tunnel company, see Comp. L. 1915, § 8252.

¶ 193. Petition for condemnation of land for use of railroad set forth and held sufficient in form and substance.—East Saginaw & St. C. R. Co. v. Benham, 28 Mich. 459.

¶ 194. A petition by one railroad to condemn land owned by another railroad is sufficient if it avers the facts required by statute, without negativing the exceptions of the statute, or setting out by way of exclusion and inclusion every fact which the owner may rely on to show the property to be exempt.—Chicago & K. Terminal R. Co. v. Grand Rapids & I. Ry. Co., 153 Mich. 686

§ 61. ——Jurisdictional facts.

Negotiation for purchase as jurisdictional fact to be alleged, see also post ¶¶ 217, 218.
Sufficiency of map and survey as jurisdictional fact, see ante ¶ 185.

¶ 195. A petition to condemn lands for the erection of a dam for mill purposes is jurisdictional, and must allege every fact necessary to entitle the petitioners to make the alleged improvement.—Fox v. Holcomb, 34 Mich. 298.

¶ 196. In condemnation proceedings where a river is to be improved the petition is jurisdictional and must set forth all the facts necessary to show that the petitioning corporation is authorized to make the proposed improvement and has taken all the necessary preliminary steps.—Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204.

¶ 197. A petition to condemn lands for railroad right of way, alleging that petitioner was organized to construct a railroad between stated points; that it caused surveys to be made; that it had located its road in accordance with such surveys and that it was petitioner's intention in good faith to construct, finish and maintain said railroad on the line so located, from the stated junction through certain named territory to the shore of Lake Michigan, contained sufficient jurisdictional allegations to comply with Comp. L. § 6243, as amended by Act No. 80, Pub. Acts 1901.—Marquette & S. E. Ry. Co. v. Longyear, 133 Mich. 94.

§ 62. ——Averments of public use, necessity and intent of condemnor.

Intent of condemnor, see also post ¶ 215.
Public uses and necessity in general, see ante §§ 11-15.
Finding based on petition failing to show condemnor's intent as to lands mentioned, see post ¶ 354.

¶ 198. A petition to acquire title to land for railroad purposes must allege that the taking is necessary for the public use.—Grand Rapids, N. & L. S. R. Co. v. Van Driele, 24 Mich. 409.

¶ 199. A petition which alleges that the property sought is "required" for public use is sufficient. "Required" is synonymous with "necessary."—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 200. Where a railroad seeks to condemn a right of way, under the condemnation statute, the use mentioned in the petition must be a public use, and the necessity a public necessity.—Pere Marquette R. Co. v. United States Gypsum Co., 154 Mich. 290.

¶ 201. The petition need not show an intention to build the entire road if a division of fifteen miles has been lawfully designated; but in such case it must appear in the petition affirmatively that such division has been lawfully made in such manner as to conform to the statute.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418.

¶ 202. Proceedings to condemn land for the erection of a passenger station cannot be sustained where it does not appear affirmatively from the face of the proceedings that the petitioner has determined to erect a passenger station and to acquire land in the district for that purpose.—Michigan Cent. R. Co. v. Ferguson, 162 Mich. 220.

§ 63. ——Averments as to location, survey and approval.

Sufficiency of averments as to location and surveys, see also ante ¶ 197.

Necessity and sufficiency of survey and map, see ante § 58.

¶ 203. Under Pub. Acts 1901, No. 80, it is not necessary that a railroad company in proceeding to the condemnation of land shall allege the filing of a map or survey.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

§ 64. ——Description of property and particular uses.

Effect of mistakes and ambiguities in description of finding, see post § 104.

Sufficiency of description in map and survey, see ante ¶¶ 179-185.

Description of property in petition in proceedings brought by state agency or public corporation, see Comp. L. 1915, § 357.

Description of property in general city and village proceedings, see Comp. L. 1915, § 3378.

¶ 204. Where land is to be taken for public purposes the description in the petition should be as definite as is necessary in a deed.—Detroit, S. & D. R. Co. v. Wayne Circuit Judge, 95 Mich. 318.

¶ 205. Where it is sought to appropriate the land of several persons for a right of way for a railroad, the petition therefor must distinctly describe each parcel and the purposes for which it is wanted, and must give the reasons for the necessity of proceeding to take it under the statute.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418.

¶ 206. The description of land to be taken for public purposes should be made as definite as would be necessary for a deed, at every stage of the proceedings at which it has to be set forth.—Mathias v. Carson, 49 Mich. 465.

¶ 207. The proper description should be petitioned for and left to the jury free from any questions except as to necessity of condemnation and value.—Manistee & N. E. R. Co. v. Fowler, 73 Mich. 217.

¶ 208. A petition for condemnation is jurisdictionally defective if it only describes the land as a strip 100 feet wide, commencing on the east line of the W. ½ of the S. W. ¼ of section 22, running N. 59° 10′ W. across certain designated governmental subdivisions, and lying 50 feet on each side of the center line of a specified railroad as located by a certain survey and indicated by stakes. And a report by the jury which describes the land in this way, and gives no map and does not name, as far as possible, the owners of land to be condemned, will not sustain an award.—Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42.

¶ 209. The application for the appointment of commissioners to condemn land must describe each owner's land proposed to be taken with as much certainty as is required in conveyance, and should contain such data that the precise location of each parcel of land may be found by the commissioners and its area computed.—Kinnie v. Bare, 68 Mich. 625.

¶ 210. A petition for a right of way for a railroad is too defective to maintain proceedings if it does not distinguish the lands of the several owners, nor show the cause of proceeding against each; and when a verdict under it is set aside, the case cannot be referred back to a new jury, but the parties must proceed by a new application.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418.

¶ 211. A petition in condemnation proceedings for a railroad not stating that the company intends to lay more than one track, the line whereof is located according to its map and survey, is not objectionable as not stating the number of tracks to be laid, for under it not more than the track thus indicated could be laid.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 212. A petition by a street railway company seeking to condemn the franchises of a plank-road company is insufficient if it states that the company needs "a strip of land not exceeding ten feet wide except at switches," which switches it does not locate, and that the strip is to be somewhere between the existing road-bed and prospective sidewalks, but does not state which side of the existing road-bed is desired, nor where the strip is to begin or end.—Detroit, S. & D. R. Co. v. Wayne Circuit Judge, 95 Mich. 318.

¶ 213. In proceedings by a railroad company to condemn for warehouse purposes land abutting on a street in which its track is located, a petition describing the premises by lot, block, and plat, and averring its said road to be adjacent and contiguous thereto, is free from ambiguity. The condemnation of the lots would carry with it all rights in

the street attaching by reason of the ownership of the abutting property, and no others. —Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co., 106 Mich. 473.

¶ 214. The petition for condemnation for a railroad need not set forth the terminal branches or spur trucks; these are sufficiently certified if shown by survey of main line duly certified by majority of directors.—Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

§ 65. ——Averment as to lands abutting on street taken.

¶ 215. A petition by a railroad company to acquire title, for railroad purposes, to lands used and occupied as a street, is fatally defective if it does not disclose whether it is designed to appropriate the lands as the respondent's property, or whether they were included in the petition for the purpose of having an assessment of the respondent's damages, by reason of his ownership of premises fronting on the street; if the latter, the petition must show that he owns such premises. —Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519.

¶ 216. The petition in proceedings to condemn for a railroad right of way must accurately state the quantity of land sought, and, where an adjoining owner's right to the use of a street is to be taken, should state his frontage on such street.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

§ 66. ——Averments as to negotiations for purchase or consent.

Necessity and sufficiency of previous effort to purchase or obtain consent, see ante § 59.

¶ 217. The fact of petitioner's inability to acquire title amicably by agreement with the owner is jurisdictional and must be alleged, and may be controverted.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418; Grand Rapids, L. & D. R. Co. v. Weiden, 69 Mich. 572.

¶ 218. The petition for condemnation to effect a railroad crossing must show a bona fide attempt and failure to obtain, by treaty between the two railroad companies, the property and franchises described therein. This is jurisdictional.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

¶ 219. The petition for condemnation for a railroad need not state the particulars of the unsuccessful negotiations to acquire title —what offers were made or declined—but it is enough to state that the owner asked what petitioner considered an unreasonable price, and that he refused to accept a reasonable sum offered.—Grand Rapids, L. & D. R. Co. v. Weiden, 69 Mich. 572.

¶ 220. A petition by a railroad company, for the condemnation of land, alleging that the petitioner has not been able to acquire title to the property, although it has tried to do so, because the owner refuses to sell the same or to set a price thereon, sufficiently shows a bona fide effort to obtain the property by purchase.—Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co., 106 Mich. 473.

§ 67. ——Averments to condemn crossings over other railroads.

Condemnation by one railroad of the property of another, see ante § 22.

Sufficiency of petition by one railroad to condemn land owned by another, see ante ¶ 194.

Proceedings necessary where one railroad seeks to acquire property of another, see ante ¶ 169.

Condemnation of highway over railroad, see Highways, II, B.

¶ 221. A petition by one road, seeking to condemn a right to cross another, is fatally defective if it seeks for condemnation of the title to the land in the right of way sought to be obtained and nothing else. It must describe the rights and franchises it may condemn under the statute, or that petitioner wishes to condemn.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

¶ 222. The petition of one railroad for the right to cross or connect with another need not contain statements not required by the statute for obtaining title to real estate or other property; e. g., it need not state the manner of the crossing, whether above or below the grade, that being left to decision of the crossing board.—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 223. A petition stating that it is necessary for the public use to cross respondent's road, and that petitioner's directorate has determined that taking is necessary to accommodate petitioner's tracks, and to develop business along its road, is sufficient.—Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

¶ 224. The petition for condemnation for a railroad crossing need not state the grade of the petitioner's road.—Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

¶ 225. The petition for condemnation for a railroad need not set forth where crossing over another road is desired, if it appears by the surveyor's map of the line duly certified. —Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

¶ 226. The petition for condemnation for a branch railroad crossing need not aver that road is in operation, or that ties or rails have been laid on any part of it.—Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

§ 68. ——Averments for condemning dam and flowage rights.

¶ 227. Where a petition avers that a stream is navigable and that the improvements include dams, it must not only allege that the assent of the governor and attorney-general and the approval of the canal board have been procured, but also that authority has been obtained from the board of supervisors to dam the stream (Const., art. 18, § 4).—Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204.

¶ 228. As Const., art. 18, § 4, forbids the damming of navigable streams except by authority of the board of supervisors, a petition under Laws 1873, Act No. 196 (revising and amending Comp. L. 1871, ch. 221) to condemn lands for the erection of a dam for mill purposes must show whether the stream is navigable or not, and if navigable, that the requisite permission has been obtained. —Fox v. Holcomb, 34 Mich. 298.

¶ 229. A petition to condemn lands for the erection of a dam for mill purposes must show affirmatively that the proposed dam will not injure any mill or millsite above or below on the same stream.—Fox v. Holcomb, 34 Mich. 298.

§ 69. Lands to be joined in one petition.

Consolidation and severance of proceedings, see post § 87.

¶ 230. Under Comp. L. 1897, § 6242, and other sections it is not essential that all the lands within a county required for a railroad, must be included in one petition for condemnation and passed upon by one jury. —Marquette & S. E. Ry. Co. v. Longyear, 133 Mich. 94.

§ 70. Notice of proceedings and service of notice.

Appearance and waiver of notice, see post § 71.

Necessity of notice and hearing before order allowing possession by condemnor, see post ¶¶ 402a, 402b.

Effect of dismissal of petition as to joint owners not served with notice of proceedings, see post ¶ 247.

Issuance and service of summons in proceedings instituted by the State, see Comp. L. 1915, § 350.

Issuance and service of summons in proceedings by public corporation or state agency, see Comp. L. 1915, §§ 358, 359.

Issuance and service of process in general city and village proceedings, see Comp. L. 1915, §§ 3379, 3380.

Issuance and service of process in fourth class city proceedings, see Comp. L. 1915, §§ 3140, 3141.

Service of petition and notice in proceedings by railroad, bridge or tunnel company, see Comp. L. 1915, § 8252.

¶ 231. Although a statute is silent on the subject of notice, the necessity of notice must be implied where private property is sought to be taken thereunder.—Swan v. Williams, 2 Mich. 427; Strahan v. Brown, 39 Mich. 168.

¶ 232. The charter of a railroad corporation is not unconstitutional because not expressly requiring notice to the owners of proceedings to assess the compensation for property taken, the charter evidently contemplating notice; so that it is the duty of the tribunal in which the proceeding is taken to see that it is given.—Swan v. Williams, 2 Mich. 427.

¶ 233. Under express terms of How. St., § 3332, providing for the service of notice on nonresidents in condemnation proceedings, it is optional whether notice be served on the agent within this state, or on the owner within or without the state.—Saginaw, T. & H. R. Co. v. Bordner, 108 Mich. 236.

¶ 234. In proceedings to condemn land, where the original notice is served on a person in no way connected with the owner of the land, and who had gone on the land only for the purpose of having service made on him so as to bind the owner such service is illegal, and confers no jurisdiction to appoint commissioners of appraisal.—Dunlap v. Toledo, A. A. & G. T. R. Co., 46 Mich. 190.

¶ 235. The jurisdiction of the probate court in proceedings to condemn lands for railroad purposes is dependent upon proof of a valid notice to the land-owners; and notice mailed to a party whose residence was in fact, and was so alleged in the petition, at Aurora, New York, directed to him at Batavia, Cayuga county, New York, is void. —Morgan v. Chicago & N. E. R. Co., 36 Mich. 428.

§ 71. Appearance and waiver of notice.

¶ 236. Want of publication of notice in condemnation proceedings is waived by voluntary appearance.—East Saginaw & St. C. R. Co. v. Benham, 28 Mich. 459.

¶ 237. The want of publication of notice to owners and parties interested cannot be insisted upon on appeal when all concerned have voluntarily appeared in the case.—East Saginaw & St. C. R. Co. v. Benham, 28 Mich. 459.

§ 72. Proper and necessary parties.

Necessity for all persons interested being made parties and heard before the same jury, see post ¶ 300.

Effect on other parties defendant of dismissal as to joint owners, see post ¶ 247.

Proper and necessary parties in street opening proceedings, see Highways, II, B.

¶ 238. All the owners of any parcel sought to be condemned must be before the court;

the necessity of taking undivided interests in the same land cannot be determined separately.—Grand Rapids, N. & L. S. R. Co. v. Alley, 34 Mich. 16, 18.

¶ 239. Under a petition by a board of education to condemn land to be used as a schoolhouse site, it is sufficient that the person owning said land at the time of the filing of the petition be served with summons, and it is not necessary that the person to whom he conveyed said land shortly after the filing of said petition be served as a defendant in said proceedings.—Board of Education City of Holland v. Van Der Veen, 169 Mich. 470.

¶ 240. The inconvenience suffered by taxpayers residing on their own property one block distant from parks and public grounds, which a board of education proposes to condemn, with the consent of the common council, for the purpose of a school site, in being compelled, because of the closing of a street, to divert one block does not establish an interest in the condemnation proceedings so as to warrant their intervention in such proceedings.—Board of Education of Hastings v. Gilleland, 191 Mich. 276.

¶ 241. In proceedings to condemn lands for a railroad right of way, mortgagees of the land must be defendants; and a discontinuance as to them without adjudicating on their rights is fatal to the proceedings.—Michigan Air Line R. Co. v. Barnes, 40 Mich. 383.

¶ 242. The objection that certain parties entitled to damages were not made defendants to a condemnation proceeding, was not open to others than such parties themselves, and as to them they were not precluded by reason of not having been made parties.—Marquette & S. E. Ry. Co. v. Longyear, 133 Mich. 94.

¶ 243. The failure to make two of three former owners of one of various parcels sought to be condemned for railroad right of way, parties defendant, did not deprive the court of jurisdiction as to such parcel on the ground that by reason of the failure to bring in such parties, the mortgage interest could not be considered; where such two former owners had conveyed their interests to petitioner and the other owner had been made a party and the value of the parcel taken had been ascertained by the jury and paid, and the mortgagee was a party.—Marquette & S. E. Ry. Co. v. Longyear, 133 Mich. 94.

§ 73. Answer and objections.

Effect on burden of proof of denial of public use in answer, see post ¶ 326.

¶ 244. In an eminent domain suit to appropriate land for a cemetery, the defendant in her answer acknowledged that the old cemetery was overfilled, and that a new one was demanded to conserve public health. Held, that by admitting the proposed enterprise to be necessary to the public welfare, the answer left open only the question of the necessity of condemning the land of defendant.—McDonald v. Marquette Circuit Judge, 159 Mich. 367.

¶ 245. In an eminent domain suit to appropriate land for a cemetery, the defendant in her answer set out that the city had contracted with a mining company by which the latter was to mine the land under the old cemetery for its own profit; that the mining company had secured new ground, to which it agreed to remove the bodies from the old cemetery; that it had a predominating influence on the city government; and other like allegations. Held, mandamus would not lie to compel the circuit judge to vacate an order striking out these and other immaterial parts of the answer.—McDonald v. Marquette Circuit Judge, 159 Mich. 367.

¶ 246. The title of a land-holder cannot be litigated in proceedings before commissioners to condemn the land for railway purposes: and his averment, in answer to the petition for the condemnation of a particular lot, that this and certain other specified lots, lying together, constituted his homestead, and that he occupied them as such, was held sufficient to raise the question of injury to the contiguous lots.—Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

§ 74. Dismissal or discontinuance.

New proceedings after defective ones, see post § 75.

When proceedings by the State dismissed, see Comp. L. 1915, § 352.

Disability of council to discontinue after verdict in general proceedings by cities and villages, see Comp. L. 1915, § 3396.

Right to discontinue before report of jury or commissioners in railroad, bridge and tunnel company proceedings, see Comp. L. 1915, § 8255.

¶ 247. A dismissal of the petition as to joint owners not served with notice of the proceedings operates as a dismissal as to all.—Grand Rapids, N. & L. S. R. Co. v. Alley, 34 Mich. 16, 18.

¶ 248. Where a petition for more than one branch railroad is sufficient as to one and is denied as to the other, it may be discontinued as to the latter and prosecuted as to the other.—Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206.

§ 75. New proceeding after defective one.

Lesser award on second proceedings with judgment for difference, see post § 121.

New trial, see post § 111.

Right to possession during pendency of new proceedings following defective ones, see post ¶¶ 402a, 402b.

¶ 249. Where condemnation proceedings prove abortive because of lack of jurisdiction or failure of proof, the petitioner may, under Comp. Laws 1897, § 6251, bring a new proceeding and correct thereby the errors in the earlier proceeding.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

C. HEARING AND TRIAL.

§ 76. Constitutional mode; necessity of jury.

Functions of jury and questions triable, see post § 77.

Necessity for condemnation of lands within a county to be passed on by one jury, see ante ¶ 230.

Relative powers of legislature and judiciary, see Constitutional Law § 48.

Provisions of the constitution as to jury trial of damages, see Const., art. XIII, § 2.

Right to jury in proceedings instituted by the State, see Comp. L. 1915, § 351.

Request for jury in petition in proceedings by public corporation or state agency, see Comp. L. 1915, § 357.

Right to jury in railroad, bridge and tunnel proceedings, see Comp. L. 1915, § 8254.

¶ 250. The Const., art. 18, § 2, provides that, when private property is taken for the use and benefit of the public, the necessity of using such property, etc., and the just compensation to be made therefor, except, etc., shall be ascertained by a jury. As the laws then in force relative to laying out roads were inconsistent with this provision, it was held that, until new laws were passed, there was no authority for laying out roads compulsorily.—People v. Kimball, 4 Mich. 95.

¶ 251. In condemning land for railroad purposes, but for the specific provisions of our constitution the state could have provided that the inquiries as to necessity and value should be made by any medium it might select.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456; and see People ex rel. Green v. Michigan Southern R. Co., 3 Mich. 496.

¶ 252. The right to a jury trial in railroad condemnation cases is a substantial one that cannot be refused or evaded when asserted in proper time.—Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 12.

¶ 253. The constitutional amendment of 1859 (forming the proviso to Const., art. 18, § 2), dispensing with a jury to determine the necessity of taking land for public uses in the case of action by commissioners of highways, has no application to the taking of land for a city street, and in such case a jury is essential.—Campau v. City of Detroit, 14 Mich. 276.

¶ 254. Const., art. 15, § 15, providing that "private property shall not be taken for public improvements in cities, etc., without the consent of the owner, unless compensation be determined by a jury," etc., does not dispense with the ascertainment by a jury or commissioners of the necessity of such taking, as provided in art. 18, § 2.—Horton v. City of Grand Haven, 24 Mich. 465.

¶ 255. Under Const. 1835, land may be taken by the state for the public use without stipulation between the owners and the legislature, or the intervention of a jury, or of commissioners mutually chosen. It is only requisite that an impartial tribunal be provided for assessing the compensation; and such tribunal may be constituted without the intervention of the owner of the land.—People ex rel. Green v. Michigan Southern R. Co., 3 Mich. 496.

¶ 256. U. S. Const., Amend. XIV, does not require that in proceedings in a state court for the condemnation of private property for public purposes the questions of necessity and compensation shall be passed upon by the same jury.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; affirming 103 Mich. 556.

¶ 257. The XIVth Amendment does not require that condemnation proceedings under state authority be had by a jury of inquest rather than before a common law jury presided over and controlled by a judge.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; affirming 103 Mich. 556.

§ 77. ——Functions of jury and questions triable.

Determination of amount of award as function of jury, see also post ¶ 334.

Special questions for jury, see post § 108.

Viewing premises as function of jury, see post § 101.

Discretion of jury in determining award, see post ¶ 383.

Sufficiency of description of property as question for jury, see ante ¶ 207.

Questions triable collaterally on issue as to necessity of particular parcel, see ante ¶ 41.

Determination of necessity for taking as function for jury, see ante ¶ 40.

Duties of jury in proceedings instituted by the State, see Comp. L. 1915, § 351.

Duties of jury in proceedings by public corporation or state agency, see Comp. L. 1915, § 361.

Functions of jury and questions determined in verdict in fourth class city proceedings, see Comp. L. 1915, §§ 3143, 3144, 3154, 3155.

Powers and duties of jury in railroad, bridge and tunnel company proceedings, see Comp. L. 1915, § 8255.

¶ 258. Under the constitutional limitations on the right of eminent domain, the necessity for the use, and the compensation for the property taken, must be found by the jury, and no legislative or municipal

authority can determine either; it is a purely judicial inquiry.—Powers' Appeal, 29 Mich. 504; Paul v. City of Detroit, 32 Mich. 108.

¶ 259. The inquiry in proceedings to condemn lands for railroads is as to an appraisal or estimate of values and a determination of the necessity of the proposed taking.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 260. Act No. 359, Laws 1873, §§ 18, 19, provides that a jury shall decide whether it is necessary to take a given piece of land by eminent domain for a public improvement. Held, the act is unconstitutional, since it fails to provide in addition that a jury shall decide whether or not the proposed public improvement is necessary.—Board Water Com'rs City of Detroit v. Lorman, 158 Mich. 608.

¶ 261. The jury or commissioners in proceedings to condemn land for railway uses are judges of the law as well as of the facts. Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456; Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

¶ 262. In proceedings to condemn a railroad right of way the jury are judges of the law as well as of the facts.—Detroit, B. C. & W. R. Co. v. First Nat. Bank of Yale, 196 Mich. 660. (Fellows, Stone, Ostrander and Bird, JJ., dissenting.)

¶ 263. It cannot be said as a matter of law that public necessity requires improvements to be made in a navigable river any more than it can be said, as a matter of law, that public necessity requires a railroad to be built and the constitutional tribunal and not the legislature must determine whether public necessities require the improvement.—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48.

¶ 264. It is for a jury to determine the damages to an adjacent proprietor from the malicious and unnecessary operation of a railroad in the public street.—Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

§ 78. Character of jury and jury trial.

Number and qualification of jurors, see post § 79.
Venire list, drawing and impaneling, see post § 81.
Challenges, see post § 82.
Waiver of jury or waiver of challenges, see post § 83.
Oath and compensation of jurors, see post §§ 84, 85.
Necessity of unanimous verdict by jury, see post § 109.
Interference with or misconduct of jury, see post § 94.

¶ 265. All the safeguards ordinarily attaching to jury trials are implied in the use of the term "jury" in the constitutional provisions on the exercise of the right of eminent domain, and no action by laws or by proceedings under them can be maintained if any of these securities are impaired and disregarded.—Paul v. City of Detroit, 32 Mich. 108.

¶ 266. Under so imperative a constitutional provision as controls in Michigan, no legislation can be maintained which does not plainly require the question of the necessity of taking private property for public use to be left to the jury; their finding without such requirement is extrajudicial and not within their oaths, the oath being the measure and limit of their legal action; and property taken under legislation which does not provide expressly for every constitutional safeguard framed to govern such action cannot be said to be taken by due process of law.—Powers' Appeal, 29 Mich. 504.

¶ 267. Act 124 of 1883, as amended by Act 48 of 1887 (How. St., §§ 3064a-3064y), is not unconstitutional in not providing for the payment for the land condemned before it is taken; and said statute, as a whole, provides for such a finding by the jury as the constitution warrants.—City of Detroit v. Beecher, 75 Mich. 454.

§ 79. Number and qualifications of jurors.

Disqualification of juror as ground for setting aside award on appeal, see post ¶ 417.
Objection to qualifications of jurors raised first on appeal, see post ¶ 423.
Right to raise objection in supreme court for first time of stockholder in condemnor corporation acting as juror, see post ¶ 427.
Qualifications of jurors in proceedings by public corporation or state agency, see Comp. L. 1915, § 360.

¶ 268. The jurors must be freeholders.—Peninsular Ry. Co. v. Howard, 20 Mich. 18.

¶ 269. The constitution not having prescribed the number of the jury, it must be a common-law jury of twelve.—Campau v. City of Detroit, 14 Mich. 276.

¶ 270. An adjoining land-owner injuriously affected by the discontinuance by the board of supervisors of a state road is entitled to have the necessity and his compensation ascertained by a jury of twelve freeholders; and Pub. Acts 1887, No. 179, providing for a jury of six, is unconstitutional.—Pearsall v. Eaton County Sup'rs, 71 Mich. 438; Pearsall v. Eaton County Sup'rs, 74 Mich. 558.

¶ 271. Const., art. 18, § 2, provides for a jury of twelve freeholders where private property is taken for the use of the public, and it is violated by a provision of a city charter that the jury in such a case shall be

composed of twelve inhabitants of the city qualified to serve as jurors in courts of record; such jurors not being required to be freeholders.—City of Owosso v. Richfield, 80 Mich. 328.

¶ 272. It is competent for the legislature to impose, in addition to the qualifications required by the constitution to be possessed by jurors in proceedings to take private property for public use, such qualifications as are found in the charter of the city of Saginaw, viz., that the jurors shall be electors of fair character and sound mind, capable of understanding and speaking intelligibly the English language.—City of Saginaw v. Campau, 102 Mich. 594.

¶ 273. The qualifications of jurors in condemnation proceedings are expressly fixed by Comp. L. 1897, § 3377, and the further provision that the practice and procedure in regard to the jury be governed by the practice of civil cases in circuit courts, does not refer to qualifications and hence does not impose the restrictions of Pub. Acts 1893, No. 204, providing that jurors of Wayne County shall not have served as jurors during the preceding 3 years.—City of Detroit v. Heineman, 128 Mich. 537.

¶ 274. A stockholder in the railroad company is not a competent juror, and if one is drawn he should disclose his interest, and the company at its peril should challenge him. An inquest by a jury, one of whose members was a stockholder in the company, is void.—Peninsular Ry. Co. v. Howard, 20 Mich. 18.

¶ 275. A subscriber to a railroad-aid fund, who takes no stock in the road, acquires no legal interest in another projected road from the fact merely that it is to be leased to the road which he has aided; and he is not therefore incompetent to act as a juror in condemnation proceedings by such other road.—Detroit, West. Trans. & J. R. Co. v. Crane, 50 Mich. 182.

¶ 276. One who has given his note to a railroad company to aid in the construction of its road is disqualified as a juror in proceedings to condemn land for its right of way; and the disqualification cannot be removed by stipulation between the parties.—Michigan Air Line R. Co. v. Barnes, 40 Mich. 383.

§ 80. Commissioners of appraisal.

Number requisite for decision by commissioners, see post § 110.
Questions triable before commissioners, see ante ¶ 246.
Order appointing commissioners as final order subject to review on certiorari, see post ¶ 451.
Power of commissioners to impeach award by their individual affidavits as to their proceedings, see post ¶ 389.
Special findings by commissioners, see post ¶ 367.
Continuance of proceedings before commissioner, see post ¶ 303.
Power and control of court or judge over commissioners after appointment, see post ¶¶ 301, 303.
Power of probate court to direct continuance in proceedings before commissioners, see ante ¶ 177.
Appointment and qualification of commissioners under proceedings instituted by the State, see Comp. L. 1915, § 351.
Duties of commissioners in proceedings instituted by the State, see Comp. L. 1915, § 351.
Appointment of commissioners of appraisal in railroad bridge or tunnel proceedings, see Comp. L. 1915, § 8254.
Powers and duties of commissioners in railroad bridge and tunnel company proceedings, see Comp. L. 1915, § 8255.

§ 81. Venire list, drawing and impaneling.

Procedure for selection of jury, in proceedings by public corporation or state agency, see Comp. L. 1915, § 360.
Impaneling of jury in fourth class city proceedings, see Comp. L. 1915, §§ 3142, 3153.
Method of impaneling jurors in railroad bridge and tunnel proceedings, see Comp. L. 1915, § 8254.
Practice in recorder's court of Detroit, see Comp. L. 1915, § 3393.

¶ 277. The order of the court in condemnation proceedings should direct freeholders to be summoned.—Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519.

¶ 278. The "vicinage" from which jurors are to be drawn is the whole county, and not the town or neighborhood in which the land is to be taken.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459.

¶ 279. The jury in condemnation proceedings brought by a municipality should be chosen from the body of the county and not merely from a township or village interested in the condemnation.—Houghton Village Common Council v. Huron Copper Min. Co., 57 Mich. 547.

¶ 280. The "vicinage" from which a jury of freeholders in a street-opening case must be drawn (Const., art. 18, § 2) may be limited by statute to the municipality instead of including the county at large; but in such case the whole municipality will be within it.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

¶ 281. The drawing of a jury must be in the presence of the court at the time of making the order therefor.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459.

¶ 282. In drawing jurors from the petit-jury box those not freeholders must be set

aside, and the drawing is to continue until the requisite number of qualified jurors is obtained.—Peninsular Ry. Co. v. Howard, 20 Mich. 18.

¶ 283. On an inquest of the value of property required for a railroad, after a juror had been struck from the panel by one of the parties, and the jury completed, it was held that he could not be resummoned by the officer in the place of one who had been excused.—In re Detroit & P. R. Co., 2 D. 367.

§ 82. Challenges.

Necessity for railroad company challenging one of its stockholders as juror, see ante ¶ 274.

Peremptory challenges in proceedings instituted by the State, see Comp. L. 1915, § 351.

Right to peremptory challenges in general city and village proceedings, see Comp. L. 1915, § 3381.

¶ 284. Jurors may be challenged for cause in these proceedings, but not peremptorily.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459; Peninsular Ry. Co. v. Howard, 20 Mich. 18.

¶ 285. A challenge is properly overruled if the judge knows at the time of nothing which would give the juror a bias; and if the challenger knows of facts which would do so, it is not enough to present them for the first time as a reason for refusing to confirm proceedings which have been long in progress at considerable cost, and in which the juror has taken part without any showing of legal cause against his acting.—Detroit, West. Trans. & J. R. Co. v. Crane, 50 Mich. 182.

¶ 286. A statute providing for the taking of property by a city for public use is not fatally defective for not providing that challenges for cause may be allowed. The right exists in all cases where the jury is a common-law one, and cannot be taken away by statute.—Kundinger v. City of Saginaw, 59 Mich. 355.

§ 83. Waiver of jury or objections and challenges.

Loss of right by failure to assert cause for challenge at time of challenging, see ante ¶ 285.

¶ 287. It is competent for the owners of land sought to be condemned for street purposes under How. St., § 3064a et seq., to waive their constitutional right to have the questions of necessity and compensation determined by a jury of freeholders.—Borgman v. City of Detroit, 102 Mich. 261.

¶ 288. In a proceeding to appropriate one's property under the right of eminent domain, which he is opposing throughout, he cannot be held to have waived a constitutional objection to the number of jurors by not objecting specifically.—Campau v. City of Detroit, 14 Mich. 276.

¶ 289. Proceedings to lay out a township drain are not invalidated by the fact that a juror was not a freeholder, if no objection was made to his sitting, and the party afterwards objecting was present, aided in striking the panel, and declared himself satisfied with it.—Clark v. Drain Com'rs, 50 Mich. 618.

¶ 290. Where in condemnation proceedings the verdict by a jury of eleven men is filed, entered, and confirmed, no appeal is taken, and the award is paid and accepted by the parties interested, the parties are taken to have waived the provision of Act No. 176, Pub. Acts 1903, calling for a jury of twelve men.—Weber v. City of Detroit, 158 Mich. 149.

¶ 291. Where the claimant to lands, the title to which a railroad company had petitioned to acquire, was present at the impaneling of a jury of inquest, and no challenge was interposed, the objection to the confirmation of the jury's report, that the jurors were not affirmatively shown to be freeholders, is not well taken in the absence of any showing that any of them were disqualified.—Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519.

§ 84. Oath of jurors.

Oath as covering measure and limit of legal authority, see also ante ¶ 266.

Oath of jurors in street opening proceedings, see Highways, II, B.

Oath of jurors in proceedings instituted by the State, see Comp. L. 1915, § 351.

Oath of commissioners in proceedings instituted by the State, see Comp. L. 1915, § 351.

Oath of jurors in proceedings by public corporation or state agency, see Comp. L. 1915, § 361.

Oath of jurors in general city and village proceedings, see Comp. L. 1915, § 3382.

Oath of jury in fourth class city proceedings, see Comp. L. 1915, §§ 3143, 3154.

¶ 292. In these proceedings the oath of the jurors is not to be construed by itself, but as part of the proceedings in which it is taken; and if, when so construed, everything required by the statute is embraced in substance if not in form, it is sufficient.—East Saginaw & St. C. R. Co. v. Benham, 28 Mich. 459.

¶ 293. Proceedings to condemn private property will be quashed if the record does not show that the jurors impaneled to determine the necessity for taking the property and the compensation to be paid for it took, before acting, an oath covering these constitutional duties. They are not required to

recite their oath in their report, and such recital is not sufficient proof of it.—Bowler v. Perrin, 47 Mich. 154.

¶ 294. It seems that it is not enough for jurors in condemnation proceedings to swear that they will "examine and determine the necessity of locating and constructing a ditch described as follows," etc., as the constitution requires them to determine the necessity of taking land therefor, and the compensation to be paid for it.—Bowler v. Perrin, 47 Mich. 154.

¶ 295. Where the oath administered to the jury in proceedings to lay out a ditch does not specify the line of the ditch or its dimensions, but refers to it merely as "Pine Creek Ditch No. 2," it is insufficient, as it does not apply to a ditch of any specific character and predetermined location.—Chapman v. Clark, 49 Mich. 305.

¶ 296. How. St., § 3466 (Laws 1881, Act No. 244, § 9, the Union-Depot Act), provides that the jury "shall take and subscribe an oath that they will justly and impartially ascertain and determine the necessity of taking and using any such real estate or property for the purposes proposed." How. St., § 3436 (section 7 of said act), provides that a petition filed for the purpose of acquiring land must state, among other things, that the property described in the petition is required for the purposes of its incorporation, and that the taking thereof is necessary for public use." Held, that these sections taken together require the oath to be that the jury will determine the necessity of taking the land for public use, and the statute is not unconstitutional.—Fort-Street Union Depot Co. v. Morton, 83 Mich. 265.

§ 85. Compensation of jurors.

Fees and compensation and sustenance of jurors in general, see Jury, VII.

Compensation of jurors in proceedings by public corporation or state agency, see Comp. L. 1915, § 369.

¶ 297. Where a condemnation proceeding is instituted by a city of the fourth class, a juror must seek his pay from the city in accordance with the provisions of Comp. Laws 1897, § 3408, and is not entitled to recover the same from the county under Act No. 236, Pub. Acts 1907.—Rorabacher v. Nichols, 165 Mich. 127.

§ 86. Venue and change of venue.

Place in which proceedings may be instituted, see also post ¶ 301.

¶ 298. Pub. Acts 1905, No. 309, providing for a change of venue in judicial proceedings does not apply to proceedings to condemn land.—Michigan, O. & I. R. Co. v. Monroe Circuit Judge, 144 Mich. 44.

¶ 299. Act No. 309, Pub. Acts 1905, provides that the court may on certain grounds grant a change of venue in any criminal or civil action. The amendment of 1907 provides that the court may change the venue in "any cause" pending therein. Held, that the amendment did not enlarge the scope of the original act so as to permit a change of venue in condemnation proceedings.—Grand Rapids & I. Ry. Co. v. Kalamazoo Circuit Judge, 154 Mich. 493.

§ 87. Consolidation and severance of proceedings.

Splitting causes of action and reserving demands for future litigation, see post ¶ 483.

Splitting, severance and joinder of verdicts, see post § 107.

Lands to be joined in one petition, see ante § 69.

¶ 300. In condemnation proceedings for a single purpose, all persons who must at any time be made respondents should be brought in so as to be heard before the same jury; the proceeding is indivisible.—Houghton Village Common Council v. Huron Copper Min. Co., 57 Mich. 547.

§ 88. Procedure on hearing.

Functions of judge, see post § 89.

Regulation of evidence and number of witnesses, see post § 90.

Record of proceedings and stenographic report, see post § 91.

Argument and assistance by counsel, see post § 92.

Propriety of instructions and requests, see post § 93.

Interference with and misconduct of jury, see post § 94.

Evidence, see post §§ 95-101.

Hearing on petition in proceedings instituted by the State, see Comp. L. 1915, § 351.

Use of exhibits and maps by jury, in proceedings by public corporation or state agency, see Comp. L. 1915, § 363.

Right of jury to petition, maps and blank form of verdict in fourth class city proceedings, see Comp. L. 1915, §§ 3145, 3156.

Right of jury to have petition, maps and exhibits in jury room in general city and village proceedings, see Comp. L. 1915, § 3384.

Visit to property by commissioners or jury in proceedings by the State, see Comp. L. 1915, § 351.

Visit to property by jury in proceedings by public corporation or state agency, see Comp. L. 1915, § 361.

View of premises in general city and village proceedings, see Comp. L. 1915, § 3382.

¶ 301. Condemnation proceedings do not proceed according to the course of the common law. They may be begun in any court of record in the county where the land lies. They may be heard before the judge at chambers. The commissioners, when ap-

pointed, are not under the power or control of the court or the judge. The judge appoints the time of their first meeting.—Michigan, O. & I. R. Co. v. Monroe Circuit Judge, 144 Mich. 44.

¶ 302. The question whether there is any sufficient cause for resorting to condemnation proceedings is preliminary in its character, and should be settled in some separate way in advance. It involves both fact and law. —Manistee & N. E. R. Co. v. Fowler, 73 Mich. 217.

§ 89. ——Functions of judge.

See also post ¶ 311.

Jurisdiction of court in general, see ante § 57.

Power or control of judge over commissioners after appointment, see ante ¶ 301.

Confirmation or rejection of award as function of court, see post § 111.

Waiver of right to have judge attend jury, see post ¶ 425.

Attendance and instruction by court in railroad, bridge and tunnel company proceedings, see Comp. L. 1915, § 8255.

¶ 303. The probate court cannot direct a continuance in condemnation proceedings pending before a commissioner appointed by it.—Michigan Cent. R. Co. v. Tuscola Probate Judge, 48 Mich. 638.

¶ 304. The functions of the judge in attendance upon a jury in condemnation proceedings are at most advisory; and where the proceedings of the jury are not based on false principles, the supreme court, on review, will not consider questions raised on merely technical objections to the admission or rejection of testimony though in accordance with the judge's rulings.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 305. It is not error for the court to refuse to instruct the jury or commissioners on the condemnation of land for railway uses. The court may, but is not required to, instruct under the statute.—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 306. A jury appointed under Const. 1850, art. 18, § 2, providing that when private property is taken for public use, the necessity thereof and compensation therefor shall be determined by a jury of twelve freeholders, etc., is a special tribunal to determine the law and the facts, and hence instructions to them are not required of the probate judge in eminent domain proceedings to condemn a right of way for a drain. —McDuffee v. Fellows, 157 Mich. 664.

¶ 307. There is no constitutional inhibition against a statutory provision (How. St., § 3466) that in proceedings to condemn land for the purposes of a union railroad depot company the circuit judge may attend the jury "to decide questions of law and administer oaths to witnesses."—Fort St. Union Depot Co. v. Backus, 103 Mich. 556, affirmed in 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

¶ 308. The award of the jury in condemnation proceedings, instituted in the circuit court, cannot be disturbed on account of the attendance of the circuit judge to decide questions of law and administer oaths to witnesses, as provided by How. St. § 3466, unless some ruling or instruction of the circuit judge is clearly erroneous, and leads to the plain conclusion that the jury were thereby prejudiced against the party complaining.— Fort St. Union Depot Co. v. Backus, 103 Mich. 556, affirmed in 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

§ 90. ——Regulation of evidence and number of witnesses.

Requisites and sufficiency of proofs, see post § 99.

Fees of witnesses, see post § 116.

Discretion of court to limit number of witnesses on same matter, see Trial, V.

¶ 309. Proceedings to condemn land for railway uses are special and unlike ordinary trials at law; the inquest may be conducted by commissioners or a jury without the aid of counsel, so that the practice must be simple and a large discretion allowed in admitting or rejecting testimony.—Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

¶ 310. An inquest of damages for land condemned for railway uses may be conducted by a jury without legal assistance, and liberal practice in the admission or rejection of testimony is allowable; and the conclusions of the jury thereon will not be disturbed except for rulings that were manifestly inaccurate and did substantial injustice.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 311. A probate judge has no power to act as a nisi prius judge, presiding over a common-law jury, in condemnation proceedings, nor to direct what testimony shall go to the jury, and on what theories of damage.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 312. In a proceeding under Comp. L. 1897, §§ 6361-6366 for the condemnation of land, it is a compliance with the statute to hear testimony as to several distinct parcels of land at the same time.—Benton Harbor Terminal Ry. Co. v. King, 131 Mich. 377.

¶ 313. Under the usual practice in courts, to prevent abuse, the judge may limit the number of witnesses produced to prove a single point in condemnation proceedings under How. Stat. § 3064q, granting fees, upon affidavit, to witnesses attending such proceedings in good faith.—Dorland v. Superior Judge, 78 Mich. 182.

¶ 314. Where prior to calling a jury in a railroad condemnation case, the judge, after hearing testimony as to values and as to an offer made to the owner in question, stated that there was such a wide difference as to values and that enough testimony had been put in, and that further testimony would not change his opinion and that he thought that it was his duty to order a jury, but that such owners might if they desired offer further testimony on the day for the assembling of the jury, it was not error for another judge who presided when the jury assembled, to exclude further preliminary testimony as to values, and the court did not lose jurisdiction where all such testimony was later offered, and the trial was fully entered upon.—Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302.

§ 91. ——Record of proceedings; stenographic report.

Use of stenographic record on certiorari, see post ¶ 459.
Record on appeal, see post § 130.
Necessity of recital of oath in report of jury, see ante ¶ 293.

¶ 315. In condemnation proceedings under Comp. L. 1897, §§ 6361-6366, the attorney for the landowners demanded that the testimony be taken in writing and that a stenographer be employed. The court instructed the jury that a stenographer was not necessary and the jury could take the testimony themselves if they wished and paper was furnished them to make such notations as they desired. Held, not error since the statute does not require that a stenographer be employed and the request as made was not proper.—Benton Harbor Terminal Ry. Co. v. King, 131 Mich. 377.

§ 92. ——Argument and assistance by counsel.

Necessity for assistance of counsel, see ante ¶ 309.
Improper argument of counsel as harmless error, see post ¶ 475.
Necessity of counsel presenting and arguing in brief any material point in petition for certiorari, see post ¶ 465.
Refusal of jury to hear counsel as harmless error where right to be heard not urged, see post ¶ 424.

¶ 316. In condemnation proceedings by a union depot company counsel were allowed to argue that there was no necessity for taking a street to the injury of respondents, because petitioner could take the property of a railroad company abutting on the other side of the street. The law was otherwise. Held, that this was erroneous, and that its effect was to influence the jury in awarding damages, even though they found a necessity for taking the street; hence the award should be set aside.—Fort-Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 317. A statement in the opening argument of counsel for the city in proceedings to condemn land for street purposes, that any testimony showing a benefit is to be considered by the jury in arriving at the amount of damages to be awarded, is not ground for a reversal, if no evidence as to benefits is given upon the trial, and the jury are clearly instructed to give respondent the value of his land, and all damages sustained by him.—City of Pontiac v. Lull, 111 Mich. 509.

¶ 318. In a proceeding for the assessment of damages for the condemnation of property under the Drain Law, the fact that counsel for the drain commissioner contended for a wrong rule of law in arguing before the jury, does not vitiate the proceeding, in the absence of any evidence of bad faith, or that the jury were misled by such contention.—McDuffee v. Fellows, 157 Mich. 664.

¶ 319. While a blank form for a verdict in condemnation proceedings which can be filled just as easily in one way as the other is not objectionable, it is error to allow the petitioner to practically draw up the desired verdict and deliver it to the jury under the sanction of the court.—Manistee & N. E. R. Co. v. Fowler, 73 Mich. 217.

¶ 320. In a condemnation proceeding a verdict was prepared by the railroad and submitted to the jury containing the formal language necessary for a finding either way, with blanks for the insertion by the jury of their findings as to necessity and as to the amount of the award. Held, the submission of this paper to the jury was not erroneous.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

§ 93. ——Propriety of instructions and requests.

See also ante ¶¶ 305, 306, 311.
Instructions in action for damages, see post ¶ 497.
Erroneous instructions as harmless error, see post ¶ 469.
Instruction as to measure and elements of compensation, see also ante ¶ 104.
Propriety on instruction that jury might take notes of testimony, see ante ¶ 315.
Instructions to jury in general city and village proceedings, see Comp. L. 1915, § 3382.

¶ 321. Where, in a proceeding to ascertain the compensation to be paid to the owner of land and of a factory thereon for the appropriation to railroad uses of a street in front of the premises, the court in a colloquy with counsel suggested a doubt whether the profits of the business were not too speculative to be considered as an element of damage, and where the court charged the jury that respondent was entitled to full compensation, no instruction being asked and none being given as to the matter of profits, held, that in the absence of a request for a specific instruction, the judgment should not

be reversed on the supposition that the jury was misled by the court's expression of doubt.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; affirming 103 Mich. 556.

¶ 322. The words in a charge in a railroad condemnation case to "pay Mr. H. what the land is worth, and pay Mr. B. what the land is worth, and no more than it is worth, that is all they are entitled to"; in view of the remainder of the charge, were not subject to the objection that they limited the jury in their award and gave them to understand that they were to give no damages for anything on or under the land, nor to give damages for any change in the manner of conducting the quarries in question.—Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302.

¶ 323. In an action by the owner of an apartment house for damages for the construction of a railroad in the street opposite his premises where it appeared that the house was rendered useless for residence purposes, but was of more value than before because the land could be used for factory purposes an instruction that the measure of damages was the depreciation in rental value for residence purposes only was approved.—Plantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661. (Kuhn and Brooke, JJ., dissenting.)

¶ 324. Where, in proceedings to open a street, it appeared that after such opening a narrow strip of land thirteen feet wide would be left, an instruction that the jury was "at liberty" to give the whole value of the lots if they found such strip worthless, was not open to the objection that it debarred the jury from giving any compensation for damages to the strip unless they found such strip to be worthless.—City of Grand Rapids v. Luce, 92 Mich. 92.

§ 94. Interference with and misconduct of jury.

Propriety of jury striking average, see post ¶¶ 345, 387.

Presumption on appeal of injury where there is interference with or misconduct of jury, see post ¶ 433.

Timeliness of objection as to interference with and misconduct of jury, see post ¶ 420.

¶ 325. It was reversible error, in proceedings for the condemnation of land, for counsel, witnesses and jurors to mingle freely, and to receive unsworn opinions of bystanders, and for meals, drinks, and cigars to be furnished the jury and paid for by petitioner's representatives, on the occasion of the view of premises, though it may not appear that the jurors were influenced.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

D. EVIDENCE.

General law of evidence, see Evidence.

§ 95. Burden of proof and presumptions.

Admissibility and competency, see post §§ 96-98.

Requisites and sufficiency of proofs, see post §§ 99-101.

Presumptions in collateral proceedings, see post § 147.

Presumptions on record on appeal, see post § 130.

¶ 326. Under Comp. Laws 1897, § 6245, the burden is on the petitioner seeking to condemn land, to show that the proposed use is a public use, where such use is denied by defendant, in his answer.—Pere Marquette R. Co. v. United States Gypsum Co., 154 Mich. 290.

¶ 327. To support eminent domain proceedings, there must be evidence of a prior attempt to purchase.—Michigan Cent. R. Co. v. Ferguson, 162 Mich. 220.

¶ 328. There is a strong presumption that abutting owners or their predecessors in title, had received compensation for damages occasioned by the construction of a steam railroad track in a public street, forty-two years before.—Felton v. Wedthoff, 185 Mich. 72.

§ 96. Admissibility and competency.

Opinions and conclusions as to value and award, see post § 97.

As to necessity of taking, see post § 98.

Effect of court rulings as to admission of evidence on proceedings before jury, see ante ¶ 304.

When errors in admission of evidence harmless, see post § 139, ¶¶ 467, 468, 470-474, 476.

Competency of testimony of juror impeaching award, see post ¶ 387.

Evidence admissible on motion for rejection or confirmation, see post ¶¶ 388, 389.

Admissibility of phonographic reproduction of sound made by adjacent railroad to show damage thereby, see Evidence, IX.

¶ 329. The owner of land condemned for a street is entitled to its full market value, and any testimony is objectionable that tends only to show its value for specific purposes, or to show that it was transferred by a former owner for the purpose of speculating upon the street opening.—Chaffee's Appeal, 56 Mich. 244.

¶ 330. In proceedings to condemn land for a street, testimony of what one of the parcels was offered to witness for about a year before the trial is competent.—City of Grand Rapids v. Luce, 92 Mich. 92.

¶ 331. In a proceeding to condemn land for railroad purposes testimony that other persons than respondents had given the right

of way is inadmissible.—Bay City Belt-Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 332. An award of damages for land sought by a union depot company was set aside because the company had not been permitted to show that respondents who used their property for a planing-mill could, by using a certain kind of dust-arrester, make their building comparatively safe from ignition by sparks from a passing engine where respondent's witness had himself testified as to the best way of arresting dust and shavings.—Fort-Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 333. In condemnation proceedings for right of way by a railroad company where the owner expressly disclaimed any right to damages resulting from increased fire risk evidence offered by the petitioner showing insurance rates on his property and on other property is properly excluded.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

§ 97. ——Opinions and conclusions as to value and award.

Valuation of property for measure of compensation, see ante §§ 43-45.

Exclusion of evidence of value as error reviewable on certiorari, see post ¶ 463.

Admissibility of evidence as to value and comparisons with other values, see also ante ¶¶ 119, 120.

¶ 334. The proper amount of compensation for land taken in condemnation proceedings cannot be sworn to by witnesses, but must be found by the jury from data.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

§ 98. ——As to necessity of taking.

Competency of evidence of public necessity in action for damages, see post ¶¶ 497-499.

Admission of conclusion as to necessity of street opening as harmless error, see Harmless Error.

¶ 335. On the question of damages it is improper to receive testimony that instead of condemning a street in front of claimant's property the condemnor might have taken other property in use by another railroad company.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 336. In proceedings by a railroad company to condemn a gravel pit (How. St., § 3323) the fact that the company already owns large quantities of gravel, and that it has sold a number of car loads, is not conclusive against its right to condemn, but is proper to be considered by the jury, in connection with testimony tending to show that the land in question is necessary to enable the company to operate its existing beds with economy and safety.—Saginaw, T. & H. R. Co. v. Bordner, 108 Mich. 236.

¶ 337. In a petition by a school board to condemn a lot on a certain court for school purposes, evidence was admitted on the question of the public necessity of the proposed improvement, to show that adjoining residents of the court would be inconvenienced and damaged. Held, that even though such evidence is, in strictness, inadmissible, letting it in was not error where the jury, by viewing the premises, had a chance to observe for themselves, and where there was other proper testimony on the point.—Board of Education City of Grand Rapids v. Brown, 159 Mich. 148.

§ 99. Requisites and sufficiency of proofs.

Admissions on pleadings, see post § 100.

View as overcoming evidence, see post § 101.

Regulation of evidence and number of witnesses, see ante § 90.

What is prima facie evidence of ownership of property taken in general city and village proceedings, see Comp. L. 1915, § 3397.

¶ 338. In an action by the owner of a residence against a railroad for damages due to the construction of a railroad in the street in front of the premises, evidence held sufficient to sustain a verdict for $1,000 damages.—Plantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661.

§ 100. ——Admissions on pleadings.

¶ 339. Where the petition in proceedings by one railroad company to condemn land of another company shows the property to be subject to condemnation, and no issue thereon is raised by the answer, the jurisdictional fact of the right to condemn is admitted. So held where the land sought to be taken abutted upon a street in which the tracks of both companies were located, and it was claimed by the respondent that the proceeding was an attempt to condemn its track and right of way not subject thereto.—Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co., 106 Mich. 473.

¶ 340. Condemnation proceedings instituted by a railroad company are not invalidated by the failure to prove that the petitioner had filed a map and survey of its line, as required by How. St. § 3332, where the averment of that fact in the petition was not denied by the answer.—Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co., 106 Mich. 473.

§ 101. ——View as overcoming evidence.

Procedure of the jury on taking the view, see ante § 88.

View as evidence to sustain award, see post ¶ 383.

Sufficiency of view without further proof of necessity of taking, see post ¶ 363.

Conclusiveness of findings and verdict after jury has had view of premises, see post ¶ 440.

Right of jury after view of premises to dispense with argument of counsel, see post ¶ 424.
View as overcoming erroneous evidence, see also ante ¶ 337.

¶ 341. The jury, in proceedings to condemn lands, are not bound by the testimony submitted to them, but are also expected to use their own judgment and knowledge from a view of the premises and from their own experience as freeholders.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 342. The jury in condemnation proceedings, as in all cases where no certain measure of damages exists, must trust somewhat to its own judgment, that being one of the purposes for which juries of inquest are provided. Jurors are expected to view the premises and use their own senses, both to obtain such information as an eye-witness can gain, and to interpret and comprehend the testimony of others, the purpose throughout being to give all the damages which they reasonably discover, past or present and to result, but no more.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 343. A jury in condemnation proceedings cannot follow its judgment as to value in opposition to testimony.—Chaffee's Appeal, 56 Mich. 244.

¶ 344. A view of the premises does not alone justify the jury in denying to a railroad company, in a proceeding to open a street across its track, indemnification for the expense of keeping a gateman or flagman at the crossing, where the undisputed testimony, as well as the surroundings, conclusively shows that it will be necessary to keep such a gateman or watchman.—City of Detroit v. Detroit, G. H. & M. R. Co., 112 Mich. 304.

E. AWARD, FINDINGS AND JUDGMENT.

§ 102. Award or verdict.

Finding as to necessity, see post § 103.
Description of property, see post § 104.
Payment or enforcement of award and rights in same, see post §§ 117-121.
Specification of amounts or gross award, see post § 105.
Specification of shares of mortgagees, lienors or lessees, see post § 106.
Necessity of award by jury and its constitutional requisites, see ante § 78.
Conclusiveness of findings and verdict on appeal, see post § 131.
Specification of benefits in verdicts in street opening cases, see Highways, II, B.
Validity of award of arbitrators as to amount of damages, see Arbitration ¶ 98.
Matters determined in verdict in proceedings by public corporation or state agency, see Comp. L. 1915, § 362.
Matters covered in verdict in general city and village proceedings, see Comp. L. 1915, § 3383.
Blank form of verdict for use of jury in proceedings by public corporation or state agency, see Comp. L. 1915, § 363.
Blank verdict form in general city and village proceedings, see Comp. L. 1915, § 3384.
Necessity that verdict be in writing and signed by all jurors in proceedings by public corporation or state agency, see Comp. L. 1915, § 361.
Necessity that verdict be in writing and signed by jurors in general city and village proceedings, see Comp. L. 1915, § 3382.

¶ 345. An award of damages in proceedings to condemn land is not invalid for having been reached by averaging the amounts as marked by each commissioner, if the commissioners did not agree beforehand upon this mode of compromise, but merely resorted to it as a proper method of arriving at a just result, after stating to each other the amounts which they had individually fixed.—Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

¶ 346. An award of damages in condemnation proceedings is invalid if, without the consent of the parties, it gives compensation on any but a money basis.—Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42.

§ 103. ——Finding as to necessity.

Public necessity for taking in general, see ante § 11.
Constitutional requirement for jury to make finding as to necessity, see ante ¶ 266.

¶ 347. A finding in the verdict that "it is necessary that said real estate and property should be taken for the purposes of said company" is not such a finding of the necessity for the taking of said property for the public use, either in form or substance, as is required by Const., art. 18, § 2. The report of the jury or commissioners must distinctly find that the taking is necessary for the public use and benefit; and to make such a report they must be satisfied, not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance.—Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519.

¶ 348. A finding by a jury that they "did ascertain and determine that it is necessary for said company to take said real estate for public use, to wit, for the purpose of said company's incorporation as and for right of way," is a sufficient finding that the land was required for the public use.—East Saginaw & St. C. R. Co. v. Benham, 28 Mich. 459.

¶ 349. The verdict of a jury "that it was and is necessary to take and use said land for the purpose of operating and constructing

said railroad by said company" is not sufficient either in form or substance.—Grand Rapids, N. & L. S. R. Co. v. Van Driele, 24 Mich. 409.

¶ 350. Where commissioners were appointed to determine the necessity of taking land for a railroad company, their finding "that the taking of said strip or parcel of land was required and necessary for the constructing and operating of said railroad and a necessary public use thereof" was held sufficient.—In re Morgan's Appeal v. Chicago & N. E. R. Co., 39 Mich. 675.

¶ 351. In proceedings under Laws 1865, p. 651, as amended by Laws 1867, p. 193 (Comp. L. 1871, ch. 221) to obtain water-power to operate a manufactory, the necessity for the taking must be passed upon, and a finding that the taking is to be for the public use is not sufficient.—McClary v. Hartwell, 25 Mich. 139.

§ 104. ——Description of property.

Averment of description in petition, see ante § 64.

Validity of finding with indefinite description, no map and no designation of owners' names, see also ante ¶ 208.

Insufficiency of description in oath of jury as affecting award, see ante ¶ 295.

¶ 352. Where commissioners appointed to assess damages for taking land for railroad purposes assessed them in view of the tract taken altogether, but understated the quantity of the land by a fraction of an acre, it was held that it did not invalidate their action.—In re Morgan's Appeal v. Chicago & N. E. R. Co., 39 Mich. 675.

¶ 353. A description in an award condemning lands for railway purposes allowed a strip 30 feet wide on each side of a given line across the entire premises, except that in crossing a specified parcel a strip only 25 feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former, and by giving the courses and distances. Held sufficient.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 354. Under a petition to acquire title for railroad purposes, but failing to show for what purpose the lands specified are included in the petition, an award of a jury disclosing that they had assessed the damages which they thought the respondent entitled to on account of his "claiming" to own certain lands used and occupied as a street, without determining whether, in fact, he did own it, and from which it does not appear whether the damages awarded were the estimated value of the land, or only that of some doubtful claim they supposed him to be setting up, cannot be sustained.—Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519.

§ 105. ——Specification of amounts or gross award.

Payment into court for division, see post § 118.

Determination to whom award is to be paid in railroad bridge and tunnel proceedings, see Comp. L. 1915, § 8258.

¶ 355. In taking lands for a right of way for a railroad, each owner has a right to have a finding as to the value of his land and the necessity for taking it; and a general finding, giving a single sum for taking the land of several owners, is invalid.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418.

¶ 356. Where a jury is required merely to determine the damages or compensation for taking property for a railroad company, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury.—Michigan Air Line Ry. Co. v. Barnes, 44 Mich. 222; Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 357. The jury need not itemize the damages awarded.—City of Grand Rapids v. Bennett, 106 Mich. 528, per McGrath, C. J.

¶ 358. Where three separate parcels of land are affected by proceedings to condemn a railroad right of way in a street, each parcel should be considered and damages awarded separately for each.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 359. Where parts of two lots owned by the same person are taken by condemnation proceedings, the jury in giving a lump sum as compensation to the owner, is held to have compensated for both lots, an apportionment to each lot being unnecessary.—Weber v. City of Detroit, 158 Mich. 149.

¶ 360. Where the interest of two persons in lands is treated as joint by the petition asking that they be condemned for railroad purposes, and the persons appear jointly and jointly demand a jury, it is not improper for the jury to award an undivided sum to the two; their own action precludes them from insisting that their interests should have been separately regarded.—East Saginaw & St. C. R. Co. v. Benham, 28 Mich. 459.

§ 106. ——Specification of mortgagees', lienors' or lessees' shares.

Impairment of interests of mortgagees, lienors and others in secondary right as "taking" entitling to award, see ante § 21.

Right of mortgagee to appeal, see post ¶ 406.

Apportionment in verdict to cover mortgages, leases, agreements or other liens in proceedings by public corporation or state agency, see Comp. L. 1915, § 362.

¶ 361. An award of damages for land condemned for railway uses was sustained where

it expressed the gross sum allowed to all joint claimants and specified how much of it was for each of those interested as mortgagees.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 362. In proceedings to open a street under Laws of 1877, Act No. 201, the jury should apportion damages between owners, mortgagees, lessees, etc., so that each can receive a warrant for the specific sum to which he is entitled. But acceptance of the sums awarded waives the error of neglecting to do this, and the persons interested are presumed to have agreed upon an apportionment among themselves.—Rentz v. City of Detroit, 48 Mich. 544.

§ 107. Splitting, severance and joinder of verdicts.

Consolidation and severance of proceedings in general, see ante § 87.

Splitting causes of action and reserving demands for future litigation, see post ¶ 483.

¶ 363. The provision of the charter of Detroit that the jury in a matter of opening an alley, after having visited the place of the intended improvement, and gone "as near as may be practicable" to the property to be taken, shall return at once to the court and first determine the necessity for the taking, and then, if they find in the affirmative, hear evidence, is clearly improper, in that it requires the jury to determine the most important question in the case without proof or argument, and upon such examination only of the property as they see fit to make, in the absence of any requirement to make any at all. The question of necessity, being the very foundation of the right to take private property, is one on which the parties have a full right to be heard, and have the jury remain open to conviction and uncommitted until full hearing. A jury can render but one verdict, and that only when the whole inquiry before them is ended, and they cannot therefore determine the necessity by itself; it depends on other facts as well as on the question of convenience.—Paul v. City of Detroit, 32 Mich. 108.

¶ 364. The statute providing for the condemnation of lands for public purposes contemplates that one jury in one proceeding shall determine the question of the necessity of the condemnation of lands of different persons in a locality; and a verdict so rendered was not void because rendered before hearing testimony as to the value of, or the prospective damages to the lands of a particular owner so condemned.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

§ 108. Special questions and findings.

Questions for jury in general, see ante § 77.

¶ 365. There is no provision in the statutes relative to condemnation proceedings, whereby special questions are to be submitted to jury or commissioners.—Toledo, S. & M. R. Co. v. Campau, 83 Mich. 31; Toledo, S. & M. R. Co. v. Campau, 83 Mich. 33.

¶ 366. The jury's failure to answer special questions in condemnation proceedings cannot be assigned as error.—T., S. & M. R. Co. v. Campau, 83 Mich. 31.

¶ 367. A commissioner's special finding that map and survey are insufficient can have no effect inasmuch as it was not a proper question for him to determine, such question should have been raised before the court on the application to appoint commissioners, being a jurisdictional question.—T., S. & M. R. Co. v. Campau, 83 Mich. 33.

§ 109. Unanimity in verdict.

¶ 368. Where a "jury" is provided by the constitution, a jury in the common-law sense, deciding only by a unanimous verdict, is meant.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418.

¶ 369. The verdict in proceedings to condemn land for railroad purposes must be unanimous, and a verdict signed by less than all the jurors is a nullity.—Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418.

§ 110. Decision by commissioners; number requisite.

Commissioners of appraisal in general, see ante § 80.

¶ 370. The word "commissioners," as used in Const., art. 18, § 2, means commissioners clothed with such powers as prior to the adoption of the constitution they had been clothed with,—that is, the right to decide all questions by a majority vote; and where commissioners are appointed, a decision by a majority of them is binding.—Serrell v. Patterson, 107 Mich. 234.

§ 111. Confirmation or rejection of award and new trial.

Excessiveness or inadequacy of compensation, see post § 112.

Procedure to confirm or reject, see post § 113.

Affidavits to impeach or sustain award, see post § 114.

Cause for challenge of juror presented for first time as ground for rejection of award, see ante ¶ 285.

Objection to confirmation of verdict as amounting to motion for new trial, see post ¶ 420.

Necessity of presenting reasons for or against confirmation in lower court, see post ¶ 418.

Erroneous instruction as ground for rejection of award, see ante ¶¶ 321, 322.

Furnishing jury with desired form of verdict as ground for setting aside, see ante ¶¶ 319, 320.

Attendance of court to decide law questions and swear witnesses as ground for setting aside award, see ante ¶ 308.
New proceedings after defective ones, see ante § 75.
Power of court to set verdict aside and grant new trial in proceedings by public corporation or state agency, see Comp. L. 1915, § 364.
Power of court to set aside verdict in general city and village proceedings, see Comp. L. 1915, § 3385.
Motions for new trial in proceedings by public corporation or state agency, see Comp. L. 1915, § 365.
Motion for new trial in general city and village proceedings, see Comp. L. 1915, § 3386.
Amendments of verdict in general city and village proceedings, see Comp. L. 1915, § 3385.

¶ 371. The confirmation of a report in condemnation proceedings is not a matter of strict right even upon a regular record. If substantial reasons are shown against it by facts not in the record itself, the court has power to do justice and refuse confirmation, and on appeal the same power exists.—Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 12.

¶ 372. Under How. St., chap. 93, § 10, providing that in condemnation proceedings on the incoming of the report the court shall "confirm the same * * * unless for good cause shown by either party" and that said court as to confirmation "shall have the powers usual in other cases," the court may set aside the award either for (1) fraud or misconduct of the jury, (2) gross errors or mistakes of the jury, (3) erroneous rejection or admission of evidence, (4) errors evincive of existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in discharge of the duty imposed on the jury, (5) inadequacy or excessiveness of damages.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 373. The provision in How. St., ch. 93, § 10, that the court shall have the power usual in other cases, as to the confirmation of the report of the commissioners or jury in condemnation proceedings instituted under the act, refers to the powers of the courts in the confirmation of reports made to them by bodies or persons authorized by law to make them in accordance with the practice of such courts.—Backus v. Wayne Circuit Judge, 89 Mich. 209.

¶ 374. A circuit court has no power to set aside the award and report of a jury in condemnation proceedings, and order a new trial or inquisition before a new jury, where the objections to the confirmation of the report are not based upon jurisdictional defects, under How. St., ch. 93, § 10, which provides that "on such report being made by the commissioners or jury, the court, on motion shall confirm the same on the next or any subsequent day, when in session, unless for good cause shown by either party" and further providing that "said court, as to the confirmation of such report shall have the powers usual in other cases."—Backus v. Wayne Circuit Judge, 89 Mich. 209.

¶ 375. The court before which proceedings are taken to acquire title to real estate for the use of a union railroad depot company has power to set aside a report or award and to order a new trial, even though the objections to confirmation are not based upon jurisdictional defects.—Fort-Street Union Depot Co. v. Backus, 92 Mich. 33. (Overruling Backus v. Wayne Circuit Judge, 89 Mich. 209.)

¶ 376. If, in proceedings to condemn land, a jury has been summoned under proper circumstances, has conducted its inquiries legally and with due regard to private rights, and has reached a legitimate conclusion as to the necessity for the condemnation and the compensation, the appropriation of the land on payment of such compensation will be lawful and will not be affected by collateral action by the judge or court.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 377. Where the land condemned by the commissioners appointed by the probate court, for corporate uses, has been actually appropriated by the railroad company after paying the award therefor under protest, the company cannot claim that the award should be set aside, as that would deprive the owners of their property without the necessity or the compensation being first determined, which the constitution forbids (Const. Art. XV, § 9).—Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

¶ 378. Whether under the statute a second award of damages for the condemnation of land for a union railroad depot company is final, quære.—Fort Street Union Depot Co. v. Backus, 103 Mich. 556; affirmed in 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

¶ 379. Under Pub. Acts 1883, No. 124 (H. St., § 3064k), providing that motions for a new trial in proceedings by cities and villages to condemn property for public use shall be made within two days after the rendition of the verdict, unless further time is allowed by the court, and that if no such motion is made, or, being made, is overruled, the court shall enter judgment confirming the verdict, and that such judgment, unless reversed by the supreme court, shall be final and conclusive, the power to grant a new trial is exhausted when a motion therefor has once been denied and the verdict confirmed.—Zoltowski v. Judge of Recorder's Court, 112 Mich. 349.

¶ 380. Where the trial court determines that the damages assessed by the jury in a

condemnation suit are insufficient, it is error to refuse to grant a new trial to the property owner on condition that the condemning party pay a larger sum than that awarded.—City of Grand Rapids v. Coit, 149 Mich. 668.

§ 112. ——Excessiveness or inadequacy of compensation.

See also ante ¶ 372.

Inadequacy or excessiveness of compensation as matter reviewed on appeal, see post § 132.

Evidence as to value to support award, see ante § 97.

Damages in excess of true value of property taken as intendment of condemnation statute, see ante ¶ 102.

¶ 381. The probate court in condemnation cases has power to set aside the report of commissioners for good cause shown, if, for example, the amount awarded is unreasonable, and indicates prejudice or impartiality or action upon a wrong basis of estimation. —Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

¶ 382. An award of $96,000 for constructing a railroad in a street fronting on claimant's planing mill property worth with all improvements not over $159,450 is so excessive as to warrant setting aside the award.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 383. A large discretion is left to the jury in relation to assessment of damages in condemnation proceedings and they are expected to use their own judgment and knowledge from a view of the premises and their experience as freeholders quite as much as from the testimony of witnesses to matters of opinion, hence the finding of the jury will not be disturbed where the question of damages is one about which different persons would greatly differ.—Marquette & S.-E. Ry. Co. v. Longyear, 133 Mich. 94.

§ 113. ——Procedure to confirm or reject.

Hearing on report of commissioners or jury in proceedings instituted by the State, see Comp. L. 1915, § 352.

¶ 384. The showing upon a motion to set aside an award is ordinarily made by affidavits and counter affidavits, but it is discretionary with the court to require oral testimony and cross-examination. — Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

¶ 385. The method of bringing to the court's attention the facts that warrant rejection of the award is largely in the discretion of the court, but such facts may be presented by affidavits or oral testimony upon which the court is bound to act.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 386. A probate order confirming a report of commissioners on condemnation of a railroad crossing is invalid if made out of term without notice to the respondent.—Michigan Cent. R. Co. v. Tuscola Probate Judge, 48 Mich. 638.

§ 114. ——Affidavits to impeach or sustain award.

Use of affidavits and counter affidavits on motion for rejection or confirmation, see also ante ¶¶ 384, 385.

¶ 387. Under Const. art. 18, section 2, the jury provided for in eminent domain proceedings and in proceedings to fix the value of land taken under the drain law has so far the character of a common law jury, that it is incompetent to show by one juror that the value of the land was fixed in the jury room by striking an average of the estimates furnished by each of the jurors, as a reason for not confirming their report.—Wixom v. Bixby, 127 Mich. 479.

¶ 388. The official report of the commissioners appointed by the probate court in proceedings to condemn land for railroad purposes should not ordinarily be outweighed by affidavits as to the value of the land and the damage thereto. Such evidence is, however, admissible on a motion to set aside the report.—Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

¶ 389. Commissioners in proceedings to condemn land for railway purposes are not like a common-law jury, and their individual affidavits are admissible to impeach their finding or to show, like any other fact, the rule of damages on which they proceeded.—Marquette, H. & O. R. Co. v. Houghton Probate Judge, 53 Mich. 217.

§ 115. Judgment or decree.

Right to execution for collection of judgment, see post § 120.

Lesser award on second proceedings with judgment for difference, see post § 121.

Judgment in eminent domain proceeding as bar or estoppel, see Former Adjudication.

Order and judgment made on payment of award in proceedings instituted by the State, see Comp. L. 1915, § 352.

¶ 390. Where, pending an appeal by a union depot company from an award of damages in condemnation proceedings in the circuit court the amount of the award was paid to respondents, and where, upon a second trial below a less sum was awarded, judgment is, under How. St., § 3468 (Comp. L. 1897, § 6366), properly entered for the petitioner for the difference between the two awards, and execution thereon is authorized by How. St., § 7664 (Comp. L. 1897, § 10300). —Fort Street Union Depot Co. v. Backus, 103 Mich. 556; affirmed in Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

§ 116. Costs and allowances.

See also post ¶ 481.

Allowance of attorney fees, see post ¶¶ 479, 480.

Right to execution for collection of costs, see post § 120.

Costs on appeal or certiorari, see post § 141.

Costs in other action or proceeding as element of damage, see ante § 42.

Proper items of costs in drain condemnations, see Drains § 47.

Allowance for attorney fee in general city and village proceedings, see Comp. L. 1915, § 3394.

Liability of railroad bridge or tunnel company to pay attorney fees to owners of lands condemned, see Comp. L. 1915, § 8249.

¶ 391. Where, upon a second trial in condemnation proceedings for a union railroad depot company, the award of damages is less than on the first, costs are properly awarded to the successful petitioner under H. S., § 3468.—Fort St. Union Depot Co. v. Backus, 103 Mich. 556; affirmed in 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

¶ 392. Where condemnation proceedings were affirmed on appeal so far as they related to the findings of the jury, but were reversed as to certain collateral orders, costs of the supreme court and also of the proceedings below were awarded to appellant.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 393. Disbursements for fees of witnesses and attorneys not allowed by any statute in condemnation proceedings under Detroit park and boulevard act.—Hester v. Commissioners of Parks of Detroit, 84 Mich. 450.

¶ 394. Fees of witnesses attending, in good faith, condemnation proceedings, may, under How. St., § 3064q, be taxed on proper affidavit.—Dorland v. Grand Rapids Superior Judge, 78 Mich. 182.

VI. PAYMENT OR ENFORCEMENT OF AWARD, AND RIGHTS IN SAME.

Award, finding and judgment in general, see ante §§ 102-116.

§ 117. In general; pendency of appeal or rehearing.

Payment into court for division, see post § 118.

Awards to estates or representatives, see post § 119.

Execution and enforcement of judgment, see post § 120.

Lesser award on second proceedings with judgment for difference, see post § 121.

Effect of payment of award on right to appeal, see post ¶¶ 407, 408.

Payment of award in general city and village proceedings, see Comp. L. 1915, § 3391.

When judgment to be paid in fourth class city proceedings, see Comp. L. 1915, § 3160.

Payment of award in village proceedings, see Comp. L. 1915, § 2815.

¶ 395. The owner of lands sought by a railroad company is not put in fault so as to be liable for the subsequent costs by refusing a tender; nor is he deprived of any rights by the mere deposit, pending appeal, of the sum awarded by the jury.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

§ 118. Payment into court for division.

Deposit in court pending appeal, see ante ¶ 395.

¶ 396. Where the commissioners in condemnation are unable to apportion the damages among the several respondents, an award in gross, subject to apportionment by the court, is proper under How. St., § 3338, providing that, in case of doubt as to whom the money belongs, the court may direct the some to be paid into court, and may determine who is entitled thereto.—Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co., 106 Mich. 473.

§ 119. Awards to estates or representatives.

Title and right of representative in property and assets of estate, see Estates of Decedents, IV.

Collection of assets and properties of estate in general, see Estates of Decedents, V, B.

¶ 397. In condemnation proceeding an award in favor of an estate should be paid to executor.—City of Detroit v. Schilling, 93 Mich. 429.

¶ 398. An award paid to an executrix under the condemnation of land belonging to the estate (Sess. L. 1834, pp. 40, 44; 3 Terr. L. 1289) would be sustained, under Rev. Stat. 1846, p. 288, § 7, as paid not only for her personal interest, but for those which she represented as executrix.—Barlage v. Detroit, G. H. & M. R. Co., 54 Mich. 564.

§ 120. Execution and enforcement of judgment.

Lesser award on second proceedings with judgment for difference, see post § 121.

¶ 399. Execution will not issue against a railroad company to enforce payment of either damages or costs allowed in condemnation proceedings; unless such payment is made in sixty days the title of the owner to the land is not divested.—Derby v. Gage, 60 Mich. 1.

¶ 400. No execution for costs in railroad condemnations since they are on the same footing as the damages.—Derby v. Gage, 60 Mich. 1.

§ 121. ——Lesser award on second proceedings with judgment for difference.

See also ante ¶ 390.

¶ 401. Under the express provisions of How. St., § 3468, judgment is to be entered against the landowner for the difference and costs of appeal, if on an appeal from an award he recovers a lesser sum on the second assessment of damages; and the statute clearly contemplates entry of such judgment and issuance of execution thereon, the general statute (How. St., § 7664) providing for execution on any judgment rendered in any court of record and such a proceeding being in the circuit court.—Fort St. Union Depot Co. v. Backus, 103 Mich. 556; affirmed in Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

VII. RIGHT TO POSSESSION PENDING VESTING OF TITLE.

§ 122. In general.

Nature of title acquired in general, see post § 149.

Effect of taking possession before condemnation, see ante § 10.

Right to trespass or action for damages for illegal occupancy, see post § 145.

Denial of injunction against railroad taking possession pending vesting of title, see post ¶ 490.

Effect of taking possession under court order on right to appeal from award, see post ¶¶ 407, 408.

Jurisdiction of probate court to make interim order for possession, see Probate Courts, I.

When right to possession accrues to the State, see Comp. L. 1915, § 352.

When right to possession accrues to public corporation or state agency, see Comp. L. 1915, § 368.

Right to possession on the filing of treasurer's certificate in fourth class city proceedings, see Comp. L. 1915, § 3160.

Right to possession after award is in treasury but before payment in general city and village proceedings, see Comp. L. 1915, § 3391.

Right to possession of village when compensation awarded is in treasury, see Comp. L. 1915, § 2815.

Right to possession on payment of award by railroad, bridge or tunnel company, see Comp. L. 1915, § 8257.

Effect of appeal on possession of land in railroad, bridge or tunnel proceedings, see Comp. L. 1915, § 8257.

¶ 402. That a court has refused to enjoin a condemnor from taking possession of land for its road before condemnation and payment does not legalize possession taken by it before such acts.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 402a. An order under How. St., § 3340, allowing possession to be taken of lands sought to be condemned pending proceedings therefor, when, after failure of a first attempt to condemn them, by reason of defects in the proceedings, a second attempt is made, cannot, if it can be granted at all, be granted without full notice and an adequate hearing; and the probate court has never power to make such an order.—Detroit, L. & N. R. Co. v. Livingston County Probate Judge, 63 Mich. 676.

¶ 402b. How St., § 3340, allowing an order to be made permitting possession to be taken of lands sought to be condemned, pending a second attempt to condemn them after a first attempt has failed by reason of defective proceedings, does not apply where one railroad seeks to cross another.—Detroit, L. & N. R. Co. v. Livingston County Probate Judge, 63 Mich. 676.

VIII. APPEAL AND REVIEW OF JUDGMENT AND AWARD.

§ 123. Mode of review and jurisdiction to review.

Right to appeal and allowance of appeal, see post § 124.

Appellate procedure, notice and record, see post § 125.

Saving questions for review, see §§ 126-128.

Scope of appeal and matters reviewable, see post §§ 129-132.

Review on certiorari and grounds for writ, see post §§ 133-138.

Grounds for reversal and harmlessness of error, see post § 139.

Law of case in subsequent proceedings, see post § 140.

Costs on appeal or certiorari, see post § 141.

Propriety of certiorari as to questions which may be raised on appeal, see post ¶ 462.

Province of supreme court on appeal in reviewing findings of fact, see post § 131.

State decisions presenting Federal question reviewable by United States Supreme Court, see Courts § 91.

State decisions as rule in Federal courts, see Courts § 29.

Appeal or other review of highway opening proceedings, see Highways, II, B.

Remedy by mandamus, see Mandamus, II.

Appeal from judgment of court confirming verdict in proceedings by public corporation or state agency, see Comp. L. 1915, § 365.

Right of appeal from judgment of probate court to circuit court in fourth class city proceedings, see Comp. L. 1915, §§ 3150-3152.

Appeal in general city and village proceedings, see Comp. L. 1915, § 3387.

Appeals by railroad, bridge and tunnel companies, see Comp. L. 1915, § 8257.

¶ 403. An appeal to the circuit court from an order in condemnation proceedings in the probate court, is not authorized by section 699, Comp. Laws 1897.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

¶ 404. Comp. L. 1897, § 669, being the general statute for appeals from an order, sentence, decree or denial by the probate judge, does not admit of an appeal from his decision in a condemnation case on cause shown against the appointment of commissioners or a jury that the proposed taking was for a private use and therefore beyond the jurisdiction, or of an appeal from any other order or determination of the probate court or the judge thereof in such a proceeding; since condemnation proceedings are not a part of the ordinary and general jurisdiction of that court, but are special and summary proceedings authorized by statute.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668, overruling anything to the contrary in Defoe v. Bay Circuit Judge, 116 Mich. 567 and Pere Marquette R. Co. v. United States Gypsum Co., 148 Mich. 308.

¶ 405. In a condemnation proceeding by a railroad the appearance and showing of cause by a person affected as permitted by Comp. L. 1897, § 6245, presents a question for the probate court whether the commissioners should be appointed to appraise damages; and the settled practice is to review the decision, if favorable to the petitioner, by certiorari seasonably instituted or by the statutory appeal from the award or report, as provided in Comp. L. 1897, § 6248, if the case has gone to that stage.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

§ 124. Right to appeal and allowance of appeal.

Right to ejectment where based on irregularities in condemnation proceedings reviewable on appeal, see post ¶ 506.

¶ 406. Any one—e. g., a mortgagee—whose rights are affected by the result of condemnation proceedings may appeal, even though there has been a discontinuance as to him.—Michigan Air Line R. Co. v. Barnes, 40 Mich. 383.

¶ 407. Under How. St., §§ 3467, 3468, in condemnation proceedings by a union railroad depot company, payment of damages by order of court and taking possession of the property do not constitute an abandonment of the company's right to appeal from the award.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

¶ 408. Right to appeal from award of damages against it is not lost by depot company's paying award and occupying condemned land pending appeal.—Fort St. Union Depot Co. v. Peninsular Stove Co., 103 Mich. 637.

¶ 409. The general provisions of the laws regulating procedure in the probate courts do not apply to special proceedings for the condemnation of land; hence section 674, Comp. Laws 1897, authorizing the circuit court to allow appeals from the acts of the probate judge where the person aggrieved has omitted to claim an appeal, does not apply to a case where plaintiff failed to appeal within the time provided by statute in condemnation proceedings.—Stapleton v. Macomb Circuit Judge, 151 Mich. 210.

§ 125. Appellate procedure, notice, exceptions and record.

[Note. While in many particulars appellate procedure in eminent domain proceedings is the same as in ordinary writs or appeals, yet because such review is statutory it is treated separately. The general topic Appeal should be consulted in connection with this.]

New appraisal on appeal in railroad, bridge or tunnel proceedings, see Comp. L. 1915, § 8257.

¶ 410. Under How. St., § 3337, requiring a "specification" of objections, the notice of appeal from the jury's report in condemnation proceedings must point out the errors and defects complained of with such particularity that the attention of the appellee and the court will be at once precisely directed to them.—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 411. Under How. St., § 3337, requiring that a notice of appeal from an appraisal or report in proceedings to condemn lands for railroad uses "shall specify the objections to the proceedings," an objection in the notice of appeal that the court did not have jurisdiction to appoint the commissioners or to confirm their report is too general.—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 412. Objections in the notice of appeal to the petition and award must be clearly specified.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 413. An objection that the award of a jury in proceedings to take land "is against the law and evidence in the case" cannot show what objections are deemed waived, and is insufficient to raise any question.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 414. Whether a bill of exceptions is appropriate for bringing up questions on appeal in condemnation proceedings under the railroad law of 1873, quære.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 415. When a party seeks a ruling on which to base an appeal if it is wrong, he cannot rely on the judge's private knowledge of facts, but must bring them into the case in some authoritative and responsible form, so that they may become a part of the record for the purposes of the review.—Detroit, West. Trans. & J. R. Co. v. Crane, 50 Mich. 182.

¶ 416. The findings of a jury in proceedings for the condemnation of land will not be set aside unless upon objections raised in the record and unless the record shows that the proceedings were erroneous.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

¶ 417. An award in a condemnation proceeding may be set aside on appeal for the disqualification of a juror.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

§ 126. Saving questions for review.

Acquiescence and waiver, see post § 127.
Jurisdictional defects, see post § 128.
Necessity of having objections raised in record for review, see ante ¶¶ 415, 416.
Necessity of urging cause for challenge at time of impaneling jury, see ante ¶ 285.
Mode and sufficiency of objections to save questions for review in ordinary actions and suits, see Saving Questions.

¶ 418. In reviewing proceedings for the condemnation of lands, the supreme court cannot consider any reasons against the confirmation of the report of the jury except those which were presented to the lower court.—Detroit, West. Trans. & J. R. Co. v. Crane, 50 Mich. 182.

¶ 418a. On appeal from a judgment against a tenant claiming damages to its leasehold by reason of destruction of access by separating grades at a railroad crossing material points affecting the right to damages and the amount allowable will not be considered where they were not made below.—City of Detroit v. C. H. Little Co., 141 Mich. 637.

¶ 419. The failure to except to a verdict in condemnation proceedings by a city against a railroad company on the ground that no allowance was made for keeping the crossing of the proposed street in repair will prevent consideration of the objection on appeal.—Village of Royal Oak v. Detroit, G. H. & M. R. Co., 138 Mich. 294.

¶ 420. The objection to witnesses and jurors mingling freely with bystanders and being served meals, cigars and drinks, etc., at the expense of petitioner's representatives, on the occasion of viewing the premises, in condemnation of land proceedings, was seasonably made upon objection to confirmation of the verdict; since that amounted to the same thing as a motion for a new trial.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

¶ 421. Where in a proceeding by a street railway company to condemn land to build an embankment to carry its tracks over a railroad, the issue is whether the company's right is restricted by statute to building a trestle, if the company does not aver that it had secured the permission of a village to lay its track and operate its cars upon the land sought to be condemned and the failure to do so is not made the ground of objection, such point will not be considered on appeal.—Detroit United Ry. v. Barnes Paper Co., 172 Mich. 586.

§ 127. ——Acquiescence and waiver.

Appearance and waiver of notice of proceedings, see also ante ¶ 237.
Acceptance of gross award as waiver of right of apportionment, see ante ¶ 362.

¶ 422. An assignment of error upon the action of the court in permitting an adjournment in condemnation proceedings before the sheriff had returned his list of jurors cannot be considered, where the record shows that the parties consented to the adjournment.—Ann Arbor R. Co. v. Beach, 110 Mich. 209.

¶ 423. An objection that the record in a proceeding for the condemnation of land does not show that the jurors were residents of the county, will not be considered on appeal where not raised in the court below but the parties appeared and took part in the trial.—Benton Harbor Terminal Ry. Co. v. King, 131 Mich. 377.

¶ 424. Refusal of the jury to hear counsel after the testimony had been heard and the premises viewed, in a condemnation proceeding, is not reversible error where it does not appear that counsel insisted upon being heard.—Benton Harbor Terminal Ry. Co. v. King, 131 Mich. 377.

¶ 425. The objection on appeal in proceedings to condemn land under the union railroad depot act, that the jury was not attended by a circuit judge or circuit court commissioner, will be regarded as waived by petitioner where it proceeded without request that the jury be so attended.—Fort Street Union Depot Co. v. Backus, 92 Mich. 33.

§ 128. ——Jurisdictional defects.

¶ 426. Jurisdictional defects in proceedings to condemn land will defeat the proceedings at any stage, whether relied on or not.—Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42.

¶ 427. The objection that a stockholder in the condemnor railroad corporation sat as a juror may be raised in the supreme court for the first time.—Peninsular Ry. Co. v. Howard, 20 Mich. 18.

§ 129. Scope of appeal and matters reviewable.

Construction and effect of the record and presumptions thereon, see post § 130.
Verdicts and findings on the evidence, see post § 131.
Inadequacy or excessiveness of award, see post § 132.
Mode and scope of review in ordinary appeals and writs of error, see Appeal, XII.

Hearing on appeal in proceedings by public corporation or state agency, see Comp. L. 1915, § 367.

¶ 428. An appeal from confirmation of an award or report brings before the supreme court the entire case as it stood before the confirmation.—Peninsular Ry. Co. v. Howard, 29 Mich. 18; Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506; Toledo, A. A. & N. M. R. Co. v. Munson, 57 Mich. 42.

§ 130. ——Construction and effect of the record and presumptions thereon.

Presumptions on record in certiorari, see post ¶ 461.

¶ 429. Unless there are indications to the contrary the presumption is that all evident facts bearing on the amount of damages were taken into account.—Michigan Air Line Ry. Co. v. Barnes, 44 Mich. 222; Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 430. It cannot be said in a street opening case that the jury made no award for damages to business of an abutter, where there was evidence that the land alone was worth only $3,000, and that there was space enough left for respondents to carry on their business, and where the award was about $4,500.—City of Detroit v. John Brennan & Co., 93 Mich. 338.

¶ 431. Where the record in a condemnation proceeding does not contain all the testimony it cannot be said that there was no evidence of public necessity for taking the lands.—Benton Harbor Terminal Ry. Co. v. King, 131 Mich. 377.

¶ 432. In a condemnation proceeding where the record does not contain all the evidence, it cannot be said on appeal that there is no evidence that the petitioner had been unable to acquire title to the land.—Benton Harbor Terminal Ry. Co. v. Hall, 131 Mich. 384.

¶ 433. The landowner appellant from a condemnation proceeding need not affirmatively show that he was injured by the interference of bystanders and the counsel for the condemnor with the jury on the occasion of a view of the premises to be taken.—Detroit & Toledo S. L. R. Co. v. Campbell, 140 Mich. 384.

¶ 434. Where the jury in proceedings to condemn land for a railroad take all measures that they would if they were personally concerned to acquire a knowledge of the value of the land and of the injury the road is likely to cause it, it is presumable on review that further evidence as to the public importance of the work and as to amounts of compensation to other owners would not have influenced their judgment.—Detroit, West. Trans. & J. R. Co. v. Crane, 50 Mich. 182.

§ 131. ——Verdicts and findings on the evidence.

¶ 435. The finding in proceedings to condemn land that the taking thereof is necessary is conclusive if there is evidence to support it.—Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

¶ 436. The jury having determined the necessity, the supreme court will not review the question further than to ascertain that there was evidence to support the verdict.—Saginaw, T. & H. R. Co. v. Bordner, 108 Mich. 236.

¶ 437. It is not within the province of the court to review questions of fact, on appeal of condemnation proceedings brought by a railroad company, further than to see that the finding is supported by the evidence.—Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

¶ 438. Inasmuch as the range of inquiry on the matter of damages is very wide, the object being to recompense the landowner for his entire loss, it is not within the province of the supreme court to review the inquiry further than to see that the finding is supported by the evidence.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

¶ 439. The finding of the jury in condemnation proceedings as to the public necessity for the railroad in question was not disturbed, as the judge before he impaneled the jury, and the jury in making an award, must have been satisfied as to the point.—Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302.

¶ 440. In a railroad condemnation case where there was dispute as to whether the defendant had asked an unreasonable price and as to whether a bona fide attempt to agree had been made by the company, the finding of the jury on those questions was not disturbed, where a large number of witnesses had been called as to the value of the land in question and the testimony was as far apart as it well could be, and where the jury had viewed the land.—Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302.

§ 132. ——Inadequacy or excessiveness of award.

Evidence as to value to support award, see ante § 97.

Excessiveness or inadequacy as grounds for rejection of award, see ante § 112.

¶ 441. An award of damages and compensation for property taken for railway purposes will not be disturbed on review unless grossly inadequate, or so inadequate as to give rise to the inference that the jury or

commissioners acted on a wrong basis.—Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350.

¶ 442. On appeal from the report in condemnation for a railroad the finding of a jury is not conclusive as to the amount of damages; and such finding will be set aside where it appears that the award is in disregard of uncontradicted testimony and of proper elements of damage.—Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390.

¶ 443. The award of damages in proceedings to condemn land is conclusive on review unless the authorities making it have misconceived the law and have not fully considered all the essential elements of the injury done to the landholder.—Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

¶ 444. An award of damages in condemnation proceedings will not be vacated unless clearly against evidence.—Fort-Street Union Depot Co. v. Jones, 83 Mich. 415.

¶ 445. Where an award in a railroad condemnation proceeding is within the range of testimony it will not be reversed on technical grounds, or because the damages are apparently excessive or inadequate.—Chicago, D. & C. G. T. Junction R. Co. v. Simons, 200 Mich. 76.

¶ 446. In condemnation proceedings for a railroad right of way, where the jury, having viewed the premises and heard proofs and argument of counsel, allowed the several owners substantial damages in each case, held that respondents could not be heard to complain as to the theory of the application of benefits to damages adopted by the jury.—Detroit, B. C. & W. R. Co. v. First Nat. Bank of Yale, 196 Mich. 660.

¶ 447. An award in a condemnation proceeding will not be disturbed on the ground of inadequacy, when within the maximum and minimum value of the property taken as fixed by the witnesses.—City of Detroit v. Gray, 183 Mich. 193.

¶ 448. An award of compensation in a proceeding to condemn suburban land for railroad purposes will be set aside on appeal to the supreme court where the jury's award is plainly based upon the value of the land for farming purposes and there is evidence that it has a much greater value for subdivision and platting purposes.—Chicago, D. & C. G. T. Junction R. Co. v. Simons, 200 Mich. 76.

§ 133. Review on certiorari; grounds and propriety of writ.

See also ante ¶ 405.

Judgments and proceedings reviewable, see post § 134.

Time for writ to issue, see post § 135.

Objections to writ and quashal or dismissal, see post § 136.

Return to writ and effect of return, see post § 137.

Scope and subjects of review, see post § 138.

Certiorari in general and procedure therein, see Certiorari.

¶ 449. Questions that do not go to the jurisdiction of the court to entertain proceedings to condemn land for railroad use, and which can as well be raised on appeal, should not be brought up on certiorari.—Grand Rapids, L. & D. R. Co. v. Weiden, 69 Mich. 572.

§ 134. ——Judgments and proceedings reviewable.

¶ 450. Certiorari will lie to review proceedings to condemn land when void for want of jurisdiction; though it should not be favored where any other remedy is adequate.—Dunlap v. Toledo, A. A. & G. T. R. Co., 46 Mich. 190.

¶ 451. In proceedings to condemn lands for the improvement of navigation, the order appointing commissioners to determine the necessity of the taking, and to ascertain the damages, etc., is not interlocutory merely, but is final so far as any action by the court is concerned, and may be reviewed at once on certiorari.—Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204.

¶ 452. Where on an appeal to the supreme court from the confirmation of the report of a jury in condemnation proceedings a new appraisal is directed to be made before a new panel, a common-law certiorari lies, if taken in proper season, to correct grave errors committed by the jury in their proceedings, affecting injuriously the rights of the parties; but such correction will not extend to the final facts to be adjudicated upon by the jury, namely, the necessity for taking the property for the public use, and the just damages or compensation to be made therefor.—Backus v. Wayne Circuit Judge, 89 Mich. 209.

¶ 453. Certiorari is the proper remedy for review of the order of the circuit court, where it attempted to entertain an appeal from the probate court's dismissal of a condemnation proceeding by a railroad taken under Comp. L. 1897, § 669, and to retain such case for trial on the merits.—Pere Marquette R. Co. v. United States Gypsum Co., 148 Mich. 308, per McAlvay, C. J., Blair, and Ostrander, JJ., holding it was proper because the circuit court's order might be regarded as in effect the same as a reversal and remand and an attempt by the circuit to exercise jurisdiction thereafter; Carpenter, Montgomery and Moore, JJ., impliedly concurring with them, by voting for mandamus on the ground that the other modes of review were inadequate, though they expressed no opinion that certiorari was proper, if adequate. This was affirmed on the hearing of the order to show cause issued in the case, the ground of affirmance being that such a proceeding and

the order therein could in no wise be appealed to the circuit court under Comp. L. 1897, § 669, not being an order of the probate court as such within its ordinary and general jurisdiction to which the statute applies; and accordingly that, the circuit being without jurisdiction because of the nullity of the appeal, certiorari would have been proper, if seasonably sought for.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

¶ 454. The determination of the court, on the issue which may be raised under section 6245, Comp. Laws 1897, providing that on presentation of a petition for condemnation, all persons whose interests are to be affected by the proceedings may show cause against the prayer of the petition, and may disprove any of the facts alleged therein, may be reviewed by certiorari, whatever the form in which cause is shown of record: but it is not contemplated that cause shall be shown by a series of special pleadings, the decision upon each of which may be separately reviewed.—Chicago & K. Terminal R. Co. v. Grand Rapids & I. Ry. Co., 153 Mich. 686.

¶ 454a. Upon granting mandamus to compel a circuit judge to vacate an order setting aside condemnation proceedings upon the ground that an appeal did not lie to the circuit court from the probate court, the petitioner may be granted leave to have a writ of certiorari to review the action of the probate court, the time for a common-law writ of certiorari having expired.—United States Gypsum Co. v. Kent Circuit Judge, 150 Mich. 668.

§ 135. ——Time for writ to issue.

¶ 455. A writ of certiorari in cases involving interference with important works ought not to be allowed unless applied for as soon as practicable; and, if granted after the expiration of the twenty days allowed for an appeal in proceedings to condemn land, will not be sustained unless under circumstances clearly explaining and accounting for the delay.—Dunlap v. Toledo, A. A. & G. T. R. Co., 46 Mich. 190.

¶ 456. In proceedings to condemn land for railroad uses the point that the statute is unconstitutional because authorizing the taking of land before having made compensation for the same is prematurely raised at the early stage of an inquest, and cannot be brought up on certiorari.—Grand Rapids, L. & D. R. Co. v. Weiden, 69 Mich. 572.

¶ 457. The circuit court in condemnation proceedings overruled certain preliminary objections made by defendant, and ordered a jury to determine the necessity of taking the property, and to fix damages therefor. Held, the supreme court would not entertain before a verdict a writ of certiorari bought by defendant to review the lower court's rulings on the objections.—Michigan Cent. R. Co. v. Miller, 158 Mich. 88.

§ 136. ——Objections to writ; quashal or dismissal.

¶ 458. A certiorari removing condemnation proceedings to the supreme court was not retained where the questions raised were such as could be raised by certiorari or appeal after the inquest of damages, and the retention of the writ was likely to do injury by delaying the proceedings.—Detroit Western Transit & Junction R. Co. v. Backus, 48 Mich. 582.

§ 137. ——Return to writ and effect of return.

¶ 459. While a probate judge may adopt the stenographer's notes of testimony taken in a condemnation proceeding as his own, and certify the evidence as shown by such notes, he is not obliged to do so, nor can such notes be resorted to for the purpose of impeaching his return to a certiorari.—Traverse City, K. & G. R. Co. v. Seymour, 81 Mich. 378.

¶ 460. The return of a judge of probate to a certiorari sued out by respondents to review condemnation proceedings, if responsive and covering the points of error appearing in the affidavit, is conclusive upon the respondents and the court.—Traverse City, K. & G. R. Co. v. Seymour, 81 Mich. 378.

¶ 461. An award in condemnation proceedings will not be disturbed on certiorari upon the ground that one of the jurors was not a freeholder, even though the testimony in the record fails to show that he is such, where the trial judge states in his return that only a small part of the testimony is included therein.—Ann Arbor R. Co. v. Beach, 110 Mich. 209.

§ 138. ——Scope and subjects of review.

¶ 462. It is the policy of the supreme court, both in civil and criminal cases, to refuse to hear upon certiorari questions which may be raised upon a final hearing before it, after a full hearing in the trial court. This rule has been applied in condemnation proceedings, and will be adhered to when practicable.—Pere Marquette R. Co. v. United States Gypsum Co., 148 Mich. 308.

¶ 463. The exclusion of evidence of the value of the property and other land in the vicinity offered to support the answer on the issue as to a previous bona fide effort to purchase is such error as to be reviewable on certiorari.—Grand Rapids, L. & D. R. Co. v. Weiden, 69 Mich. 572.

¶ 464. The corporate existence of a company and its right to exercise corporate franchises cannot properly be passed upon by the inferior tribunals for assessing damages in condemning lands, and cannot therefore be considered on certiorari to review their ac-

tion.—Schroeder v. Detroit, H. & M. R. Co., 44 Mich. 387.

¶ 465. Under a petition for certiorari to review condemnation proceedings, assignments of error not discussed in the petitioner's brief, but only argued in the petition itself, will not be considered by the supreme court.—Board of Education City of Holland v. Van Der Veen, 169 Mich. 470.

§ 139. Ground for reversal or harmlessness of error.

Erroneous evidence made harmless by view, see ante ¶ 337.

Doctrine of harmless error as generally applied, see Harmless Error.

Use of phonograph to show noise as harmless error because reproduced noise was less than original, see also Harmless Error.

¶ 466. Where the evidence showed that before the petition was sworn to no sufficient effort was made to settle with the owner, but that such effort was made before it was filed and the proceeding was moved in the probate court, the supreme court on appeal from the report reluctantly allowed the petition to stand without being resworn or presented anew.—Grand Rapids & I. R. Co. v. Welden, 70 Mich. 390.

¶ 467. Proceedings to condemn land will not be set aside for errors in admitting or excluding testimony, unless the errors controlled result.—Fort-Street Union Depot Co. v. Jones, 83 Mich. 415.

¶ 468. Rulings on the admission of testimony in proceedings by commissioners or a jury for the condemnation of lands for railroads will not be reviewed on appeal to the supreme court unless they have done substantial injustice.—Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506.

¶ 469. Although a statement in the charge in a railroad condemnation case, that "it has been repeatedly held that railroads are public necessities," standing alone might have been open to the objection that it removed the question of necessity from the jury, there was no error, in view of the remainder of the charge which fully instructed the jury upon the necessity of the road and the taking of the land in question.—Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302.

¶ 470. Questions raised over the introduction of evidence on proceedings by a railroad for the condemnation of land, cannot ordinarily be considered on appeal, though evidence clearly improper might justify a reversal of confirmation, should it appear that it had caused a substantial error on the part of the jury. Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384.

¶ 471. The award of the jury in proceedings to condemn lands for railroad uses will not be set aside merely because of the admission of testimony that would not have been admissible under strict legal rules, unless it appears to have caused substantial injustice. Detroit, West. Trans. & J. R. Co. v. Crane, 50 Mich. 182.

¶ 472. Questions raised over the introduction of evidence will not ordinarily be considered by the supreme court in condemnation proceedings, although it may be true where clearly improper evidence was received it might justify a reversal of confirmation should it appear that it had caused substantial error on the part of the jury.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

¶ 473. In condemnation proceedings for the right of way for a railroad errors in the admission of evidence as to the feasibility of other lines are harmless where the jury had found it necessary for the petitioner to occupy the street named in his petition.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

¶ 474. Even if it were held error (and it was held not to be) to allow the introduction of phonographic records of sounds and noises claimed to have been caused by the operation of trains in proximity to the landowner's hotel, its mild reproduction of sounds could not have so seriously prejudiced petitioner in a condemnation proceeding for a right of way for a railroad, as to require a reversal on that ground.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

¶ 475. In condemnation proceedings verdicts for damages will not be set aside because of improper arguments of counsel as to damages where the court has carefully given the jury the proper rules for their guidance, and instructed them to disregard the argument complained of as improper, unless it seems probable that such argument actually affected the verdict.—City of Detroit v. C. H. Little Co., 146 Mich. 373.

¶ 476. As the rule of damages and benefits where property is taken for a public way in Detroit must be the same whether the land taken and that benefited are owned by the same or different persons, the city cannot be injured by the exclusion, in condemnation proceedings, of evidence that deeds severing the ownership were made collusively so as to avoid the erroneous rule allowed by the charter and followed in the recorder's court.—City of Detroit v. Chaffee, 68 Mich. 635.

§ 140. Law of case in subsequent proceedings.

Law of the case in second appeals or on retrials of ordinary actions and suits, see Appeal, XII, G, XV.

¶ 477. A condemnation petition was sustained in a former appeal against a demurrer but was dismissed for lack of proof that petitioner had taken the necessary preliminary steps. An amended petition was filed in the circuit court embodying everything

contained in the former petition and making the same fuller and more complete. Held, the supreme court must necessarily overrule a demurrer to the amended petition.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

§ 141. Costs on appeal or certiorari.

See also ante ¶ 392.

Costs on proceedings in general, see ante § 116.

Costs in other proceedings as element of damage, see ante § 42.

Award of costs on appeal in proceedings by public corporation or state agency, see Comp. L. 1915, § 367.

¶ 478. Under an eminent domain statute (How. St., § 3468), providing that on being awarded an increased compensation by the second report "all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefore and for all costs of appeal shall be rendered against the party so appealing," the last quoted word "appealing" means the unsuccessful party, and not an appellant which succeeds in having the award reduced.—Fort St. Union Depot Co. v. Backus, 103 Mich. 556, affirmed in 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

¶ 479. Comp. L. 1897, § 6240, providing for costs and attorney fees in condemnation proceedings makes the circuit judge the final arbiter as to the amount of the attorney fees to be awarded and the supreme court cannot review his determination.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

¶ 480. Under Comp. L. 1897, § 6240, providing for the allowance by the court of reasonable attorneys' fees in addition to the award by the jury in condemnation proceedings, the award for such fees was not reviewable, as the only provision for appeal in such proceedings is contained in section 6248, which provides only for appeal "from the appraisal or report of the commissioners or jury."—Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302.

¶ 481. Where proceedings to condemn lands were affirmed so far as the findings of the jury were concerned, but beyond that were reversed, costs of the supreme court and of the proceedings below were allowed to the appellants.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456.

IX. INJUNCTION, ACTION FOR DAMAGES AND OTHER INDIRECT REMEDIES; COLLATERAL ATTACK.

§ 142. Indirect remedies in general.

Injunction and equitable relief in general, see post §§ 143, 144.

Trespass and actions for damages, see post § 145.

Ejectment, see post § 146.

Collateral attack, see post § 147.

Compulsion of condemnation proceedings by mandamus, see Mandamus, II.

¶ 482. Proceedings to condemn land for railroad uses are purely statutory; the remedies therein provided are exclusive, and cannot be extended beyond those contained in the statute.—Derby v. Gage, 60 Mich. 1.

¶ 483. Where the owner of land has allowed a railroad company to build and operate a road over it with the understanding that the rights of parties as to damages should be adjusted thereafter, and the company takes statutory proceedings to fix the damages, the owner should present all his claims for settlement in these proceedings, and cannot split his demand and reserve part of it for future litigation. But if such proceedings are not resorted to, he would have a suitable remedy for the enforcement of his rights otherwise.—Harlow v. Marquette, H. & O. R. Co., 41 Mich. 336.

§ 143. Equitable relief in general; injunction.

Right to damages where injunction is violated, see post ¶ 496.

Effect on right to possession of refusal of court to enjoin condemnor from taking possession before condemnation, see ante ¶ 402.

General law of injunctions, except the propriety of injunction as a remedy for illegal taking, see Injunctions.

Injunction against use pending appeal, see Appeal, ¶ 612.

Jurisdiction to restrain occupation of land pending review of condemnation proceedings in supreme court, see Courts § 51, ¶ 168.

Estoppel to seek injunction, see Estoppel, III.

Acceptance of compensation as working estoppel to ask injunction, see Estoppel, III.

Unfeasibility of complete relief in specific performance suit because of necessity of jury to condemn, see also Equity ¶ 873.

¶ 484. Equity jurisprudence does not include the exercise of eminent domain. The necessity of taking property and the ascertainment of damages are not cognizable by bill in equity brought to amend the proceedings of the proper tribunal.—Clark v. Drain Com'r, 50 Mich. 618.

¶ 485. Injunction is a proper remedy by an abutter against a railroad company which under color of authority from city authorities and under claim of a reserved right is proceeding to build a general railroad in a street without condemnation of the plaintiff's rights in the use of such street, which the railroad will destroy.—Riedinger v. Marquette & W. R. Co., 62 Mich. 29.

¶ 486. In an injunction suit against the construction of numerous tracks in a street

under claim of authority from the city and also under a reservation in a plat of right to the plattor to occupy any street with its railroad, the validity of the reservation is not material, if it appears that the proposed use by the railroad company is an additional burden and use beyond that reserved.—Riedinger v. Marquette & W. R. Co., 62 Mich. 29.

¶ 487. An electric railway company which, without exercising the right of eminent domain, forcibly took possession of a strip of land on the side of a highway, cut down trees and laid its tracks upon such strip, although the owners attempted to prevent such acts, was required by a mandatory injunction to remove such tracks; and the taking of proofs to ascertain the damage was likewise ordered.—Freud v. Detroit & P. Ry. Co., 133 Mich. 413.

¶ 488. Under Comp. Laws 1897, § 6234, How. 2nd Ed., § 6587, providing that a railroad shall not be constructed on a street until damages and compensation be made to abutting property owners, an abutting property owner who has not been compensated may insist that construction work be enjoined until he receives compensation, even though the railroad is not to be constructed in front of his premises.—Horton v. Grand Rapids & I. Ry. Co., 199 Mich. 472.

¶ 489. Under a city franchise for the occupancy of a street for a railroad, providing that before the street shall be occupied by the tracks the claims and rights of abutting owners within the prescribed limits shall be adjusted either by agreement or by condemnation proceedings, an abutting property owner on such street within the prescribed limits is entitled to an injunction restraining construction work until compensation is given or settlement made, although the railroad company does not contemplate extending its line to or past such owner's premises.—Horton v. Grand Rapids & I. Ry. Co., 199 Mich. 472.

¶ 490. Where a railroad corporation had, in good faith, obtained an assessment of damages for land needed for their road long before they wanted the use of it, and afterwards, when any delay would have been injurious to them, and while the confirmation of the inquisition was pending in the supreme court, to which it had been reserved, had tendered the damages assessed and proceeded to use the land, an injunction to restrain the use was refused, notwithstanding the inquisition was not valid until confirmed; inasmuch as the corporation could only be delayed, and could not be prevented from finally obtaining the land.—Mercer v. Williams, W. 85.

§ 144. ——Relief on condition.

¶ 491. An injunction against the construction of a railroad in a street without condemnation of the property rights of plaintiff abutter was made to run for six months with a provision that, if within that time the defendant should not in some legal manner acquire the rights of plaintiff, the decree should be revived and made perpetual.—Riedinger v. Marquette & W. R. Co., 62 Mich. 29.

¶ 492. In dismissing a bill to enjoin interference with a crossing which complainant had made by violent and illegal methods over defendant's road, the court, in order to end the controversy, and as a condition of granting the affirmative relief asked by defendant, made a decree—conditioned on defendant's assenting thereto—appointing the members of the state board commissioners to adjust the crossing, and to estimate the compensation to be paid therefor.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 63 Mich. 645.

§ 145. Trespass and actions for damages.

Right to action for illegal occupancy before condemnation, see ante § 41.

Sufficiency of allegations in nuisance to admit of recovery of damages for taking the property, see also Damages ¶ 985.

General law of trespass, see Trespass.

Right of action for nuisance in general, see Nuisance.

Effect of condemnation proceedings on pending suit for damages, see also Abatement § 14, ¶ 52.

¶ 493. It is an actionable trespass to apply force in subjecting land for public street use when the necessity of the taking, as well as the measure of compensation, has not been determined in a legal way and no public easement exists.—Sheldon v. Village of Kalamazoo, 24 Mich. 383.

¶ 494. Where the land was actually occupied by a tenant, the landlord's right of action for trespass upon the premises under void condemnation proceedings goes with land and attaches only to his reversionary interest, and is condemned and appropriated therewith, and disappears when subsequent valid proceedings are taken as permitted by H. St., § 3340, and compensation made.—Dunlap v. Toledo, A. A. & G. T. R. Co., 50 Mich. 470.

¶ 495. Where a subscriber in aid of a railroad is injured by the road's being run across his lands instead of half a mile away, as contemplated by his promise, he has a remedy for such damages as he has suffered thereby, independent of his agreement.—Michigan, M. & C. R. Co. v. Bacon, 33 Mich. 466.

¶ 496. Abutters who have been granted an injunction against the laying of a car track until the right to lay it had been condemned by appropriate proceedings may sue for damages computed to the time when such proceedings are instituted, where the track con-

tinues thereafter to be used and the proceedings are not instituted by the railroad company.—Taylor v. Bay City St. R. Co., 101 Mich. 140.

¶ 497. In an action for damages for placing a car track fronting abutter's evidence that there was no public necessity for defendant's line in the street is competent; and, if it is admitted, refusal to instruct the jury that the determination of the mayor and the common council as to the propriety and public convenience of the line was conclusive on all parties, is error.—Taylor v. Bay City St. R. Co., 101 Mich. 140.

¶ 498. In an action for damages from placing car tracks in a street fronting plaintiff's property it is competent for defendant to show any statement made by any of the plaintiffs which tended to show that he regarded the railroad as a benefit rather than an injury.—Taylor v. Bay City St. R. Co., 101 Mich. 140.

¶ 499. In an action for damages for obstructing a street with car tracks abutters cannot show that drays and teams cannot stand in the street at right angles with the sidewalk and leave room for defendant's cars to pass. Plaintiffs would not be entitled to recover damages for that, since private parties have no absolute right to place drays and trucks across the street when public travel is thereby obstructed.—Taylor v. Bay City St. R. Co., 101 Mich. 140.

¶ 500. An action to recover damages for an illegal occupancy is not abated by subsequent proceedings to condemn the land for railway purposes.—Callanan v. Port Huron & N. W. R. Co., 61 Mich. 15.

¶ 501. Case for nuisance consisting in the manner of constructing a bridge over a stream on plaintiff's premises as a part of defendant's railroad will not lie, where there was a condemnation for the road according to plans which included the bridge, and where no substantial deviation from plan is alleged; since all such damages were presumptively included in the condemnation.—Barnes v. Michigan Air Line Ry., 65 Mich. 251.

¶ 502. The statute for the condemnation of lands to the use of a railroad company does not empower a party aggrieved by its unauthorized occupancy of land to resort to the statutory remedy of appraisal for compensation, but he has a right of action in the ordinary way. Until the proper body has passed upon the necessity for the railway the question of compensation by statutory appraisal cannot arise.—Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

¶ 503. The value of premises for dwelling purposes is a question of fact in an action for injury to the owner from the unauthorized use of an adjacent highway by a railroad company.—Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393.

§ 146. Ejectment.

Right to action for illegal occupancy before condemnation, see ante § 41.
General law of ejectment, see Ejectment.
Whether ejectment lies against use of sewer laid across lands without legal authority, see Ejectment ¶ 13.

¶ 504. Ejectment lies against a city for land condemned and in actual use as a public street.—Tuller v. City of Detroit, 97 Mich. 597.

¶ 505. Ejectment lies for land taken under a void condemnation proceeding.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

¶ 506. Where a court has jurisdiction of the subject-matter and the person in a condemnation proceeding, ejectment for the land taken will not lie for irregularities reviewable on writ of error.—Sandusky Grain Co. v. Sanilac Circuit Judge, 184 Mich. 126.

¶ 507. One is not estopped from maintaining ejectment by the fact that he has given defendant a parol license to proceed with its railroad and occupy his land.—Wood v. Michigan Air Line R. Co., 90 Mich. 334.

§ 147. Collateral attack.

¶ 508. Where property is condemned for public purposes it will be presumed, in collateral proceedings, that persons affected thereby have been properly compensated in damages, if found entitled thereto.—Henkel v. City of Detroit, 49 Mich. 249.

¶ 508a. Heirs who receive from an executrix money for their shares in an award, either directly or ultimately in distributing the estate, waive all errors in the condemnation proceeding by which she was made a party representing them and they were omitted.—Barlage v. Detroit, G. H. & M. R. Co., 54 Mich. 564.

§ 148. Right of action and effect of transfer of land.

See also ante ¶ 115.
Rights of grantees in general, see post § 150.
Propriety of making condemnor party defendant in suit for foreclosure of vendor's lien, Vendor and Purchaser, XII.

¶ 509. Damages to a lot abutting upon a street wherein a railroad company has laid its tracks under a mere license granted by the city subject to the rights of adjacent owners, do not belong as an entirety to the then owner; but are a continuing injury which accrues to a grantee from year to year by reason of such occupancy of the street, although he did not own the lot when the road was constructed, and although no

rights of action have been assigned to him by the former owner.—Hoffman v. Flint & P. M. R. Co., 114 Mich. 316.

X. TITLE ACQUIRED AND LIABILITIES ENSUING.

§ 149. Nature of title acquired.

Transferability and rights of grantees, see post § 150.

Right to possession pending vesting of title, see ante § 122.

Nature of title before adjudication or payment of claims of owners of properties taken, see post ¶ 513.

Necessity of payment within sixty days to prevent title being divested, see ante ¶ 399.

Waiver or loss of right by failure to pay award within sixty days after confirmation in railroad, bridge or tunnel proceedings, see Comp. L. 1915, § 8257.

¶ 510. While the owners of lots have undoubtedly rights in the street in front of said lots, the condemnation of the lots themselves includes all rights in the ways appurtenant thereto.—Michigan Cent. Ry. Co. v. Miller, 172 Mich. 201.

¶ 511. The uses to which lands taken under the right of eminent domain for public purposes may lawfully be put cannot exceed the measure of the necessity that must be found as the basis of the right to take them at all; and lands thus taken for nonhighway purposes cannot properly be converted into a highway.—Paul v. City of Detroit, 32 Mich. 108.

§ 150. Transferability and rights of grantees.

Right of grantee to action for damages, see ante § 148.

¶ 512. Lands taken by the state for its railroads passed by the sale of the roads to the purchasers, notwithstanding the owners of the lands had failed to present their claims and obtain compensation.—People ex rel. Green v. Michigan Southern R. Co., 3 Mich. 496; Smith v. McAdam, 3 Mich. 506.

¶ 513. Certain lands lying east of the village of Hillsdale were, in the year 1838, taken and appropriated by the state for the use of the Michigan Southern Railroad, which was completed and brought into use over said lands in 1844; and in 1846 all the right, title and interest of the state in the railroad were transferred to the Michigan Southern Railroad Company. It was held that, under the law of 1838, providing for the acquisition of lands for the purposes of railroads, and the settlement of claims for the appropriation of property for such uses, the lands in question vested in the state, whether the claim for damages for their appropriation had been adjudicated upon and satisfied or not; that the transfer of the road by the state to the company imposed upon the latter no obligation to pay said damages, and that the company took such lands relieved of any claim or lien for such claim.—People ex rel. Green v. Michigan Southern R. Co., 3 Mich. 496; Smith v. McAdam, 3 Mich. 506.

EMOLUMENTS to EQUIPMENT.

Cross-References.

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- Independent Contractors distinguished, see Independent Contractors.
- Liability to servants for injuries in course of employment, see Master and Servant, III; Workmen's Compensation Law.
- Public employees, see Officers and Public Employees; Municipal Corporations, XV; Schools, V; and like topics.
- Responsibility of superior for acts of employees, see Master and Servant, IV; Agency, II.
- Rights of parent toward employer of child, see Parent and Child, III.
- Mutual relief funds, see Master and Servant; Insurance.

Employment Agencies—
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Employment Contracts—
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- Injunctive relief against encroachment, see Injunctions, II.
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EQUITY.

TREATS of the general law of equity and of the practice in the courts of chancery.

I. GENERAL PRINCIPLES AND MAXIMS (§§ 1-10).
II. EQUITABLE RIGHTS, TITLES AND REMEDIES (§§ 11-14).
III. JURISDICTION (§§ 15-44).
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XI. REHEARING, AND BILLS OF REVIVOR, SUPPLEMENT AND REVIEW (§§ 229-250).
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Analysis.

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[Note. Inasmuch as the Judicature Act has directed that rules of practice be adopted "abolishing distinctions between law and equity proceedings as far as practicable" and has embodied various statutory provisions likening the practice in equity to that at law, the editorial treatment of this topic has been to retain here only the general rules of equity which are fundamental; and, as far as is practicable to treat in the specific topics the specific law of equity; hence to exclude to topics such as Creditors' Suits; Injunctions; Specific Performance, the equities and the equity practice applied in such suits. In

such topics as Fraud; Drains; Taxes; Indemnity and Contribution, this treatment facilitates collation of the legal and equitable aspects of the topic in one place and in connection with each other. For references to matters thus sent for treatment to the specific topics, see cross-references throughout this topic.

Some of the section lines in the following analysis describe matters which are obsolete by reason of the new procedure. As the digest aims at completeness, however, it is necessary to forbear any attempt at identifying or segregating that which is obsolete. To some extent it has been indicated by giving numbers followed by a letter (e. g., §§ 111a-111e). Nothing has been omitted and the sections are worded as far as possible so as to describe the new features of practice and also to contain the older decisions, e. g., post § 112.]

I. GENERAL PRINCIPLES AND MAXIMS.

§ 1. In general.

Rights recognizable in equity, see post § 11.
Instances when equity will decree compensation in money, see post § 217.
Maxims of law are collected under a separate head entitled "Maxims," which see. The maxims retained here are only such as are generally regarded as the "maxims of equity."
Various maxims, see post §§ 2-8.
Applications of maxim that equity will grant complete relief, see post §§ 218-222.
Maxim, "Once a mortgage, always a mortgage," see Mortgages, II.
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§ 2. Equality and priority.

Equities between wrongdoers, see post § 5.
Loss as between two equally innocent and blameless persons, see post § 9.
Tacking legal title of another to one's own inferior equity, see post ¶ 36.
Equality is equity, applied to insolvent corporations, see Corporations § 219.

¶ 1. Equality is equity.—Hollister v. Loud, 2 Mich. 309; Turnbull v. Prentiss Lumber Co., 55 Mich. 387; Comstock v. Potter, 191 Mich. 629.

¶ 2. Where the equities of both parties are equal, and neither has the legal title, the prior equity prevails.—Wing v. McDowell, W. 175; Norris v. Showerman, W. 396.

§ 3. Following the law.

In matters of chancery jurisdiction, see also post § 15.
Declination of jurisdiction where legal remedy or defense sufficient, see post § 39.
Conformity to precedents rather than to supposed justice of the case, see Courts § 18 et seq.
Following legal rules in applying statute of frauds, see Frauds, Statute of, III.
Following legal rules of liability on negotiable instruments, see Negotiable Instruments.

¶ 3. Equity follows the law.—Abbott v. Godfroy's Heirs, 1 Mich. 178; Thurston v. Prentiss, 1 Mich. 193; Lockwood v. Beckwith, 6 Mich. 168; Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265; Beaubien v. Beaubien, 23 How. (64 U. S.) 190, 16 L. ed. 484; Grand Lodge A. O. U. W. v. Child, 70 Mich. 163; Casterton v. Plotkin, 188 Mich. 333.

§ 4. Doing or offering equity.

Averments in the bill as to doing or offering, see post § 87.
Doing iniquity or being in mutual wrong, see post § 5.
Using laches as a sword, see also post ¶ 206.
Necessity of paying debt to obtain relief against mortgage lien, see Mortgages, VIII.
Offer to do equity as barring other party's right to costs, see Costs § 33.

¶ 4. He who seeks equity must do equity.—Schwarz v. Sears, H. 440; Michigan State Bank v. Hammond, 1 D. 527; Morris v. Hoyt, 11 Mich. 9; Fraser v. Little, 13 Mich. 195; Palmer v. Township of Napoleon, 16 Mich. 176; Smith v. Humphrey, 20 Mich. 398; Merrill v. Humphrey, 24 Mich. 170; Prout v. Wiley, 28 Mich. 164; McCredie v. Buxton, 31 Mich. 383; Goodenow v. Curtis, 33 Mich. 505; Connors v. City of Detroit, 41 Mich. 128; Terry v. McClintock, 41 Mich. 492; Bumpus v. Bumpus, 59 Mich. 95; Toms v. Boyes, 59 Mich. 386; Wallace v. McBride, 70 Mich. 596; Gates v. Cornett, 72 Mich. 420; Young v. Toledo & S. H. R. Co., 76 Mich. 485; Long v. Kaiser, 81 Mich. 518; Dwight v. Scranton & Watson Lumber Co., 82 Mich. 624; McKisson v. Davenport, 83 Mich. 211; Ayres v. Dutton, 87 Mich. 531; Hawes v. Detroit Fire & Marine Ins. Co., 109 Mich. 324; Auditor-General v. Hutchinson, 113 Mich. 245, 248; Wheeler v. Dime Savings Bank, 116 Mich. 271; Croskery v. Busch, 116 Mich. 288, 290; Metropolitan Life Ins. Co. v. Freedman, 159 Mich. 114; McQuillan v. Ayer, 189 Mich. 566; Northern Michigan Building & Loan Ass'n v. Fors, 190 Mich. 69.

¶ 5. The maxim that "he who seeks equity must do equity" has no application in favor of a son to give him a lien for services upon the setting aside of a deed from the parents to such son because of proof that it was never delivered effectively, and where the son's testimony was conflicting with his claim.—Roup v. Roup, 136 Mich. 385.

¶ 6. A receiver of a copartnership cannot maintain a bill to recover as partnership assets the equity or surplus value of prop-

erty conveyed by it to the defendant and by him mortgaged to obtain money for the partnership, where no offer is made to pay such indebtedness for which defendant stands personally liable or to save the defendant harmless with respect thereto.—Security Trust Co. v. Dinsmore, 186 Mich. 273.

¶ 7. In March, 1907, complainant became the assignee of the vendee of a land contract made with defendant brewing company as vendor, and in order to meet the payments borrowed money of defendant D. Co. and assigned the contract to it as security. In September, 1901, notice of forfeiture was served on complainant for failure to comply with the contract in buying liquor exclusively from defendant brewing company and in making the stipulated payments. On November 15, 1909, complainant was ousted by suit brought by defendant brewing company. He took no appeal from this judgment but turned over possession to defendant brewing company. Not until December 3, 1910, did complainant file his bill to redeem on the ground that defendants had conspired to defraud him. Held, the complainant, having failed to perform any of the essential parts of the contract, had not done equity and could not appeal to equity for relief.—Mills v. William Drueke Co., 172 Mich. 394.

§ 5. Doing iniquity; mutual wrong.

Clean hands maxim, see post § 6.

Right of party to illegal contract to have relief, see Contracts §§ 89, 90.

Denial of accounting or contribution to partners in illegal business, see Partnership, VII, E.

Denial of discovery in aid of law action where transaction is illegal, see Discovery ¶ 11.

¶ 8. He who has committed iniquity shall not have equity.—McCredie v. Buxton, 31 Mich. 383; Common Council of Village of Cedar Springs v. Schlich, 81 Mich. 405.

¶ 9. A court of equity is not to be made an instrument of wrong.—Miller v. Cornwell, 71 Mich. 270.

¶ 10. A tortious act can never be the foundation of an equitable right.—Campau v. Campau, 19 Mich. 116; McCredie v. Buxton, 31 Mich. 383; Putnam v. Reynolds, 44 Mich. 113.

¶ 11. Where parties are concerned in illegal agreements or others transactions, whether they are mala prohibita or mala in se, equity will not interpose to grant relief.—Thurston v. Prentiss, 1 Mich. 193.

¶ 12. Equity will not lend its assistance to one who participates in a supposed fraud upon another for his own gain when it afterwards appears that he himself was the defrauded party.—Dakin v. Rumsey, 104 Mich. 636.

¶ 13. Equity will not deny relief to one party as against another who has led him, by a violation of confidence, into a wrong act, when the former is least in fault. They are not in equal wrong.—Barnes v. Brown, 32 Mich. 146.

¶ 14. Equity interferes in cases where extortion is practiced under color of law, to protect, in the interest of justice, even those who are not wholly blameless, and to prevent the process of law from being perverted to fraud and oppression.—Briggs v. Withey, 24 Mich. 136.

¶ 15. A court of equity will not balance the equities between the parties when both are in the wrong, nor give the complainant relief against his own vice and folly.—Rozell v. Redding, 59 Mich. 331.

¶ 16. A complainant who was to become the owner of land and the growing crops thereon, on a certain day, and who, by an abuse of injunctional process, prevented a tenant who was entitled to the possession and full use of the premises and crops up to such day, from cutting the crops during the closing days of his term, was not entitled to the aid of equity, to recover the value of the crops, even though the crops were immature and if left would have ripened for his benefit.—Piper v. Piper, 122 Mich. 662.

¶ 17. A court of equity will not interfere to aid a husband to obtain rights in a corporation organized by his wife with property which he had previously transferred to her, to place it beyond the reach of his creditors, although there was an understanding that he should continue to have an interest in such property and participate in the profits of the corporation; since equity will not compel a confederate in an illegal scheme to carry out her contract.—Wipfler v. Detroit Pattern Works, 140 Mich. 677.

§ 6. Clean hands.

Maxim as to wrongdoers, see ante § 5.

Unclean hands as ground for denying leave to file bill of review, see post ¶ 966.

Unclean hands as bar to specific relief, see also specific topics, e. g., Accounting Suits § 2; Creditors' Suits § 16; Fraudulent Conveyances, II-IV; Foreclosure, I; Quieting Title, I; Reformation, I; Rescission, I, III; Specific Performance, III.

Necessity of clean hands by complainant in accounting suit against trust mortgagee, see Chattel Mortgages ¶ 450.

Right to plead clean hands maxim against corporation suing defendants as promoters, see also Corporations ¶ 138.

Clean hands maxim applied in divorce, see Divorce ¶ 118.

¶ 18. He who comes into equity must come with clean hands.—Hoff v. Hoff, 48 Mich. 281; Lowes v. Lowes, 127 Mich. 307; Massi v. Lavine, 139 Mich. 140; Cochrane Timber Co. v. Fisher, 190 Mich. 478; Brown v. Brown, How. N. P. 94.

¶ 19. The maxim, "he who comes into equity must come with clean hands," has no application where the wrong is done to one not a party to the suit.—Cochran Timber Co. v. Fisher, 190 Mich. 478.

¶ 20. Rescission of a sale of land for misrepresentations by vendors' agent cannot be obtained by one who combined with the agent in breach of trust to obtain the land at a reduced price.—Pearce v. Ware, 94 Mich. 321.

¶ 21. Where a village, in order to evade the constitution, has obtained the passage of an act authorizing it to borrow money for public improvements and to issue bonds therefor, which bonds it has turned over to a railroad company for constructing a road through the village, it cannot have the aid of a court of equity to have such bonds declared void and their negotiation enjoined, but will be left to make such defense as it can at law.—Common Council of Village of Cedar Springs v. Schlich, 81 Mich. 405.

¶ 22. In a suit against a debenture company for a receivership and accounting and other relief on the ground that the scheme is a lottery and fraudulent, and impossible of performance, the debenture holders are not precluded from equitable relief where the scheme appeared plausible, the company's advertisements were grossly fraudulent, and there was nothing to indicate moral turpitude on the part of the purchasers.—Christian v. Michigan Debenture Co., 134 Mich. 171.

¶ 23. In an action by a resident to restrain the maintenance by a city of a municipal coal yard, the unlawful conduct of complainant in having entered into a combination with other coal dealers in violation of Comp. L. 1897, §§ 11377-11379, a statute regulating and controlling the price of coal in the market, while it will not excuse unauthorized action by the city in engaging in the coal business, does bear upon the question as to whether complainant came into a court of equity with clean hands.—Baker v. City of Grand Rapids, 142 Mich. 687.

¶ 24. A purchaser of practically the entire stock in trade of a merchant in bulk in violation of the "Sales-in-Bulk Act" (Pub. Acts 1905, Act No. 223), does not come with clean hands into a court of equity as an intervener to establish his title to the property as against the receiver of the seller.—Farrar v. Lonsby Lumber & Coal Co., 149 Mich. 118.

§ 7. Substance and form.

Treating land as money and the reverse, see post § 12.

Treating amendments as made, see post § 141.

¶ 25. Equity regards substance rather than form, and enforces the actual intent if lawful and just.—Stuart v. Worden, 42 Mich. 154.

¶ 26. In a bill of the nature of a bill for specific performance or for an equitable garnishment, the court may inquire where is the substantial equity in the case—Young v. Clarendon Tp., 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; affirming 26 Fed. 805.

§ 8. Treating acts as done.

Doctrine of equitable conversion of land into money and vice versa, see post § 12.

¶ 27. Equity considers that as done which ought to have been done.—Grand Lodge A. O. U. W. v. Child, 70 Mich. 163; Ripley v. Seligman, 88 Mich. 177.

¶ 28. Equity will look upon that as done which the parties intended should have been done.—Near v. Donnelly, 80 Mich. 130.

§ 9. Two equally innocent parties.

"Two innocent parties rule" as applied in agency, see also Agency §§ 44, 49.

"Two innocent parties rule" as applied in case of agent's positive dishonesty, see Agency ¶ 314.

¶ 29. Where one of two innocent parties must suffer a loss occasioned by the negligence of one of them, it must rest on the one who caused it, however honest his intentions may have been.—Wilson v. Arnold, 5 Mich. 98; Moran v. Palmer, 13 Mich. 367; Stebbins v. Walker, 46 Mich. 5.

¶ 30. The reposing of a trust or confidence in the wrongdoer by the person who is allowed to suffer ordinarily marks the limitation on the principle that where one of two innocent persons must suffer by the fault of a third, he shall sustain the loss whose negligence put it into the power of the third to occasion it. It supposes some kind of action by a responsible person which may involve injury to another by the misbehavior of the third.—Burson v. Huntington, 21 Mich. 415; Holmes v. Trumper, 22 Mich. 427; Gibbs v. Linabury, 22 Mich. 479.

¶ 30a. As between two innocent persons the rule, that injury must fall on the one whose act or omission made the loss possible, has no application, if one of them is not in any worse position and is not injured by the act.—Smith v. Osborn, 33 Mich. 410.

¶ 31. When one of two parties equally innocent must suffer, the law leaves the loss

where it has chanced to fall.—First Nat. Bank of Detroit v. Burkham, 32 Mich. 328.

¶ 31a. Whenever one of two innocent persons must suffer by the act of a third, the loss shall be borne by that one whose behavior in the matter denoted to the other that such third person's doings therein were worthy of trust according to their outward seeming.—Peake v. Thomas, 39 Mich. 584.

¶ 32. Where one of two innocent parties must suffer wrong by the act or default of another, that one must suffer the loss through whose act or neglect such third person was enabled to commit the wrong; but the doctrine is an equitable one and extends no further than is necessary to protect the innocent party in whose favor it is invoked.—Zucker v. Karpeles, 88 Mich. 413.

§ 10. Policy towards penalties and forfeitures.

The subject of penalties (other than for crime) and forfeitures is fully treated in Penalties and Forfeitures, which see.

II. EQUITABLE RIGHTS, TITLES AND REMEDIES.

§ 11. Rights, titles and defenses in general.

Lands regarded as personalty and the reverse, see post § 12.
Equitable remedies, see post § 14.
Necessity of clear legal right to sustain bill, see post § 19.
Unjust assertion of legal rights in oppression of complainant, see post § 21.
Existence of equitable right or title as reason for assuming jurisdiction although remedy exists at law, see post § 40.
Wrongdoing as destroying equitable rights, see ante § 5.
Equitable assignments, see Assignments § 13.
Nonrecognition of assignment of tort causes of action, see Assignments § 9, ¶ 36.
Power to relieve from expulsion from association, see Associations, § 6.
Equities good against trustee in bankruptcy, see Bankruptcy § 3.
Equitable assets subject to creditors' bills, see Creditors' Suits §§ 5-7.
Dower interest in equitable rights and titles, see Dower § 12.
Effect in equity of promises invalid under the statute of frauds, see Frauds, Statute of, III.
Liens in general, see Liens.
Particular kinds of liens, see Chattel Mortgages; Mortgages; Pledges; Mechanics' Liens; Vendors and Purchasers, XI; Forestry, III (log and labor liens); etc.
Equitable liens, see Liens.
Equitable mortgages, see Mortgages, II, C.
Equitable right to contribution or exoneration, see Indemnity and Contribution, II; Suretyship; Guaranty.
Subrogation doctrine, see Subrogation; Mortgages, VIII; Liens; Taxes; Insurance.
Rights and equities arising out of fraud, see Fraud; Rescission.
Mistake and accident and equities arising from them, see Mistake.
Rights and equities respecting penalties and forfeitures, see Penalties and Forfeitures.
Clouds on title to land and equity to have them removed, see Quieting Title.
Rights and equities of infants or respecting them, see Infants; Guardianship.
Rights and equities arising out of coverture, see Husband and Wife.
Rights and equities arising out of insanity of persons, see Insane Persons.
Maturity of right to injunction against threatened act, see Injunctions, I, II.
Equity of occupant of land in possession to injunction against execution sale against legal owner, see Injunctions, II, B.
Injunction against use of name or portrait, see Injunctions, II.
Equitable title as defense in ejectment where tax certificate but no deed issued at commencement of action, see Ejectment ¶ 73.
Former adjudication as bar to relief, see Former Adjudication, IV.

¶ 33. Rights known as "equitable rights" differ from other rights in their essential nature, and not in form only, and can be efficiently protected and made available only by the means known as "equitable."—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 285.

¶ 34. Courts of equity have no power to enforce any vague equities which involve no rights or interests protected by the recognized rules of justice.—Hendricks v. Toole, 29 Mich. 340.

¶ 35. Equity will not take jurisdiction of a matter that does not come within the principles of any adjudged case, nor any of the established principles upon which equity jurisdiction is based.—Norris v. Hill, 1 Mich. 202.

¶ 36. Subsequently obtaining the legal title in right of another, and not in one's own right or obtaining it with notice of the prior equity, will not aid the holder of the postponed equity.—Norris v. Showerman, W. 206.

¶ 37. It is equitable rights alone which courts of equity can recognize, and that which has been obtained by fraud, and which can only be used for fraudulent purposes, is not an equitable right.—Hanold v. Bacon, 36 Mich. 1.

¶ 38. Equity has no power to create new contracts between parties, or, in the absence of fraud, accident or mistake, to supply omissions in contracts deliberately made.—Nash v. Burchard, 87 Mich. 85.

¶ 38a. An equitable defense pro tanto to a contract for the payment of a sum certain after making specified deductions does

not arise from the fact that there are other deductions which equitably should have been made and that the claim is an equitable one for money had and received; since the equity which could prevail must be one known to the law and none arises against an express contract.—Fraser v. Fraser's Estate, 42 Mich. 275.

¶ 39. It is equitable that one should reap what he has sown.—Lucas v. Parks, 84 Mich. 92.

¶ 40. Equity never interferes to deprive one of a substantial legal right, although it will sometimes require one so to exercise his right as not unnecessarily to injure another.—Third National Bank v. Haug, 82 Mich. 607.

¶ 41. Courts should not discourage the recognition of merely moral obligations by proceeding as if they could have been enforced at law.—Eccard v. Brush, 48 Mich. 3.

¶ 42. Courts of equity cannot create contracts any more than courts of law.—Wood v. Truax, 39 Mich. 628.

¶ 43. In case it appears that, before a suit to correct and reform a conveyance was instituted, the defendant had conveyed away the land in question, so that correcting the deed will only give occasion for litigation, this fact may be allowed weight if the cause is not clear on its equities.—Backus v. Jeffrey, 47 Mich. 127.

§ 12. Equitable conversion and reconversion.

Interest or title of husband regarded as land in which dower right exists, see Dower, II.

Partnership lands as subject to dower of partner's wife, see Dower § 11.

Propriety of ejectment against lands impressed with character of personalty, see Ejectment ¶ 14.

¶ 44. Equity will treat real property as converted into personalty where a will by which it is devised absolutely and without conditions directs that it shall be exchanged for money and interest-bearing securities; and it will so regard it for all the purposes of the will and of the settlement of the estate, even though the exchange was never actually made and though the beneficiaries may have died. And so far as it is not disposed of by the will it would pass under the statute of distributions, and not under that of descents. But it would not be personalty for the purpose of any remedies unconnected with the conversion, nor in the hands of those to whom it was transmitted afterwards.—Shaw v. Chambers, 48 Mich. 355.

¶ 45. In equity partnership lands are converted for purposes of accounting and settlement.—Godfrey v. White, 43 Mich. 171; Merritt v. Dickey, 38 Mich. 41.

¶ 45a. Proceeds of land of a decedent, sold by the guardian of one of the heirs he having had a license to sell the ward's share and selling the other shares by agreement with the adult coheirs, do not assume the character of personal assets of the decedent's estate, so as to support an accounting by the guardian against the widow who holds the proceeds of decedent's personalty subject to distribution to the ward and the other distributees.—Cole v. McFall, 48 Mich. 227.

¶ 46. The doctrine of equitable conversion applies to a provision in a will which directs a double conversion first of land into money and then of money into land.—Ford v. Ford, 80 Mich. 42.

¶ 47. Where a will directs the executors to convert certain lands in one state into rentable "inside" property in a specified city in another state as soon as practicable after the testator's death, irrespective of all contingencies, an equitable conversion of such lands is effected by the terms of the will. —Ford v. Ford, 80 Mich. 42.

¶ 48. Property in land in Michigan bought with the proceeds of a sale of land in Ohio by a resident thereof who had procured his wife to join him in the deed by falsely representing that he intended to devote the money to the purchase of other land in that state, is not controlled by the law of Michigan denying the right of dower to nonresidents.—Bear v. Stahl, 61 Mich. 203.

§ 13. Right of volunteer to relief.

Persons claiming under forged deed, see post ¶ 208.

Validity of voluntary conveyances between parties, see also Fraudulent Conveyances, III.

Right of volunteer to enforce executory gift or trust, see Gifts; Trusts, XII.

¶ 49. A court of equity will not relieve a party from the consequences of a risk which he voluntarily assumes.—McCredie v. Buxton, 31 Mich. 383.

¶ 50. A voluntary conveyance cannot be corrected without the consent of all the parties to it.—Redding v. Rozell, 59 Mich. 476.

¶ 51. An error in the description of land in a voluntary conveyance will not be corrected in equity unless all of the parties consent.—Shears v. Westover, 110 Mich. 505.

¶ 52. A court of equity does not correct a mistake in a conveyance that is voluntary and without consideration unless all the parties consent.—Tuthill v. Katz, 174 Mich. 217.

¶ 53. A grantor may have relief in a court of equity against a voluntary conveyance of land, where it appears that the deed was made by him while in a condition of partial intoxication, induced by the grantee, who

stood to him at the time in a fiduciary relationship.—Tiffany v. Tiffany, 110 Mich. 219.

¶ 54. A conveyance and agreement by which the interests of the several heirs in an estate are conveyed to a trustee in order that he may make conveyances for the partition of the estate among the heirs according to allotments agreed upon, the effect of which is to cut off the interest of one of the heirs, will be set aside, where it appears that the latter, when the papers were executed, was so nearly blind as to be unable to read them, that he was misinformed as to their effect, and that he notified the trustee, before the latter had acted in the matter, that he should insist upon the same interest to which he would have been entitled had the alleged agreement not been made.—Shurte v. Fletcher, 111 Mich. 84.

¶ 55. Where a deed, given by a father to his son in consideration of love and affection, errs in the description of the premises, and the grantee, without knowing this, goes into possession of the lands he supposes to be deeded, and improves and expends money on them, his mortgagee in good faith may maintain against such grantee or his heirs, or purchasers from them without consideration, a bill for the correction of the description in the original deed. Such a bill is not demurrable for want of equity in that the original agreement to convey was without sufficient consideration. This agreement is not necessary to support the conveyance, and if it were, it might be inferred from the deed and the circumstances stated in the bill and proved. If such grantor had conveyed to his four sons the whole of his lands in separate parcels, and erred in the description of the premises conveyed to one of them, it would be unimportant whether any consideration was paid to the father or not, and the case here is as it would be if the sons had inherited the whole of the lands in common, and had undertaken to make an amicable partition of them by a conveyance to each of his respective portion, and the same mistake had been made. The portion received by each would be a consideration for his conveyance to the other.—Cummings v. Freer, 26 Mich. 128.

§ 14. Remedies in equity.

[Note. Each of the ordinary equitable suits is treated specifically in a topic devoted to it or in part to it. The topic treating of the specific remedy or of the subject to which it applies should be consulted.—See cross-references following.]

Accounting suits, see Accounting Suits.

Remedy against depositary of instrument in escrow for misdoing, see Escrows.

Accounting, settlement and distribution of estates, see Estates of Decedents, XII, XIII.

Accounting between mortgagee and mortgagor, see Mortgages, IV, VIII, IX.

Remedies available against corporate officers at law or in equity, see also Corporations, XVII, H.

Bills to foreclose liens of corporations on members' stock, see Corporations § 315.

General law of creditors' suits, see Creditors' Suits.

Equitable remedy to recover dower, see Dower § 42.

Remedies for protection of easements, see Easements § 40.

Remedies to enforce claims against estates, see Estates of Decedents, VI, C.

Remedies to subject land to payment of decedent's debts, see Estates of Decedents, VII.

Collection and reduction of assets of decedent to possession of representative, see Estates of Decedents, V, B.

Remedies for fraud, see Fraud, III; Rescission; Trusts; etc.

Equitable remedies for contribution, see Indemnity and Contribution, III.

Remedy by injunction and occasion or propriety for injunctions, see Injunctions.

Impropriety of injunction divesting legal rights summarily, see Injunctions, I, II, V.

Remedy by interpleader of adverse claimants, see Interpleader.

Reformation of instruments for mistake or other ground, see Reformation.

Restoration of lost or destroyed papers and documents, see Restoration of Papers.

Bills to redeem from mortgages, see Mortgages, IX.

Bill to redeem from chattel mortgage, see Chattel Mortgages § 116.

Remedies in equity to collect taxes, see Taxes, X, A.

Remedies for enforcement or protection of trusts, see Trusts, IX et seq.

Equitable set-off, see Set off.

Grounds for discovery, see Discovery, I.

Obsoleteness of pure bills for discovery, see Discovery § 1.

III. JURISDICTION.

A. IN GENERAL; GROUNDS FOR ASSUMPTION OR DECLINATION.

Necessity of jurisdiction of parties to make decree, see post § 202; and see Courts, V, A.

Pleading jurisdiction in equity, see post § 83 et seq.

§ 15. Nature and scope in general.

Personal nature of the jurisdiction exercised, see post ¶¶ 107, 108.

Jurisdiction dependent on amount, see post §§ 16-18.

Necessity of clear right and legal title, see post § 19.

Fraud and injustice or oppression as grounds, see post §§ 20-22.

Mistake and accident as grounds, see post § 23.

Particular subjects and grounds, see post § 24 et seq.
Incidental and relative jurisdiction, see post §§ 25-29.
Consent to equity jurisdiction, see post § 30.
Ouster and loss of jurisdiction, see post § 31.
Declination of jurisdiction because of foreign subject, want of power or means, or legal nature of cause, see post §§ 32-35.
Inadequacy or nonexistence of legal remedy as ground of jurisdiction and adequacy of legal remedy as ground for declining, see post, III, B.
Prevention of multiplicity and circuity as ground for assumption, see post, III, C.
Mode of objecting to jurisdiction in equity, see post § 97.
Constitutional jurisdiction of chancery, see Constitutional Law § 57.
Nature of jurisdiction of supreme court in chancery, original or appellate, see Courts § 51.
Jurisdiction of courts in general, see Courts, V.
Jurisdiction as concluded by law of the case on former appeal, see Appeal § 469.
Statutory grant of jurisdiction as in English chancery courts in 1847, see Jud. Act, chap. VI, § 4; Comp. L. 1915, § 12302.
Enumeration of subjects and scope of jurisdiction, see Jud. Act, chap. VI, § 4; Comp. L. 1915, § 12302.

¶ 56. While equity courts are given special jurisdiction to deal with and correct that wherein the law is deficient because of its universality, they do not rise above, or have power to change, the law, either common or statute.—J. W. McCausey & Co. v. Gittleman, 201 Mich. 8.

§ 16. Amount in controversy.

How measured or estimated, value of subject-matter or amount of claim or damage, see post § 17.
Aggregating several claims to make up amount, see post § 18.
Bill against local assessment by person assessed less than $100, see post ¶ 78.
Land value as criterion where land is involved, see post § 17.
Reformation suit as suit affecting land, see post ¶ 70.
Necessity and sufficiency of allegations as to jurisdictional amount, see post § 84.
Mode of objecting for insufficiency of amount, see post § 98.
Amount less than $100 as reason for not retaining bill to complete relief by compensation as at law, see post § 222.
Statutory rule for dismissal of suits below $100 in controversy, see Jud. Act, chap. VI, § 3; Comp. L. 1915, § 12301.

¶ 57. Jurisdiction of a bill, under Comp. L. 1871, § 4246; How. St. § 5704, for discharge of a mortgage, does not depend upon the amount secured by the mortgage, and it obtains though the amount secured or unpaid is less than $100. Even without the statute the bill, it seems, would lie where the original mortgage was for more than $200.—Collar v. Harrison, 28 Mich. 518.

¶ 58. Under Comp. L. 1871, chap. 215, the circuit court in chancery had no jurisdiction to enforce mechanics' liens for amounts less than $100.—Dewey v. Duyer, 39 Mich. 509.

¶ 59. A bill in equity to obtain an offset of a judgment will not lie, if at all, unless it shows that the amount involved, after satisfying any proper claim of the attorneys, exceeds $100.—Wells v. Elsam, 40 Mich. 218.

¶ 60. Whether a bill would lie to restrain the unlawful interference with the owner's enjoyment of property worth less than $100, quære.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 61. A bill to foreclose a land contract is a suit concerning property within the meaning of Comp. L. 1897, § 435, providing for the dismissal of suit concerning property where the matter in dispute shall not exceed $100 with certain exceptions.—Sands & Maxwell Lumber Co. v. Gay, 138 Mich. 82.

¶ 62. A bill to foreclose a land contract is not a suit to foreclose a mortgage within the meaning of Comp. L. 1897, § 435, providing for the dismissal of suits concerning property where the matter in dispute shall not exceed $100 excepting foreclosure of mechanics' liens and foreclosure of mortgages.—Sands & Maxwell Lumber Co. v. Gay, 138 Mich. 82.

¶ 63. A bill to set aside a contract for the purchase of a road scraper is a suit to restrain the levying of a tax on land under Pub. Acts 1903, No. 183, and must be dismissed unless the tax levied on plaintiff amounts to more than $100. If it is not an attempt to get a decree which will have the effect of restraining the proceedings begun by the making of the contract and the levy of one instalment of the tax there is no jurisdiction under Comp. L. 1897, § 435, which fixes the same jurisdictional amount in chancery suits concerning property.—Bartlett v. Austin & Western Co., 147 Mich. 58.

¶ 64. Under Pub. Acts 1903, No. 183, § 1, providing that no decree shall be made in any suit pending or hereafter commenced in any circuit court of chancery, brought to restrain the proceedings taken or about to be taken by any officer, etc., "which may or shall result in a tax being levied upon property" unless that tax which may or shall be levied upon complainant's property shall amount to more than $100, "and all such suits brought shall be dismissed by the court, one who is assessed for $6.50 for the year cannot enjoin the making of a contract for the purchase of a road machine to be paid for in five years out of tax levies.—Bartlett v. Austin & Western Co., 147 Mich. 58.

¶ 65. A bill by a receiver of an insolvent mutual fire insurance company, claiming a lien upon property of two members of the company, under How. St. § 4258, because of an unpaid assessment, is properly dismissed under How. St. § 6613, which provides for the dismissal of every suit concerning property, except suits between copartners, suits for the enforcement or foreclosure of mechanics' liens, and suits for the foreclosure of mortgages, where the matter in dispute does not exceed one hundred dollars. How. St. § 4263, authorizing receivers to sue for assessments in actions of assumpsit or debt, does not authorize a bill to enforce liens in violation of § 6613.—Peake v. Bradley, 121 Mich. 182.

§ 17. ——Criteria or measure of amount.

Sufficiency of allegation as to value of land involved in tax of less than $100, see **also post ¶ 332.**

¶ 66. Where the aid of equity is sought to protect the enjoyment of property, it will not be governed by the mere value of property, but will interfere if the injury will materially lessen the enjoyment of it by the owner. —White v. Forbes, W. 112.

¶ 67. The jurisdiction of equity, where the title or enjoyment of real estate is involved, depends on the value of the land and not merely the amount of the claim asserted against it.—Fuller v. City of Grand Rapids, 40 Mich. 395.

¶ 68. Where a bill is filed to prevent a threatened injury to the freehold, it is the value of the land which fixes the jurisdiction.—Huyck v. Bailey, 100 Mich. 223.

¶ 69. Equity will take jurisdiction of a suit involving land worth in itself less than $100 if it furnishes advantages—such as a riparian right—making it worth more.—Blodgett v. Dwight, 38 Mich. 596.

¶ 70. A suit to reform and correct a conveyance is not a suit concerning property in the sense intended by the statute, which requires suits concerning property to be dismissed when the matter in dispute shall not exceed $100; but if the correcting is merely to bring within the grant a strip of land insignificant in value, the court may well dismiss it on that ground.—Backus v. Jeffrey, 47 Mich. 127.

¶ 71. In a suit for subrogation to the lien of a chattel mortgage the test of the jurisdiction is the amount of the lien.—Lucking v. Wesson, 25 Mich. 443.

¶ 72. In a suit in chancery, involving the amount of taxes due on land, which is claimed to be too small for contest in a court of equity, jurisdiction is determined by the value of the land affected by the lien, and not by the amount in dispute.—Soule v. City of Grand Haven, 174 Mich. 276.

¶ 73. The jurisdiction of equity over a suit to enjoin the sale of land on execution depends upon the value of the land, rather than upon the amount of the judgment.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 74. A court of equity has jurisdiction to set aside a judgment and execution for a less sum than $100 where the property levied upon was of the value of $2,000 or more and the judgment was void for want of jurisdiction.—Wilcke v. Duross, 144 Mich. 243.

¶ 75. The amount of the judgment and not the value of the land determines the jurisdiction where a creditor files a bill in aid of execution and prays that a conveyance be set aside.—Matteson v. Matteson, 132 Mich. 516.

¶ 76. The value of the land and not the amount of the asserted claim determines the jurisdiction where a complainant institutes a suit for the purpose of protecting his land from a lien asserted against it.—Matteson v. Matteson, 132 Mich. 516.

¶ 77. The mere fact that a foreclosure decree is for $50 too much does not involve an amount sufficient to give chancery jurisdiction of a bill in the nature of a bill of review attacking such decree.—Sanford v. Haines, 71 Mich. 116.

¶ 78. A taxpayer whose liability for a proposed local improvement does not exceed $100, the amount necessary to confer jurisdiction in chancery cases, cannot maintain a bill to enjoin such improvement.—City of Detroit v. Wayne Circuit Judge, 128 Mich. 438.

§ 18. ——Combining several claims to make amount.

¶ 79. A bill in chancery will not lie where the amount in controversy is less than $100; nor will it where the entire amount is more than that, but has to be disposed of under separate issues, no one of which involves so much.—Wallace v. Sortor, 52 Mich. 159.

§ 19. Doubtful and conflicting titles, rights or claims.

Necessity of clear legal right to maintain injunction suit, see Injunctions, I.

Jurisdiction to quiet title and remove clouds, see Quieting Title, I, III.

Jurisdiction of interpleader bills, see Interpleader.

¶ 80. Strict legal right, as distinguished from equity, is not a necessary criterion of equitable redress; but in granting relief a court of equity seeks to avoid oppression, or consequences of unnecessary rigor.—Fox v. Holcomb, 32 Mich. 494.

¶ 81. Courts of equity will not aid one man to restrict another in the use to which he may put his property unless the right to

such aid is clear.—Casterton v. Plotkin, 188 Mich. 333.

¶ 82. In a proceeding to enjoin repeated trespasses on the waters of an inland lake a court of equity will not determine the title to the submerged land where the contending parties have both had intermittent partial possession for many years.—Beach v. Rice, 186 Mich. 95.

§ 20. Fraud and undue influence.

In cases of unconscionableness and oppression, see post § 21.

Bad intent without action or injury, see post § 22.

The doctrine that equity has jurisdiction in cases of fraud and undue influence to administer the appropriate relief, and may exercise it concurrently with courts of law, is fully treated in Fraud, III.

§ 21. Unconscionableness and oppression.

¶ 83. Equity will relieve where a party has so enforced his legal rights as to work injustice to another.—Gilbert v. Haire, 43 Mich. 283.

¶ 84. Chancery grants relief in many cases where there is no legal duress in the strict acceptation of the term, and where the wronged party would perhaps be remediless at the common law.—Meech v. Lee, 82 Mich. 274.

¶ 85. Equity will not aid an unconscientious technical defense beyond the precise limit of defendant's right.—Waldron v. Murphy, 40 Mich. 668.

§ 22. Bad motive or intent.

¶ 86. Intent does not bring a case within equitable jurisdiction if the act to which it attaches does not supply an equitable cause of action.—Winegar v. Newland, 44 Mich. 367.

§ 23. Mistake and accident.

Relief from mistake and accident, see generally Mistake; Reformation; Restoration of Papers; Rescission.

§ 24. Particular subjects, objects and personal relations.

[Note. For convenience in grouping cross-references and listing the subjects of jurisdiction the following sections 24a-24l have been inserted. The matter relevant to each will be found in the topics referred to.]

Jurisdiction to relieve from awards or to enforce them, see Arbitration § 16.

Statutory origin of divorce jurisdiction, see Divorce § 1.

§ 24a. ——Trusts and assignments.

Enforcement, establishment and accounting of trusts, see Trusts.

Bills for instructions to trustees and fiduciaries, see Trusts, VI, B; Guardianship, IV.

Supervisory jurisdiction of chancery in assignments, see Assignments for Creditors § 38.

§ 24b. ——Liens and mortgages.

Foreclosure of mortgages, see Foreclosure, III, V; Chattel Mortgages, VII.

Bills to redeem and for accounting, see Mortgages, IX.

Enforcement of liens, see Liens; Mechanics' Liens; Vendors and Purchasers, XI, XII.

Subjection of lands to payment of decedent's debts, see Estates of Decedents, VII.

¶ 87. While a court of equity, having once acquired jurisdiction for other purposes, may, as an incident to general relief granted, order property sold to satisfy a lien, it has no jurisdiction to enforce a lien, either common-law or statutory, but not equitable, upon a bill filed solely for that purpose.—Marshall v. Wabash Ry. Co., 201 Mich. 167; Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

§ 24c. ——Decedents' estates and wills.

Relative chancery and probate jurisdiction over decedents' estates and administration, see Estates of Decedents, II.

Actions and suits to enforce claims against decedents' estates, see Estates of Decedents, VI, C.

Suits to subject lands to payment of debts, see Estates of Decedents, VII.

Suits for accounting by representative, see Estates of Decedents, XII.

Jurisdiction of probate or of bills to establish or annul propounded wills, see Wills, V.

Suits for partition, see Partition; Estates of Decedents, XIII, XV.

§ 24d. ——Dower, partition, homesteads, and exemptions.

Procedure to set out dower, see Dower, VI, B.

Suits to assert or protect exemption rights, see Exemptions, III.

Suits to assert or to protect homestead, see Homesteads, VIII, IX.

Partition suits, see Partition.

§ 24e. ——Infants and persons under disability and their estates.

Rights and equities of or affected by infancy or parties, see Infants.

Actions and suits by or against infants, see Infants, VII.

Guardianship of infants, see Guardianship.

Insane persons and their rights and protection, see Insane Persons.

Incompetents and delinquents other than insane persons, see Incompetents.

Jurisdiction dependent on coverture, see Husband and Wife.

¶ 88. Equity has supervisory power over the persons and estates of infants, and when any part of an infant's estate is in litigation there it is under the court's immediate protection.—Westbrook v. Comstock, W. 314.

§ 24f. ——Partnerships and corporations.

Nature, source and extent of chancery powers over insolvent or dissolving corporations, see Corporations §§ 246, 247.

Jurisdiction over sequestration of corporations, see Corporations § 234.

Jurisdiction to compel transfer of stock on corporate books, see Corporations § 290.

Jurisdiction over partnership associations, see Joint Stock Companies.

Accounting and settlement of partnerships, see Partnership, VII.

Accounting and settlement of joint adventures, see Joint Adventures.

¶ 89. Chancery has no inherent jurisdiction to act upon corporate defaults and violations of charter.—Tripp v. Pontiac & Lapeer Plank Road Co., 66 Mich. 1.

¶ 90. The jurisdiction of chancery over corporate bodies for the purpose of restraining their operations or of winding up their concerns is purely statutory, and is not a part of the general powers of equity.—Attorney-General v. Bank of Michigan, H. 315.

§ 24g. ——Enforcement and protection of contracts.

Specific enforcement of contracts, see Specific Performance.

Injunctions against breach of contract, see Injunctions.

See also topics treating of the particular contracts, e. g., Negotiable Instruments; Pledges; Mortgages; Sales; Vendors and Purchasers.

§ 24h. ——Rescission and cancellation, restoration and reformation of instruments.

The jurisdiction of these remedies is fully treated in Rescission; Reformation; Restoration of Papers.

Relief to creditors against fraudulent conveyance of concealment, see Fraudulent Conveyances; Creditors' Suits.

§ 24i. ——Penalties and forfeitures.

Relief against forfeitures and rule of non-enforceability of penalties and forfeitures, see Penalties and Forfeitures; Injunctions, II; Specific Performance, III; Vendors and Purchasers, XII; Foreclosure, III, V.

¶ 91. A court of equity may always inquire whether or not a forfeiture has occurred and declare the fact. Thereafter in the particular case it proceeds according as the fact is found.—Miller v. Steele, 146 Mich. 123.

§ 24j. ——Contribution, exoneration and indemnity.

Suits for contribution or exoneration and right of equitable contribution, see Indemnity and Contribution.

Rights and remedies of sureties, see Suretyship.

§ 24k. ——Accounting, marshalling and subrogation.

Necessity for accounting to correct fraud as sustaining jurisdiction where legal remedy also exists, see post ¶ 131.

Accounting suits and right to accountings, see Accounting Suits; Estates of Decedents, XII; Trusts, XI; Guardianship, V; Partnership, VII; Agency, IV.

Marshalling assets and securities, see Marshalling Assets.

Subrogation, see Subrogation; and see also Mortgages, VIII; Taxes, VIII, IX; Insurance, XIX.

§ 24l. ——Injunction, ne exeat, sequestration, and receivers.

See generally Injunctions; Ne Exeat; Receivers; Sequestration.

Corporate receivership and sequestration, see Corporations, XXIII.

§ 25. Incidental or ancillary jurisdiction.

For the nature and scope of the relief which equity will grant in aid of its assumed jurisdiction, see specific topics, e. g., Specific Performance, IV; Quieting Title, III; Rescission, VI; and the like.

Jurisdiction to grant ancillary injunctions, see Injunctions, I, II.

Jurisdiction to settle disputed boundary incident to proper equitable suit, see Boundaries § 25.

Interlocutory procedure and decrees, see generally post, IX and cross-references there collected.

¶ 92. The circuit court in chancery of the county where an infant resides having authorized the sale of his land has jurisdiction of supplemental proceedings to enforce payment pursuant to the sale, though the land lies in another county.—In re Axtell's Petition, 95 Mich. 244.

§ 26. Relative jurisdiction of chancery and probate courts.

Jurisdiction in guardianship matters, see Guardianship, II, IV.

Jurisdiction over insane or incompetent persons, see Incompetents; Insane Persons, II, V.

Jurisdiction and relief in condemnation proceedings or in cases of invalid takings, see Eminent Domain, V, IX.

Jurisdiction over decedents' estates, see generally Estates of Decedents, II.

¶ 93. A very large proportion of the old equity jurisdiction has been vested in the probate courts; and it seems that chancery has

jurisdiction in those cases only where an adequate remedy does not exist in the probate court.—People ex rel. Campau v. Wayne Circuit Court, 11 Mich. 393.

¶ 94. Act No. 253, Pub. Acts 1899, giving to the probate court jurisdiction over testamentary trusts and trustees, applies only to provisions actually made by will, and has no application to a case where an equitable trust is sought to be established, but even if it did apply to such a case, the courts of chancery would still have jurisdiction according to the provision of section 46 of the act.—Kundinger v. Kundinger, 150 Mich. 630.

§ 27. Pendency of action at law.

Proper mode of objection, see post § 97.
Pendency of litigation as excuse for not suing sooner, see post § 51.
Pendency of another action as ground for abatement, see Abatement § 12.

¶ 95. Pendency of an undetermined lawsuit does not bar a suit in equity on the same subject, but at a proper stage, if justice requires it, the court of equity will compel an election of remedies; even then the election of the equitable remedy is always admissible.—McGunn v. Hanlin, 29 Mich. 476.

¶ 96. Chancery cannot be ousted of its jurisdiction in a foreclosure suit by a subsequent replevin suit at law seeking to try the same question.—Austin v. French, 36 Mich. 199.

¶ 97. It is not a matter of course to deny relief in equity when a suit at law is pending, if the decision at law cannot cover the whole controversy.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 98. A suit in equity to restrain the enforcement of an assessment for a drain may go on collaterally with certiorari proceedings to review the drain commissioner's action.—Drain Commissioner v. Baxter, 57 Mich. 127.

¶ 99. Where one has obtained an executory writing by fraud, equity has jurisdiction to cancel it, and such jurisdiction is not affected by any legal redress that might be obtained in an action at law whether it has already been commenced or not.—Fred Macey Co. v. Macey, 143 Mich. 138, per Hooker, McAlvay, and Montgomery, JJ.

§ 28. ——Of other suit in equity.

As ground for abatement, see Abatement § 10 et seq.

¶ 100. A pending foreclosure suit is not to be set up in bar of a bill to clear title to the land in controversy by discharging of record as invalid the mortgage, since the purposes and parties in the two suits are different.—Eaton v. Eaton, 68 Mich. 158.

§ 29. ——Of probate or statutory proceedings.

¶ 101. Probate proceedings for discovery do not bar an otherwise proper suit in equity for winding up the affairs of a partnership; delays caused by them can be allowed for in the progress of the chancery suit.—Perrin v. Lepper, 49 Mich. 347.

§ 30. Consent or submission to jurisdiction.

Rule against jurisdiction by consent and exceptions to rule, see Courts § 63.
Submission to equity jurisdiction, see also post ¶¶ 475, 847.
Waiver by delay or failure to object in proper manner, see post § 121.
Demurrer as admission of inadequacy of legal remedy, see post § 156, ¶ 634.
Admission of jurisdiction by pleading to merits, see Appearance § 7.

¶ 102. Where the subject of litigation is not one of equitable cognizance relief cannot be given in equity, notwithstanding the defendant has answered and gone to a hearing on the merits.—Bennett v. Nichols, 12 Mich. 22; Gamber v. Holben, 5 Mich. 331.

¶ 103. Chancery may dispose of claims of third persons in assigned estates, where the parties are willing and voluntarily submit themselves to its jurisdiction although its statutory supervision over assigned estates does not go to that extent.—Edwards v. Symons, 65 Mich. 348; Sawyer v. McAdie, 70 Mich. 386.

¶ 104. Where one of two persons engaged in a joint enterprise in the nature of a partnership files his bill for a mutual accounting and the other answers and submits himself to the doctrine applicable to the class of cases in which he is impleaded, the parties have become litigants under the particular head of jurisdiction appealed to.—Wyatt v. Sweet, 48 Mich. 539.

§ 31. Cessation or ouster of jurisdiction.

Dismissal for want of jurisdiction, see post § 191.
Dismissal for insufficient amount involved, see post § 191.
Cessation by transfer to supreme court, see Appeal, IX.
Power to make amendatory, ancillary or supplementary decrees after term or enrollment, see post §§ 225, 226; and see Judgments, VI.

¶ 105. It cannot be objected on appeal that equity has lost jurisdiction by reducing the issues to that of the construction of contracts, where the bill by one railroad lessee of a union depot company against another lessee railroad company set forth the several leases and alleged a contract between plaintiff and defendant besides and prayed an injunction against threatened obstruction of plaintiff's rights to use tracks and terminals, and where before the issuance of the injunc-

tion and pending the suit they agréed on a temporary joint use of the property, thus avoiding need for the injunction, and then went to hearing on the merits without raising the want of jurisdiction by demurrer.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 106. A court of equity having obtained jurisdiction of a suit to restrain the removal of timber from land until the taxes have been paid as provided in the contract is not ousted of that jurisdiction by the fact that before the case was brought to a hearing all the property to which a lien might attach had been removed by the defendants.—Michigan Iron & Land Co. v. Nester, 147 Mich. 599.

§ 32. Suits affecting foreign subject-matter.

General rules as to jurisdiction of courts over foreign subjects, see Courts §§ 43-46.

Declination of supplemental proceedings to suit from another state, see Courts ¶ 231.

Real actions and venue thereof, see Venue, I.

Foreign and domestic administration of estates and assets, see Estates of Decedents, II.

Recognition of foreign receivers to sue or defend, see Receivers, VIII.

¶ 107. The primary operation of chancery jurisdiction is in personam; it acts upon the conscience of the party, and by its coercive power over defendant's person it will in many cases compel him to perform such acts and to execute such instruments as may be necessary to do justice to the opposite party; and this though such acts and instruments are to operate upon property beyond the jurisdiction of the court.—Graydon v. Church, 7 Mich. 36.

¶ 108. Though a court of chancery, having jurisdiction in personam, may exercise its jurisdiction in a case of contract, fraud or trust, concerning land out of its jurisdiction, it cannot make a decree to restrain or give compensation for a nuisance or tort to real property lying in another jurisdiction; so held where one railroad company filed a bill to restrain another from doing acts continually injurious to complainant's estate and franchise, by crossing its railroad and intruding within its exclusive limits.—Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. (56 U. S.) 233, 14 L. ed. 674.

§ 33. Declination for want of enforcing power.

Feasibility of relief as affecting completeness allowable, see post § 220.

¶ 109. Courts of equity must have complete jurisdiction over all matters in controversy, directly, or by power to coerce the parties, and where this does not exist, as in the case of an assignee in bankruptcy, jurisdiction will be denied.—Voorhies v. Frisbie, 25 Mich. 476.

¶ 110. Equity will not entertain a bill where it could not obtain the means of enforcing a cross-bill, if one should become proper, so as to compel both parties to do equity.—Voorhies v. Frisbie, 25 Mich. 476.

§ 34. Declination for want of means to try issues.

¶ 111. Where a bill is brought by an administrator to impress a trust on certain property held by a defendant, and claimed by her under an alleged gift inter vivos by the deceased, equity should not be denied jurisdiction on the ground that a jury is needed to try the issues of fact, since the chancellor is competent to decide them.—Chamberlain v. Eddy, 154 Mich. 593.

§ 35. Declination of legal controversies.

Declination because legal remedy is adequate, see post § 39.

Declination of jurisdiction because jury will be needed, see ante ¶ 111.

Effect of reduction of controversy to legal one, see ante ¶ 105.

Attempted consent to jurisdiction, see ante § 30.

Statutory provision for transfer from equity to law side or vice versa, see Jud. Act, chap. XI, § 2; Comp. L. 1915, § 12351.

¶ 112. The question of forgery of an instrument of title back of the mortgage being foreclosed is unfit for a court of equity to pass upon defensively unless the case is found to be a plain one; the question should be tried by ejectment.—Summers v. Bromley, 28 Mich. 125.

B. INADEQUACY OR NONEXISTENCE OF LEGAL REMEDY OR DEFENSE.

§ 36. In general.

[Note. The question whether there is such an inadequacy of legal remedy as to make a case for equity is involved in many cases which it would be impossible to collect here without encroaching on the specific topics, such as Injunctions, I, II; Quieting Title, I; Rescission; Reformation; Specific Performance. See those and other equity topics, and see cross-references post § 39.]

Rule where existing legal remedy is not plain, convenient or prompt, see post § 37.

Allegations as to lack of legal remedy, see post § 85.

¶ 113. In general, where a bill prays relief which cannot be had by law, and to which the complainant is entitled, equity takes jurisdiction.—Rowland v. Doty, H. 3; Wales v. Newbould, 9 Mich. 45.

¶ 114. The "irreparable injury" alleged as a ground of equitable jurisdiction is not necessarily such injury as cannot be measured by a pecuniary standard.—Wilmarth v. Woodcock, 58 Mich. 482.

¶ 115. Where the objection of adequate legal remedy is one that must be passed upon at the final hearing after all the evidence is in, it is not to be favored.—Wyckoff v. Victor Sewing Mach. Co., 43 Mich. 309.

¶ 116. A party will not be compelled to give up a legal remedy for an equitable one, and equitable jurisdiction can never supplant legal jurisdiction.—People ex rel. La Grange Township v. State Treasurer, 24 Mich. 468.

§ 37. Legal remedy difficult or inconvenient.

Complexity of accounts as basis of jurisdiction, see Accounting Suits § 4.

Adequacy of legal remedies to settle boundaries, see Boundaries §§ 24, 25.

¶ 117. If the remedy at law is not plain, adequate and complete, but is difficult or doubtful, equity will entertain jurisdiction.—Wheeler v. Clinton Canal Bank, H. 449; Edsell v. Briggs, 20 Mich. 429; Gott v. Hoschna, 57 Mich. 413; McKinney v. Curtiss, 60 Mich. 611.

¶ 118. Where the case presents such complications, such obstacles to a disposition at law, and such questions peculiar to equity as to make it manifest that a court of law could not so deal with it as to effect a proper adjustment and bring about a complete termination of the contention, equity will hold jurisdiction.—Wallace v. Harris, 32 Mich. 380.

¶ 119. Equity may afford relief where the legal remedy would be inadequate or not immediately available.—Maclean v. Fitzsimons, 80 Mich. 336.

¶ 120. The fact that there was a remedy at law upon a contract held not to preclude an election of an equitable remedy which was much more complete, embracing what would otherwise have been numerous suits at law, with a possible necessity for equitable relief finally.—Olson v. Morrison, 29 Mich. 395; Carroll v. Rice, W. 373.

§ 38. Exhaustion of legal remedy or recourse.

Allegations to sustain equity jurisdiction, see post § 85.

Exhaustion of legal remedies or futility of resort to them as basis for creditors' suits, see Creditors' Suits, I, C.

Exhaustion of legal recourse before resort to bill to annul fraudulent conveyance, see also Fraudulent Conveyances, V.

Prerequisites to bills against corporations by creditors, see Corporations § 200.

Prerequisites to bills by creditors to enforce stockholders' liability, see Corporations §§ 327, 336.

Failure to appeal or bring error when available as making judgment conclusive, see Former Adjudication.

¶ 121. Except where one has an actual lien or security giving him an original right to file a bill, he must exhaust his remedy at law before resorting to equity.—Vanderpool v. Notley, 71 Mich. 422.

§ 39. Declination where legal remedy adequate.

See also ante ¶ 116.

Declination of purely legal controversies, see ante § 35.

Bill for damages for fraud as demurrable, see post ¶ 348.

Amendment to transform law case into one in equity, see also post ¶¶ 548, 549.

Administration of legal relief to make it complete, see post § 222.

Adequate means for discovery at law as grounds for denial of discovery in equity in aid of law action, see Discovery ¶ 12.

Ejectment as primary remedy to determine title to real property, see Ejectment § 1.

Existence of legal remedy for suppression of conveyance by depositary of deed in escrow, see Escrows.

Legal and other remedies for collection of or surrender of assets to personal representatives, see Estates of Decedents, V, B.

Remedy for correction of irregularity in execution or sale under it, see Executions, X; Conversion; Trespass; Replevin.

Remedies for relief from defective or irregular foreclosures, see Foreclosure, V.

Remedy at law for fraud, see Fraud, III.

Remedies for assertion or protection of homesteads, see Homesteads, IX.

Adequacy of legal remedy as defense or reason against injunction, see Injunctions, I, II.

Remedies at law to obtain possession from lessee, see Landlord and Tenant, V; Forcible Entry.

Remedies at law and proper parties to redress injuries to municipal corporations, see Municipal Corporations, XVI, A.

Remedies to try title to and rights in office, see Offices, III.

Remedy at law for nuisance, see Nuisances, III.

Remedy at law for removal of highway obstructions, see Highways, XI.

Legal remedy as bar to suit for quieting title, see Quieting Title, I, III.

Adequacy of legal remedy as ground for refusing specific enforcement, see Specific Performance, I, IV.

Adequacy of legal remedy as defense to bill for construction of will, see Wills, VI, J.

¶ 122. Equity will not take jurisdiction of a case where there is a plain and adequate remedy at law.—Barrows v. Doty, H. 1; Bennett v. Nichols, 12 Mich. 22; Torrent v. Muskegon Booming Co., 22 Mich. 354; Hagenbuch v. Howard, 34 Mich. 1; Mears v. Howarth, 34 Mich. 19; Bay City Bridge Co. v. Van Etten, 36 Mich. 210; Torrent v. Rodgers, 39 Mich. 85.

¶ 123. Courts of equity will not take cognizance of cases where their jurisdiction is concurrent, if there is a plain, adequate and complete remedy at law.—Chapel v. Hull, 60 Mich. 167.

¶ 124. A bill in equity will not lie where there is an adequate remedy at law.—Petrie v. Torrent, 88 Mich. 43.

¶ 125. Equity is without jurisdiction to determine the title of one who is in the actual possession of real estate under a claim of ownership.—Beach v. Rice, 186 Mich. 95.

¶ 126. The proper remedy to obtain possession of lands held by a person in possession claiming title under an invalid title, by a party holding a legal title, is ejectment, as a court of chancery is not the proper forum to try titles to lands.—Seymour v. Rood, 121 Mich. 173.

¶ 127. Where a bill has for its object the preservation of an estate until such time as it could be administered under the Bankruptcy Law, it is subject to demurrer as the rights of the creditors are protected by legal remedies under the state laws and no reason for equity jurisdiction is disclosed.—Ideal Clothing Co. v. Hazle, 126 Mich. 262.

¶ 128. A bill will not lie in equity to require an accounting, to restrain the defendant from proceeding with a replevin suit begun by the complainant, to declare such action to have been settled by the parties, and to cancel the replevin bond; since there was an adequate legal remedy for determining such questions in the replevin suit on an issue framed under a suggestion pursuant to § 10402 et seq., Comp. Laws 1897; § 13116 et seq., How. St.—Huebel Co. v. MacKinnon, 186 Mich. 617.

§ 40. Equitable right or title involved.

Existence of lien as ground though legal remedy adequate, see ante ¶ 121.

¶ 129. In this state equity has not taken jurisdiction of cases where a suitor has a full, complete, and adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of a court of equity.—Detroit Trust Co. v. Old Nat. Bank of Grand Rapids, 155 Mich. 61.

¶ 130. It is only when the rights of parties spring from legal duties and obligations that the law furnishes the remedy for their enforcement to the exclusion of proceedings in equity.—Godfrey v. White, 60 Mich. 443.

¶ 131. A bill to set aside a conveyance of real property and to avoid a transfer of personalty will not be dismissed though it is alleged that the question as to the realty has been passed upon in a former decision and the matter relating to the personalty could be determined in an action of trover, where it alleges that the property was obtained by fraud, through a conspiracy, and that an accounting is necessary.—Lyon v. Clark, 137 Mich. 438.

§ 41. Concurrent or statutory jurisdiction and remedies.

Declination of jurisdiction because concurrent legal remedy is adequate, see ante § 39.

Concurrent jurisdiction with law, see also Courts § 69.

What remedies are concurrent for particular rights and wrongs, see specific topics treating of such rights and wrongs, e. g., Nuisances, III; Highways, XI (encroachments); Drains, II, G; Local Improvements, VII; Taxes, VI, X, XII.

Jurisdiction over actions affecting trusts, see Trusts, IX et seq.

Statutory jurisdiction to make allowance to wife living separate from husband, see Husband and Wife, VII.

¶ 132. Where there is apparently as good ground for assigning a case to the jurisdiction of a court of equity as to that of a court of law, it is not a matter of great consequence in which branch it falls, since the same judge sits in both law and equity.—Wallace v. Harris, 32 Mich. 380.

C. PREVENTION OF MULTIPLICITY AND CIRCUITY.

§ 42. In general.

Inadequacy of legal remedy requiring multiplied litigation, see ante § 37.

¶ 133. Equity may entertain an original bill on the ground of saving multiplicity of suits.—Village of Frankfort v. Schmid, 151 Mich. 85.

¶ 134. Where, instead of a complexity of controversies between the parties with respect to the same subject-matter, the complexity arises from there being involved the several rights of more than two, each attempting adjustment and each requiring at law a separate action, equity will take jurisdiction of a suit to which all are parties and therein adjust all rights and determine the whole controversy.—Buck v. Lockwood, 193 Mich. 242.

¶ 135. Suits do not become of equitable cognizance because of their number merely.—Youngblood v. Sexton, 32 Mich. 406.

¶ 136. A bill by a corporation against its former officers to recover moneys they are alleged to have wrongfully and fraudulently voted to themselves for services performed as such officers, and a further sum they are alleged to have wrongfully made by the use of the company's moneys, cannot be said to save a multiplicity of suits, and jurisdiction cannot be entertained on that ground.—Bay City Bridge Co. v. Van Etten, 36 Mich. 210.

§ 43. Numerous actions threatened or pending at law.

Avoidance of multiplicity and circuity as basis for cross-bill asserting legal rights which could not have been asserted by original bill, see post ¶ 487.

Bills of peace to prevent multiplicity, see post, XII.
Interpleader bills and grounds for them, see Interpleader.

¶ 137. Where sixty-seven suits were brought upon county orders by different plaintiffs before justices of the peace, some of which were tried and judgments rendered for the plaintiffs, and five of them appealed to the circuit court, and the county commissioners claimed to have a valid defense to them all, and filed a bill in equity to enjoin them until the appealed suits could be tried, it was held that no case of equitable jurisdiction was made out, and a preliminary injunction was dissolved.—Lapeer County Com'rs v. Hart, H. 157.

¶ 138. The fact that after appealing five out of sixty-seven actions there were no funds remaining in the county treasury with which to pay the costs and appeal the remaining suits constitutes no reason for equitable interference.—Lapeer County Com'rs v. Hart, H. 157.

¶ 139. Equity will not take jurisdiction of a suit to enforce the collection of the costs in a large number of discontinued suits at law, the court of law having had ample power to deal with each individual case.—Beecher v. Mead, 49 Mich. 162.

¶ 140. Where a succession of trespasses is threatened for which no adequate remedy lies at law, and likely to cause damage, the amount of which cannot well be ascertained, equity will interpose at any stage of the injuries, and thus the multiplicity of suits will be avoided which might be necessary if resort were had to actions of trespass.—Stone v. Roscommon Lumber Co., 59 Mich. 24.

¶ 141. Where a party is in possession, and suits at law are brought against him for portions of the land, he may file a bill to quiet title against all the claimants—the questions being the same as to all—and the suits at law will be enjoined, that the whole controversy may be settled in one proceeding.—Woods v. Monroe, 17 Mich. 238.

¶ 142. In order to prevent a multiplicity of suits equity may enjoin an encroachment on land which, if allowed to continue, would ripen into a title.—Newaygo Mfg. Co. v. Chicago & W. M. R. Co., 64 Mich. 114.

¶ 143. The jurisdiction of chancery to avoid a multiplicity of suits could not be invoked where the complainant was not threatened with such suits and where the number of suits complainant might bring would be of its own choosing.—Attorney General ex rel. Marr v. Board of Education of Detroit, 133 Mich. 681.

¶ 144. The fact that an equitable estoppel may be urged in an action at law is not a reason for denying jurisdiction in equity, where multiplicity may be avoided, although the estoppel would prevail in the law actions.—Roth v. Rubert, 176 Mich. 484.

§ 44. Taxpayers' suits.

For practice in taxpayers' suits and circumstances in which they are proper, see Injunctions, II, D; Municipal Corporations, XVI, A; Counties § 55; Townships, VIII; Taxes, X, C.

¶ 145. Several persons cannot unite to file a bill in a local court of limited jurisdiction to restrain the collection of a tax on the ground of preventing a multiplicity of suits, the tax being levied throughout the state. Such a suit could only diminish the number of suits, but it could not prevent a multiplicity of them.—Youngblood v. Sexton, 32 Mich. 406.

IV. LACHES AND ACQUIESCENCE.

§ 45. In general; maxim as to slothfulness.

[Note. Specific applications of the doctrine of laches to the various equities and equitable remedies are found in topics treating thereof. (See topics referred to under § 46 post.) None but cases seeming to have a general application and significance were retained here.]

What regarded as laches, see post §§ 46-49.
Knowledge, notice and concealment as factors, see post §§ 55, 56.
Excuses for delay, see post §§ 50, 51.
Interruption or suspension of running of laches, see post § 52.
Persons chargeable with or responsible for laches, see post §§ 53, 54.
Persons entitled to urge laches, see post § 57.
Pleading in anticipation of defense of laches, see post § 89.
General law of limitations of actions, see Limitations.
Presumptions as to payment from lapse of time, see Evidence, II; Payment, V.
Lapse of time, inaction and acquiescence as waiver of fraud, see Fraud, I, III.
Estoppel by acquiescence and silence, see Estoppel, III.
Want of diligence as destroying right to rely on another's representations, see Estoppel, III; Fraud, I; Mistake.
Bar of all claims by laches or limitations as terminating receivership, see Receivers, II, B, V.
Acquiescence as defense in ejectment, see Ejectment § 20.

¶ 146. The term "laches" involves the idea of negligence,—a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time.—Ripley v. Seligman, 88 Mich. 177.

¶ 147. Laches implies a neglect or failure to do what ought to have been done under the circumstances to protect the rights of the one to whom it is imputed, or involving the injury to the opposite party through neglect to assert rights within a reasonable time.—Holmes v. Soule, 180 Mich. 526.

¶ 148. Laches rests chiefly on the inequity of permitting a claim to be enforced by reason of changed conditions or relations of the property or parties resulting from delay.—Parks v. Brooks, 188 Mich. 645.

¶ 149. Peace and good order require that equity shall not aid those who grossly neglect to take care of their own rights.—Zoellner v. Zoellner, 46 Mich. 511.

¶ 150. Equity will not entertain a bill to recover a stale demand where there has never been any obstacle in the way of complainant's asserting his right.—Campau v. Chene, 1 Mich. 400.

¶ 151. Equity refuses to aid stale demands where the party has slept on his rights and acquiesced for a great length of time.—Douglas v. Douglas, 72 Mich. 86.

¶ 152. Equity does not favor the purchase of litigious titles or of stale demands revived after they were naturally regarded as abandoned.—Porter v. Noyes, 47 Mich. 55.

¶ 153. A court of equity looks with disfavor on any needless delay in complaining of a grievance when the party complained of is expending money or exercising important corporate functions under claim of right.—Hathaway v. Village of New Baltimore, 48 Mich. 251.

¶ 154. Equity requires vigilance, some degree of promptness on the part of those claiming to be defrauded; and especially is this true where innocent parties are dealing and assuming positions in reliance upon the validity of contracts.—Barker v. Finley, 200 Mich. 166.

¶ 155. Negligence of a complainant in signing a party wall agreement which mistakenly granted away the wall already constructed pursuant to a parol agreement, will not bar his right of recovery, where no action by the defendant with reference to the possession of the land has been induced by such negligence.—Eberle v. Heaton, 124 Mich. 205.

§ 46. Delays regarded as laches.

Laches as reason for denying reopening of case for further proofs, see post § 173.
Laches or delay as reason for denying rehearing, see post § 229.
Delay as reason for denying leave to file supplemental bill, see post ¶ 935.
Laches as bar to bill of review, see post § 242.
Laches in seeking accounting with agent, see Agency ¶ 537.
Delay barring right to relief from expulsion from membership association, see Associations ¶ 20.
Laches in seeking enforcement of building restriction, see Buildings § 23.
Laches in enforcing charity, see Charities § 5.
Laches in filing mortgage or changing possession of chattels covered, see Chattel Mortgages § 48.
Laches defeating forfeiture of corporation by state, see Corporations § 254.
Laches defeating execution purchaser failing to register stock purchased on books, see Corporations ¶ 1066.
Laches barring stockholders' suits, see Corporations § 345.
Laches as affecting right to costs, see Costs, II, B.
Laches in creditors' bills and bills in aid, see Creditors' Suits § 18.
Delay excused by resort to cross-bill in other suit and defeat therein, see also Creditors' Suits ¶ 67.
Delay as bar to divorce, see Divorce § 30.
Laches in appealing from divorce decree to subject estate to inheritance, see Divorce ¶ 391.
Laches to claim alimony award, see Divorce § 147.
Laches barring relief from drain proceedings, see Drains §§ 109, 110.
Laches affecting right to opening of default, see Defaults §§ 28-31.
Laches to claim assets of estate for administration, see Estates of Decedents, V, B.
Laches as bar to accounting by representative, guardian, or trustee, see Estates of Decedents, XII; Guardianship, V; Trusts, XI.
Laches as bar to suits to annul fraudulent conveyances, see Fraudulent Conveyances, II, B.
Laches and estoppel to have taxpayer's injunction or other suit, see Injunctions, I, II; Municipal Corporations, XVI, A; Taxes, X, C.
Laches and estoppel to complain of local assessments, see Local Improvements, VII; Drains, II, G.
Laches as bar to bill to redeem from mortgage, see Mortgages, IX.
Laches and estoppel to object to nuisance, see Nuisances, I, III.
Laches defeating pledgor or pledgee, see Pledges, II, III.
Laches as bar to suit to quiet title, see Quieting Title, I, III.
Laches as bar to reformation suits, see Reformation, I, III.
Laches as bar to suits for annulment or cancellation or rescission, see Rescission, II, III.
Laches as bar to specific enforcement, see Specific Performance, I, IV.
Laches as bar to relief from taxes or tax sales, see Taxes, VI, VIII, X, C, XII, C.

Laches as bar to establishment or enforcement of trust, see Trusts, IX et seq.
Laches as bar to bill to set aside will or probate, see Wills, V, D.
Laches barring right to make constitutional question, see Constitutional Law § 29.

¶ 156. A bill was filed to establish a right to profits from a mine and a division of the property, complainant claiming under a lease of an undivided interest in the mining grant, the remaining interest, including the reversionary right, having long before passed to defendant. It was held properly dismissed for unconscionable delay, on proof that complainant, with full knowledge of what was being done, had allowed defendant to expend money and erect costly works in order to develop the mineral resources of the land, without asserting his claim in court for more than twenty years after defendant had acquired its original interest in the property.—Harlow v. Lake Superior Iron Co., 41 Mich. 583.

¶ 157. Where a bill asking, among other things, relief against a note, was filed within three years and a half after the note was given, and within six months after it fell due, the delay was held no ground for refusing relief.—Schwarz v. Wendell, W. 267.

¶ 158. Six years' lapse before bringing suit to cancel a conveyance of land on the ground that it was obtained from the grantor under circumstances of undue influence, and for an inadequate consideration, cannot avail a defendant where the property remains in his hands, and there has been during that time no loss of evidence preventing a full presentation of the case, and the cost of the improvements made by defendant does not exceed the amount which a reasonable rent of the premises would have produced.—Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260.

¶ 159. Where the delay in presenting a claim to the assignee was due entirely to a matter of legal form in describing the nature of the debt, and to the disallowance in the shape first presented, it may be allowed afterwards, although the delay may have left less money in the assignee's hands than will place the claimant on as good a footing as those who have already received dividends.—Farwell v. Myers, 64 Mich. 234.

¶ 160. Twenty months' delay in filing a bill for review after rendition of a later decision which settled the law is laches, where the decree entered by consent had been standing a year when the later decision was rendered, and where there was no fraud or any excuse shown for the delay.—Ingles v. Bryant, 117 Mich. 113.

¶ 161. There is laches barring relief, where a party to a contract made on the strength of a decision waited two and a half years after such decision was overruled, and nine months after its attorney advised that the decision relied on was no longer the law, before any assertion of its claim for relief.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109; writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

¶ 162. A landowner on the shore of a meandered lake which lies by until a hazardous and costly venture of another has proved existence of valuable ore under the lake bed, bearing no obligation to contribute to loss in case of failure, has no equity against the owner whose enterprise produces the value.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109; writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

§ 47. ——Mere delay without change.

Mere lapse of time as adverse possession, see Adverse Possession ¶ 23.

¶ 163. Lapse of time alone is not sufficient to bar equitable relief.—Ripley v. Seligman, 88 Mich. 177.

¶ 164. In the absence of any conduct designed to mislead, mere delay will not deprive an owner of his estate, legal or equitable, until barred by some clear rule of equity.—Palmer v. Williams, 24 Mich. 328.

¶ 165. Laches alone is not necessarily conclusive against a complainant's equities when he is not of a suspicious nature nor prompt to assert his rights.—Wyckoff v. Victor Sew. Mach. Co., 43 Mich. 309.

¶ 166. Mere lapse of time, where defendant has not relied upon plaintiff's silence and acted upon it, so as to change his position for the worse and so that he would suffer a loss if he were compelled to surrender or alter what he had done by reason of plaintiff's being permitted to assert his rights, does not constitute laches.—Quinn v. Tully, 174 Mich. 30.

¶ 167. Laches, as interpreted by courts of equity, is not tested by mere delay for a certain period, but is such unreasonable neglect to assert and seek to enforce a right as will constitute in equity and good conscience a bar to recognition.—Walker v. Schultz, 175 Mich. 280.

¶ 168. Mere delay and acquiescence will not defeat the enforcement of a strict legal right by injunction, unless continued long enough to defeat the right itself.—Longton v. Stedman, 182 Mich. 405.

§ 48. ——Delays by public.

¶ 169. Thirty years' adverse possession by a city, under claim of right, of land formerly occupied as a county seat, would bar the county from reclaiming the land in equity.—

Kent County Sup'rs v. City of Grand Rapids, 61 Mich. 144.

§ 49. ——Delay less or more than period of limitations.

Application of limitations in equity, see Limitations; and see also Adverse Possession; Easements §§ 11-13.

¶ 170. Equity follows the analogies of the statute of limitations in all cases where an analogous relief is sought upon a similar claim. But where the relief sought is in its nature one of equitable and not of legal cognizance, and the remedy is of a purely equitable nature, equity follows its own rules.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265.

¶ 171. In the case of presumptive bar from lapse of time, the rule as to subsequent disabilities is different from that of the statute of limitations. Under the statute the party must bring himself within the exceptions of the statute, whereas in cases of presumptive bar he may show any circumstance that outweighs the presumption.—Abbott v. Godfroy's Heirs, 1 Mich. 178.

¶ 172. A lapse of time less than that allowed in corresponding cases at law might not be overlooked in some cases in equity, but where a holding has been clearly adverse the excuse for a longer delay in attacking it should, if any excuse is admissible, be very clear, or relief against it should be denied.—McVickar v. Filer, 31 Mich. 304.

¶ 173. The bar to a remedy in equity has reference rather to the nature of the property to be affected than to the character of the instrument which may affect it. So held where a foreclosure bill was filed twelve years after a series of notes secured by an unsealed mortgage had become due.—McKinney v. Miller, 19 Mich. 142.

¶ 174. The omission to do what one is by law required to do to protect his rights, and which justifies a fair presumption that he has abandoned the same under circumstances which mislead or prejudice an adverse party, may in equity operate as laches which will bar the assertion of such rights later under changed conditions, even though the statute of limitations has not run.—Olson v. Williams, 185 Mich. 294.

¶ 175. Any delay to make complaint as to fraud in the sale of land within the statute of limitations is insufficient to constitute laches.—Hutchinson v. Westbrook, 191 Mich. 484.

§ 50. Excuses for delay.

Anticipating the defense, see post § 89.

Where delay exceeds time of limitations, see also ante ¶ 172.

¶ 176. Pecuniary inability can never be admitted as a reason for extending the time for the assertion of an equity not springing from any fraud or fault of the other party.—McVickar v. Filer, 31 Mich. 304.

¶ 177. Relationship may be an excuse for laches in the enforcement of rights.—Wright v. Wright, 37 Mich. 55.

¶ 178. A desire to avoid family litigation is not to be disfavored; and where forbearance to file a bill in equity has not misled the defendant to his prejudice, the delay has been excused by the peculiar relationship and mutual conduct of the parties, the action of the defendant not having been such as to impress on the complainant the necessity of urgency in prosecuting.—Case v. Case, 26 Mich. 484.

¶ 179. A probate court, upon proper petition has authority to require the discovery of any and all books and papers belonging to an estate (How. St. § 5876); hence laches is not excused by want of possession of or access to such books necessary to prepare for suit.—Eames v. Manley, 121 Mich. 300.

¶ 180. On a bill in aid of execution the holder of a promissory note who relies on representations made by an indorser thereon to whom the money was first intrusted for investment, and upon whose representations that payment would be made reliance was placed, held not guilty of laches in failing to bring suit and apply securities then available for several years after maturity.—Johnson v. Cook, 179 Mich. 117.

§ 51. ——Pending litigation or immaturity of right.

Pendency of other litigation as affecting jurisdiction of equity, see ante §§ 27-29.

Knowledge or notice of right as essential basis for laches, see post §§ 55, 56.

Nonimputation to person under disability or in suspense, see post § 53.

¶ 181. A complainant seeking in equity to establish his right to remove timber from lands cannot forfeit such right by abstaining from its exercise while defendants are litigating it.—Holcomb v. Mosher, 50 Mich. 252.

¶ 182. One whose right of action to cancel a deed did not arise until a failure to probate another's will is not chargeable with laches if he moves within a reasonable time after such failure.—Barker v. Smith, 92 Mich. 336.

¶ 183. Delay by children until after their father's death in seeking to set aside, on the ground of his mental incapacity, a deed executed by him, is not such laches as bars their remedy.—Hemphill v. Holford, 88 Mich. 293.

¶ 184. Proceedings to enjoin the dissipation of an estate based upon the fraudulent suppression of a will, whereby the heirs had obtained an order of distribution of the property, which were commenced by the legatees

four years after they had discovered the will but which they had proceeded to have probated immediately on its discovery and while the original probate proceedings were still pending are not barred by laches.—Ewing v. Lamphere, 147 Mich. 659.

¶ 185. On a landowner's bill filed in April, 1905, to restrain defendant from flooding lands by a dam, it would be an extreme application of the doctrine of estoppel by nonaction to deny relief on the ground of laches where it appears that the township had begun an action against the defendant in 1902 and the suit had been dismissed on defendant's agreement to satisfy the landowners and to remedy the very conditions which were alleged to be the causes of the damage, and giving until July, 1904, to do so.—Miller v. Bank of Belleville, 148 Mich. 339.

§ 52. Interruption or suspension pending claims.

Interruption or suspension of running of limitations, see Limitations, III.
Possession as absolving possessor from duty to sue, see post § 54.

¶ 186. The mere assertion of a claim, unaccompanied by any act to give it effect, cannot avail to keep alive a right which would otherwise be precluded.—Van Buren v. Stocking, 86 Mich. 246.

¶ 187. Where the claim that a mistake had been made in omitting the descriptions of certain lands from a contract for the sale of standing timber was asserted as soon as the mistake was discovered, and was asserted at all times thereafter, although suit was not begun immediately, and where complainant never gave defendants reason to suppose the claim was abandoned or intended to be waived, and where, further, no injury had resulted to defendants from the delay, it was held that complainant was justified in exhausting persuasion before resorting to litigation, especially in view of the repeated admissions of the president of the vendor corporation, who negotiated the sale of the timber in its behalf, that he understood that the omitted lands were a part of the contract.—Metropolitan Lumber Co. v. Lake Superior Ship Canal, Railway & Iron Co., 101 Mich. 577.

¶ 188. A bill by a corporation to cancel a secret and burdensome contract to pay royalties alleged to have been procured by fraud is not barred by laches where the corporation protested promptly after discovering the fraud and entered into negotiations for a peaceable settlement which failed and began its suit a reasonable time thereafter.—Fred Macey Co. v. Macey, 143 Mich. 138.

§ 53. Persons imputed with laches; disabilities.

Who entitled to urge laches, see post § 57.
Possession as absolving possessor from suing, see post § 54.
Disability of infancy to sue, see Infants, VII.
Disabilities of insane persons, see Insane Persons, V.
Laches by infant seeking for relief from judgment, see Infants, VII.
Immunity of county from plea of laches in suit on county officer's bond, see Officers, VII.

¶ 189. Laches cannot be imputed to one who brings proceedings as soon as he is in legal condition to do so, as where one awaits a discharge in bankruptcy.—Gamble v. Folsom, 49 Mich. 141.

¶ 190. Laches in filing a bill to establish his rights is not imputable to a minor or to any person incompetent to act on his own behalf.—Dragoo v. Dragoo, 50 Mich. 573.

¶ 191. Laches is not attributable to an infant.—Putnam v. Tinkler, 83 Mich. 628.

¶ 192. The incompetency that will exonerate a complainant from the consequences of his own laches must be an incapacity of mind preventing him from realizing the nature and consequences of the fraud upon him, or an incapacity of action precluding him from taking the necessary steps to right the wrong inflicted upon him.—Wright v. Fisher, 65 Mich. 275.

§ 54. ——Persons in possession.

¶ 193. Neither the statute of limitations nor laches bars the claim of one who takes possession of and continues to occupy and improve land under his father's agreement that he should have it as an advancement, the father executing a deed which was accidentally lost before being delivered or recorded.—Michie v. Ellair, 54 Mich. 518.

¶ 194. A delay of five years by a party in possession in filing a bill to obtain the legal title will not bar his equity where nothing has been lost by the other party in consequence.—Boyce v. Danz, 29 Mich. 146.

¶ 195. A vendee of a contract for the purchase of land is not guilty of such laches as will prevent him from specifically enforcing the contract against the heirs and legatees of the vendor where during all the time between the execution of the contract and the filing of suit he had been in possession of the land, and such possession was known to all interested parties, and he had never made any demand for a deed nor made tender of the price until the suit was filed, when it appears that such demand would have been unavailing.—Detroit United Ry. v. Smith, 144 Mich. 235.

¶ 196. Where land was conveyed to a township for a road in consideration of the closing of another highway, without the deed being recorded, and subsequently the new road was abandoned and the old one reopened, held, on the recording of the deed

many years later by the township, that the grantor suing to quiet title could not be charged with laches, where he took possession of the land described in the deed on the abandonment of the road and had been in practically undisputed possession for more than sixteen years.—Hodges v. Township of West Bloomfield, 186 Mich. 259.

§ 55. Notice of knowledge as basis.

¶ 197. Laches in moving to set aside proceedings of which notice should be given cannot be imputed to the moving party if he has not been notified.—McCrickett v. Wilson, 50 Mich. 513.

¶ 198. The lapse of time which will make a claim in equity stale cannot begin until something has happened on which to base the claim; as in case of a breach of trust, no matter how long the trust has been in operation.—Chadwick v. Chadwick, 59 Mich. 87.

¶ 199. Laches is not chargeable for failure to institute proceedings in equity to satisfy a decree from the proceeds of property fraudulently transferred and sold, so long as the proceedings of the transferees are kept secret.—Reeg v. Burnham, 55 Mich. 39.

¶ 200. The fact that a ward did not begin suit to enforce a mortgage released by his alleged guardian until four years after becoming of age is not laches where he did not learn of the mortgage until shortly before the bill was filed.—Olmstead v. Taylor, 126 Mich. 316.

¶ 201. The failure of a woman and her minor children to assert ownership to the extent of their interest as legatees of a deceased shareholder in the property of a corporation that had sold all its assets by a sale void as to them, does not amount to laches, where suit was brought soon after the discovery of the true condition of the testator's estate, and the invalidity of such sale.—Marsh v. Breen Iron Co., 181 Mich. 204.

§ 56. ——Concealment or breach of trust.

Concealment of fraud or trust as suspending limitations, see Limitations, III.

¶ 202. Where the delay on the part of a cestui que trust in asserting his equitable title to lands arose from the trustee's fault, he was held not barred by laches.—Loring v. Palmer, 118 U. S. 321, 30 L. ed. 211, 6 Sup. Ct. Rep. 1073.

¶ 203. Delay in commencing proceedings to avoid a fraudulent sale by an assignee for creditors is excused by the conduct of the assignor and assignee colluding by fictions and transfers to hide the facts.—Morrison v. Mayer, 63 Mich. 238.

¶ 204. Under the particular circumstances of the case it was held that laches was not imputable to a deceased partner's representatives in pressing their claims for an accounting against the surviving partner who was a trustee and had fraudulently administered the trust for his own benefit.—Perrin v. Lepper, 72 Mich. 454.

¶ 205. A bill to rescind a contract for an exchange of property, whereby a plaintiff acquired stock in a bank which subsequently became insolvent, based upon the ground of fraud, is barred by laches, where the complainant does not act until more than two and one-half years have elapsed since he became a director in the bank and nearly a year after the bank has become insolvent, there being no excuse for the laches except reliance upon untruthful statements of other officers of the bank, as a director is bound under the law to acquaint himself with the affairs of the bank and its condition, especially where it appears that the rescission was not sought until an assessment was ordered against the stock.—Earle v. Humphrey, 121 Mich. 518.

§ 57. Persons entitled to urge laches.

Against whom laches may be urged, see ante §§ 53, 54.

¶ 206. "The law of laches should be used as a shield and not a sword."—Barron v. Myers, 146 Mich. 510.

¶ 207. Lapse of time is not ground for demurring to a bill, the object of which is to obtain payment on a land contract; it tells against the purchaser who has failed to demand a conveyance, rather than the seller. —Day v. Cole, 56 Mich. 294.

¶ 208. Rights are not lost by laches of the owner as against persons claiming only under a forged deed.—Crawford v. Hoeft, 58 Mich. 1.

¶ 209. Not commencing proceedings to enforce the priority of a mortgage over a deed made later, but recorded earlier, is not laches as against a grantee with notice where the mortgagee has always asserted such priority, where he has been guilty of no misconduct, and where he has appeared in a suit brought by the purchaser from the grantee to cancel the mortgage; especially where the grantee threatened suit but never commenced it.—Cook v. French, 96 Mich. 525.

¶ 210. An administrator cannot set up the defense of laches to an action by heirs for an accounting and to set aside a deed to a contingent interest in land wrongfully secured from them by the administrator for his son, and from which he benefited, the deed being made without consideration and without knowledge of the true significance thereof, where the delay worked no wrong nor changes prejudicial to him.—Parks v. Brooks, 188 Mich. 645.

V. PROCEDURE IN GENERAL.

§ 58. In general.

[Note. The treatment followed in this digest is to divide the procedure of courts into specific topics, such as those hereinafter referred to. Under the Judicature Act, as the procedure in equity assimilates to that at law, it is very important to treat both together as far as possible, and that has been done.]

Parties, pleadings, hearing, and decisions, see post, VI-X.

Interlocutory proceedings, see post, IX (cross-references).

Rehearing and bills of revivor, supplement and review, see post, XI.

Prayer for process under old practice, see post § 92a.

Dismissal of cause without decision or prejudice, either voluntary or involuntary, see post, X, A.

Leave to file petition or bill after decree, see post, XI.

Rules of court regulating practice, power of courts to make, see Courts, III.

Filing bill as commencement of suit, see also Actions § 6.

Appearance and process, see Appearance; Process.

Appearance in law action, effect on related chancery suit, see Appearance § 12, ¶ 55.

Abatement of actions and suits and revival of them, see generally Abatement.

Effect of death of party, see Abatement §§ 2, 3, 17.

Doctrine that pending suit will not abate action at law, and vice versa, see also Abatement § 12.

Failure of bill for ancillary relief by abatement in respect of principal matter of relief, see also Abatement ¶ 24.

Transfer of cause to law calendar, see Calendar § 7.

Transfer on appeal from equity to law or law to equity, see Appeal § 498.

Chancery procedure in contempts, see Contempt, III.

Denial of relief or recognition to party in contempt, see Contempt § 43.

Continuances and practice thereon, see Continuances.

Proceedings for discovery or for production and submission of books and papers to inspection, see Discovery.

Notice of lis pendens and filing of same, see Lis Pendens.

Procedure on paying money into court, see Payment, I, B.

Stipulations in general, see Stipulations.

Procedure to appoint guardians ad litem, see Guardians ad Litem.

Practice in making case for appeal and in taking appeal, see Appeal, VI et seq.

Errors regarded as harmless or as cured and therefore not ground for reversal of decree, see Harmless Error.

Powers of judges and court commissioners, see Courts, V; Judges, II.

Constitutional direction to abolish distinctions between law and equity proceedings "as far as practicable," see Const. art. VII, § 5.

Legislative direction to supreme court to make rules for abolishment of distinctions and simplification of proceedings, see Jud. Act, chap. I, § 14; Comp. L. 1915, § 12019.

Mode of commencing suits in equity, see Jud. Act, chap. XIII, § 5; Comp. L. 1915, § 12408.

Form and contents of chancery summons, see 1916 C. C. Rule 19.

Statutory provision for transfer from equity to law side, see Jud. Act, chap. XI, § 2; Comp. L. 1915, § 12351.

¶ 211. A complainant seeking to set aside the rules of the court will be required to make as strong a case as a defendant to set aside a default.—Thayer v. Swift, W. 384.

§ 59. Notices, motions and orders.

Motion to dismiss as a substitute for demurrer, see post § 112.

Motion and showing for leave to amend and order on motion, see post §§ 139, 140.

Practice on motions to dismiss without decision, see post § 197.

Proper practice by motion and showing to reopen cause for further proofs, see post § 173.

Application and notice to enter final decree, see post § 203.

Right of appearing defendant to have notice of application for entry of decree, see post § 203.

Necessity of notice of petition for leave to file bill of review, see post § 244.

Services of notices other than process, see Notices; Motions and Orders.

Motions and orders in general, and notices of motion, see Motions and Orders.

Notice of motion in foreclosure for deficiency judgment, see Foreclosure, VI.

Publication of orders and notices to creditors to present claims, see Jud. Act, chap. XIX, § 1; Comp. L. 1915, § 12655.

Signature of attorney to special motions, see 1916 C. C. Rule 15.

¶ 212. Notice of a proceeding in a chancery suit, if not signed by the solicitor nor by his authority, and not emanating from his office, may be disregarded; and testimony taken under such a notice may properly be suppressed.—McClintock v. Laing, 22 Mich. 212.

¶ 213. A defendant who has appeared in the cause is entitled by statute (Comp. L. 1857, § 3500) to notice of all subsequent proceedings. And where the rules fix the period of notice, such notice should in all cases be given.—Jenny v. O'Flynn, 5 Mich. 215.

§ 60. ——Entry of orders and further proceedings.

¶ 214. After the overruling of the plea in a case, it is irregular to proceed with the

cause until an order overruling the plea has been entered.—Connor v. Jochen, 171 Mich. 69.

¶ 215. Irregularities in proceeding with a cause after overruling of plea and before the entering of an order overruling the plea has been entered, and in entering an order pro confesso without giving notice thereof, are waived when the defendant for other reasons moves to vacate the order pro confesso and for leave to answer.—Connor v. Jochen, 171 Mich. 69.

§ 61. Affidavits.

Affidavits on application for leave to file bill of review, see post §§ 244, 245.

Affidavits as extraneous to bill in testing same on demurrer, see post § 114.

Answer to bill as affidavit on motion, see post ¶ 665.

General law of affidavits, see Affidavits; Oaths.

Affidavit for appearance, see Process, II, C.

Entitling affidavits in name of suit, see Affidavits § 4.

Rule as to entitling affidavits in the cause, see 1916 C. C. Rule 3.

¶ 216. Affidavit in a chancery cause is not void because the jurat is signed by the "deputy register" as the officer who administered the oath. Where he holds his position by virtue of being deputy clerk, who is an officer known to the law and authorized as such to administer oaths, the subscription "deputy register" instead of "deputy clerk" may be regarded as a mere mistake in legal designation. Whether the deputy register is not, as such, a legal official, quære.—Torrans v. Hicks, 32 Mich. 307.

VI. PARTIES.

§ 62. In general; necessary and proper parties.

[Note. Under the present statutes the selection and alignment of parties is primarily based on an inquiry "To whom does the right of action or defense pertain?" The answer to this is in the substantive law, and the specific topics should always be consulted in the portions dealing with the right to sue or the persons liable.]

Persons regarded as parties, see post § 64.

Party required to verify bill by several, see post ¶ 238.

Bills of revivor and supplement to bring in other parties, see post §§ 233-239.

Parties to bill of review, see post § 248.

General law of parties, see Parties.

Capacity to sue or to defend, see Infants, VII; Insane Persons, V; Husband and Wife, VI; Corporations, XIX.

Necessity for guardian ad litem or next friend, see Guardians ad Litem, I; Infants, VII; Insane Persons, V; Husband and Wife, VI.

Trustee as representative of cestui que trust, see Trusts, IX; and see Former Adjudication, V.

Right of taxpayer or taxpayers to sue on behalf of public or in own right to restrain illegal action, see Injunctions, II, D, V; Municipal Corporations, XVI, A; Townships, VIII; Taxes, X.

Statutory intervention, see Parties.

Leave to sue or intervene in receivership suits or proceedings, see Receivers, IV, C.

Necessary and proper parties in the various chancery proceedings, see specific topics treating of equitable remedies and rights, e. g., Accounting Suits § 8; Appeal, IV; Assignments, IV; Assignments for Creditors § 36; Chattel Mortgages § 123; Combinations and Monopolies § 9; Corporations, XIX (and references there found); Creditors' Suits, II; Divorce, VI; Dower, VI, B; Drains, II, G; Easements, V; Eminent Domain, IX; Estates of Decedents, V, B, XI, XII, XIII; Executions, X; Foreclosure, III, V, VI; Forestry, III (lien proceedings); Fraud, III; Fraudulent Conveyances, V; Garnishment, XI (interpleader proceedings); Guaranty, IV; Guardianship, IV; Highways, II, B, XI; Homesteads, VIII, IX; Husband and Wife, VI; Infants, VII; Injunctions, V; Insane Persons, V; Indemnity and Contribution, III; Insurance, XX; Interpleader; Judgments, VI, XII; Liens; Local Improvements, VII; Marriage, IV (annulment suits); Mechanics' Liens, VIII, B; Mortgages, IX (accounting and redemption); Municipal Corporations, XVI, A; Negotiable Instruments, XIV; Nuisances, III; Partition, II; Partnership, VI, VII, E; Pledges, III; Quieting Title, III; Railroads, VI (foreclosures); Receivers; Reformation, III; Rescission, VI; Specific Performance, IV; State of Michigan, V; Taxes, X-XII; Townships, VIII; Trusts, IX et seq.; Vendors and Purchasers, XI, XII; Wills, V, D, VI, J.

Statutory provisions as to suits against "unknown defendants," etc., see Jud. Act, chap. XII, § 20 et seq.; Comp. L. 1915, § 12371 et seq.

§ 63. Joinder and misjoinder and defects and substitutions.

Multifariousness of bills for misjoinder, see post § 73 et seq.

Averments as to reasons, see post § 86.

Sufficiency of excuse for nonjoinder, see also post ¶ 337.

Who may demur or object, see post § 94.

Mode of objection for misjoinder or nonjoinder, see post §§ 101, 102.

Time for objection to defects in parties, see post § 120.

Amendments of parties, see post § 129.

Dismissal for want of parties, see post § 190.

Dismissal of unnecessary or improper parties, see post § 195.

Necessity of bringing all parties to bill or in interest before court to make decree, see post § 202.
Leave to add necessary party on sustaining demurrer for defect in parties, see post § 211.
Omission of party as ground for rehearing, see post § 229.
Bills of supplement and revivor to bring in new parties or successors of original parties, see post, XI.
Cross-bills between codefendants, see post § 124.
Distinct and separate relief to different parties, see post § 214.
For proper joinders in particular suits, see Injunctions; Rescission; Specific Performance; and the like.
Statutory provisions for joining parties in equity and for impleading nonconsenting persons in joint interest as defendants, see Jud. Act, chap. XII, § 10; Comp. L. 1915, § 12361.
Statutory provision that suits shall not be defeated by nonjoinder or misjoinder, see Jud. Act, chap. XII, § 13; Comp. L. 1915, § 12364.
Effect of assignment of subject-matter of suit, substitution of assignee, see 1916 C. C. Rule 57.

§ 64. Who regarded as parties.

Identification of parties otherwise than by prayer for process, see post ¶ 350.

¶ 217. The parties defendant in a bill of complaint are those against whom process of subpoena is prayed. Where such process is not prayed against a defendant in his representative character he cannot be regarded as sued in that character.—Pardridge v. Brennan, 64 Mich. 575.

¶ 218. A person cannot be regarded as a party to a suit who is not made one by the proceedings in the case, and does not appear in that character upon the record.—Michigan State Bank v. Hastings, 1 D. 225; Michigan State Bank v. Hammond, 1 D. 527.

VII. PLEADING.

[Note. Many of the older decisions on equity pleading have been rendered partly obsolete by the Judicature Act and the 1916 Circuit Court Rules. All such decisions have nevertheless been carefully retained because many of them have value as explaining the origin of the present practice. The section lines in this division have been worded, as far as possible, so as to conform to the present features of the practice with such further sections as were needed to care for the old matter.]

General law of pleading, see Pleading.
Divorce bills, cross-bills and answers, see Divorce, IV.

A. FORMAL MATTERS; CAPTION, TITLE, SIGNATURE AND VERIFICATION, AND FILING.

§ 65. In general; form and entitling service and filing.

Necessity, sufficiency, propriety and relevancy of substantial allegations, see post § 77 et seq.
Provisions as to entitling pleadings and stating venue, see Jud. Act, chap. XIV, § 3; Comp. L. 1915, § 12455.
Form and entitling of papers and pleadings to be filed, see 1916 C. C. Rule 3.
Indorsements on pleadings filed, see 1916 C. C. Rule 3.
Business address of attorney on papers served, see 1916 C. C. Rule 3.
Provisions for service of copies on appearing defendants, see Jud. Act, chap. XIV, § 5; Comp. L. 1915, § 12457.
Provisions as to service of copy of bill with process or thereafter, see Jud. Act, chap. XIII, § 6; Comp. L. 1915, § 12409.
Time for service of copy of bill, if not served with summons, see 1916 C. C. Rule 31, § 2.
Time and place for filings, see Jud. Act, chap. XIV, § 1; Comp. L. 1915, § 12453.

¶ 218a. The objection that after a discontinuance papers were wrongly entitled in the names of both defendants was held to be a mere technicality.—Howe v. Lemon, 47 Mich. 544.

§ 66. Signatures.

Signature to notices, see ante § 59.
Pleading signed by solicitor not in the case as nullity permitting default, see also Defaults ¶ 7.
Opening default taken notwithstanding improperly signed answer, see Defaults ¶ 86.
Answers in chancery by corporations, seal, signature and verification, see Corporations § 192.
Every pleading to be signed by party or attorney, see 1916 C. C. Rule 21, § 9.
Signature of attorney to petitions and special motions, see 1916 C. C. Rule 15.

¶ 219. A bill in equity, if not signed in person or with the responsible signature of counsel, appended by himself or by some authorized representative, may be stricken from the files. A printed signature is not good.—Eveland v. Stephenson, 45 Mich. 394.

¶ 220. The requirement that a bill in equity must be signed by counsel is obsolete in Michigan, where all solicitors are counsellors, and a bill signed by solicitor is not demurrable for want of counsel's signature.—Henry v. Gregory, 29 Mich. 68.

¶ 221. A petition was not signed by the petitioner, but was verified by an affidavit signed by her, which stated that she had read it, and knew its contents, and that it

was true. Held sufficient.—Johnson v. Johnson, W. 309.

¶ 222. An answer must be signed, notwithstanding complainant has, by his bill, waived an answer under oath.—Kimball v. Ward, W. 439.

¶ 223. The lack of defendant's signature to his answer is a fatal defect on motion to strike from the files, if not waived by replication.—Bernier v. Bernier, 72 Mich. 43; reversed in 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

¶ 224. The signature of the defendant to an answer, permitted to be filed at the hearing of a bill to foreclose a mortgage, containing no admission available to the complainant as evidence and not being evidence in the defendant's behalf, may be regarded as a mere formality which can be dispensed with.—Balen v. Mercier, 75 Mich. 42.

¶ 225. An answer to a bill of complaint need not be signed by the defendant personally where answer upon oath is waived in the bill, but may be signed by his solicitor, and a similar practice prevails even though the answer is one in the nature of a cross-bill. (1897 Chancery Rule 10, subd. e and Rule 1, subd. a.)—O'Donnell v. St. Clair Circuit Judge, 146 Mich. 442.

§ 67. Verification of bill or petition.

Signature to verifying affidavit as sufficient signature to bill, see ante ¶ 221.
Amendments to supply signatures and verifications, see post § 130.
Reverification of pleadings after amendment, see post § 143.
Verification of divorce bills, see Divorce § 48.
Noncollusion affidavit for interpleader bill, see Interpleader.
Necessity of verification of mechanics' liens bill, see Mechanics' Liens, VIII, B.
False verification of bill or answer as perjury, see Crimes §§ 115, 116.
Rules as to verifying chancery pleadings, see 1916 C. C. Rule 27.
Form of oath to verify pleading, see 1916 C. C. Rule 27, § 2.
Oath to bill against "unknown defendants," see Jud. Act, chap. XII, § 24, Comp. L. 1915, § 12375.

¶ 226. Bills in equity need not be verified in the absence of any statute or rule requiring it, except when preliminary relief is sought, or when it is sought to transfer into equity matters usually cognizable at law.—Moore v. Cheeseman, 23 Mich. 332.

¶ 227. In the absence of any statute or rule requiring it, a bill in chancery need not be verified except when preliminary relief is sought.—Wardle v. Cummings, 86 Mich. 395.

¶ 228. A bill need not be under oath, when no preliminary order is required, notwithstanding an answer on oath is not waived.—Atwater v. Kinman, H. 243.

¶ 229. Where an injunction bill is framed as a mere pleading to obtain relief only on a final hearing, and not to be used as the basis of an application for preliminary relief, and where the case exhibited is within the ordinary jurisdiction in equity, and stands on no peculiar ground which might call for a verification of the bill, the objection that it should be sworn to is unwarranted.—Robinson v. Baugh, 31 Mich. 290.

¶ 230. The failure to verify an injunction bill is of no importance except for the purposes of a motion for injunction.—Glidden v. Norvell, 44 Mich. 202.

¶ 231. A trustee of a religious corporation cannot get an immediate injunction against his cotrustees on an unsworn bill.—Cicott v. Anciaux, 53 Mich. 227.

¶ 232. The petition and answer thereto in a proceeding for execution for deficiency on foreclosure must be sworn to.—Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3.

¶ 233. A bill cannot be filed to take into a court of chancery jurisdiction over a controversy of a legal nature without a verification of such facts as show its propriety.—Township of Lebanon v. Burch, 78 Mich. 641.

¶ 234. A bill seeking to restore a mortgage, a discharge of which is alleged to have been procured by fraud, should, in strictness, be verified.—Beal v. Congdon, 75 Mich. 77.

¶ 235. A bill to enforce a vendor's lien need not be verified.—Shaw v. Taylor, 146 Mich. 544.

§ 68. ——Of answer, cross-bill or plea.

Supplying by amendment, see post § 130.
Necessity of sworn answer to obtain opening of default, see Defaults § 38.

¶ 236. A bill seeking to have settled in equity matters capable of enforcement at law should be verified, and verification is required of an answer which asks such relief as if by cross-bill, under rule 123.—Bernier v. Bernier, 72 Mich. 43; reversed in 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 235.

¶ 237. A plea to a bill need not be verified where it sets up a public record of the same court in which the suit is pending.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368.

§ 69. ——Requisites and sufficiency.

¶ 238. The verification of a bill to enjoin the dissipation of an estate may be made by one or more of the complainants and need not be made by all of them.—Ewing v. Lamphere, 147 Mich. 659.

¶ 239. When a creditor's bill is verified by complainant's agent, who is not also solicitor of the complainant, the jurat should state the person to be the complainant's agent; but where it is verified by the oath of the solicitor the court will take notice of that fact from the records and proceedings in the cause.—Bergh v. Poupard, W. 5.

¶ 240. A bill asking for a preliminary injunction must be sworn to on personal knowledge of facts that will justify its issue, or reason must be shown for the absence of such verification.—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 89; Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9.

§ 70. ——Waiver of sworn answer.

Effect of answer not under oath, see also post § 164a.

Waiver of sworn answer as preventing discovery, see Discovery § 4.

Waiver of sworn answer as affecting right to accounting, see Accounting Suits ¶ 9.

Statutory provision for waiver of answer on oath and effect of answer so waived, see Jud. Act, chap. XIV, § 6; Comp. L. 1915, § 12458.

Rule requiring sworn answer if demanded by sworn bill, and effect of bill and answer as evidence, see 1916 C. C. Rule 25.

¶ 241. Under 1897 Chancery Rule 10, subd. a, providing that "whenever in a cause a sworn bill of complaint is filed, and a sworn answer demanded, the defendant shall be required to file such sworn answer," an answer under oath must be deemed to be waived in all cases except where a sworn bill is filed and a sworn answer demanded.—World Mfg. Co. v. Kent Circuit Judge, 115 Mich. 652.

¶ 242. 1897 Chancery Rule 10, providing that answer must be sworn when demanded by a sworn bill is not in conflict with How. St., § 6621 (Comp. L. 1897, § 443), which provides that "when a bill shall be filed in chancery, other than for discovery only, the complainant may waive the answer's being made on the oath of the defendant, and in such cases the answer may be made without oath, and shall have no other or greater force as evidence than the bill," since the statute does not in terms prescribe the manner in which waiver of an oath may be made.—World Mfg. Co. v. Kent Circuit Judge, 115 Mich. 652.

B. BILL, PETITION OR INFORMATION.

§ 71. Bill or petition as proper initial pleading.

Petition for relief or bill of review as proper practice to open decree, see also post ¶ 891.

Supplemental petition to make supplemental decree on matters reserved by original decree, see also post ¶ 895.

Petition for rehearing or bill, see post ¶ 918.

When information by attorney general is requisite or proper, see post § 72.

Petition or bill in suit to enforce rights in assignments, see Assignments for Creditors §§ 36-40.

¶ 243. A petition may be presented either in a case, or in a matter over which the court has jurisdiction under some act of the legislature or some other special authority.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 244. Proceedings in regard to the administration of a trust must be begun by bill of complaint, not by petition.—Ledyard's Appeal, 51 Mich. 623.

¶ 245. A judgment creditor of a cestui que trust who seeks to enforce payment out of the surplus income of the fund held in trust for the latter may present his case as well by petition as by original bill.—Spring v. Randall, 107 Mich. 103.

§ 72. Bill or information as proper practice.

Information or bill as better procedure to restrain county action at suit of attorney general, see Counties ¶ 217.

¶ 246. Where the attorney general has a right to intervene to restrain unauthorized corporate action the regular course for him is to proceed by information rather than by a bill in equity.—Attorney General ex rel. Lockwood v. Moliter, 26 Mich. 444.

¶ 247. A pleading filed as an information, though having many of the features of a bill, cannot be sustained as a bill when dismissed as an information; the attorney general failing by his information to make out a case on behalf of the public cannot bring the relator forward as orator at the hearing; and there can be no bill of complaint without a complainant.—Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

§ 73. Multifariousness; joinder and severance of causes.

Distinct parties improperly joined, see post § 74.

Distinct causes improperly joined, see post § 75.

Prayer for diverse kinds of relief, see post § 76.

Necessity that bill be consistent with itself, see also post § 78.

Inconsistency introduced by amendment, see post § 150.

Proper mode of taking objection for multifariousness, see post § 101.

Waiver of objection by delay in making it, see post §§ 119, 120.

Multifariousness of bills for specific relief praying other relief or impleading other parties, see also specific topics.

Multifariousness of bill in aid of execution and creditor's bill, see also Creditors' Suits § 2.

Multifariousness of bill for partition of dower and accountings of personalty, see also Dower ¶ 113.
Joining in injunction and nuisance bills, see Injunctions, III; Nuisances, III.
Joining in bills for relief from taxes, see Taxes, VI, X.
Statutory rule for joinder of all causes in one action except legal and equitable in same cause, see Jud. Act, chap. VIII, § 1; Comp. L. 1915, § 12309.

¶ 248. Under Pub. Acts 1915, No. 314, chap. VIII, § 1, providing that the plaintiff may join in one action, at law or in equity, as many causes of action as he may have against the defendant, a court of equity has power in divorce proceedings to adjust the property rights of the parties and to compel an accounting by the husband of money of the wife in his hands.—Stanton v. Stanton, 197 Mich. 161.

¶ 249. The general question of multifariousness discussed at length.—Wales v. Newbould, 9 Mich. 45.

¶ 250. While multifariousness cannot be well defined, yet to hold a bill multifarious the court must be able to see that disconnected and independent causes of action are brought upon the record, requiring different and independent decrees, or that defendant is brought upon the record with a portion of which he has no connection, or in which different complainants have no common interest. It sometimes, therefore, means misjoinder of causes of action and sometimes misjoinder of parties.—Wales v. Newbould, 9 Mich. 45, per Martin, C. J.

¶ 251. A bill in equity that seeks adjudication upon distinct and discordant interests is demurrable for multifariousness.—Taylor v. King, 32 Mich. 42.

¶ 252. To determine whether a bill is multifarious, we must look to the starting point rather than to the prayer; for if the complainant asks for several things, to some of which his case would entitle him and others not, he may have at the hearing that relief which is consistent with the case stated.—Hammond v. Michigan State Bank, W. 214.

¶ 253. A bill is multifarious which seeks to join causes of action that do not arise out of the same wrong, affecting all the complainants at once as well as similarly.—Winslow v. Jenness, 64 Mich. 84; Jenness v. Smith, 64 Mich. 91.

¶ 254. Different causes of complaint of the same nature, and between the same parties, may be united in one suit where the same relief is asked.—Hart v. McKeen, W. 417.

¶ 255. What constitutes multifariousness is largely left to discretion guided by the circumstances of the suit; so considered with reference to a bill seeking to foreclose four different mortgages.—Torrent v. Hamilton, 95 Mich. 159.

¶ 256. Courts of equity will not encourage the splitting of causes of action and needless litigation.—German American Seminary v. Kiefer, 43 Mich. 105; Vincent v. Moore, 51 Mich. 618.

¶ 257. A complainant may, if he chooses, make distinct controversies on the same matter the subjects of separate suits.—Bonker v. Charlesworth, 33 Mich. 81.

¶ 258. The validity of a mortgage and the regularity of a statutory foreclosure of it may be made the subjects of distinct suits.—Bonker v. Charlesworth, 33 Mich. 81.

§ 74. ——Joinder of parties distinct in interest.

Joining distinct causes, see post § 75.
Praying diverse relief, see post § 76.
Proper mode of objecting for misjoinder, see post § 102.

¶ 259. A bill is not multifarious where it is single as to its subject-matter and object and relief sought, and all the defendants are connected, though differently, with the whole subject-matter in dispute, and, when the object is to establish and obtain relief for one claim in which all of the defendants may be interested, although the defendants may have different and separate interests.—Buck v. Lockwood, 193 Mich. 242.

¶ 260. A bill by a trustee in bankruptcy against the officers and directors of bankrupt and a creditor to reach property fraudulently conveyed under a conspiracy with the creditor, a bank, to have notes of the bankrupt due the bank on which such officers were accommodation makers, sureties or indorsers, canceled and paid in preference to the claims of other creditors held not to be multifarious, as the grounds of liability all reach the same subject-matter, and are in no way distinct from each other, and the defendants are all connected in interest and liable in the one subject.—Johnson v. Harrison, 199 Mich. 221.

¶ 261. Several different things, having no connection with each other, and requiring different decrees, cannot be demanded of several defendants by one bill.—Ingersoll v. Kirby, W. 65; Cart v. McKeen, W. 417.

¶ 262. A bill filed to quiet complainant's title to lands, which makes persons defendants whose claims to the land are in no way connected, is multifarious.—Hunton v. Platt, 11 Mich. 264.

¶ 263. Where the interests of complainants are several and not joint they must be severally enforced.—Walsh v. Varney, 38 Mich. 73.

¶ 264. Matters in which there is no common interest on the one side or the other cannot be litigated jointly.—Bruner v. Bay City, 46 Mich. 236.

¶ 265. A bill to enjoin the collection of a tax is multifarious if a portion of the errors complained of affect a part only of the complainants.—Kerr v. Lansing, 17 Mich. 34.

¶ 266. Where the matter in litigation is entire in itself, it is not necessary that each defendant should have an interest in the suit coextensive with the claim set up by the bill: he may have an interest in a part of the matter in litigation instead of the whole. —Ingersoll v. Kirby, W. 65.

¶ 267. Plaintiffs in separate actions, in which executions against the same defendant were simultaneously levied, are collectively and ratably interested in the levy, and are proper cocomplainants in a bill in aid of such execution.—First Nat. Bank of St. Johns v. Tyler, 55 Mich. 297.

¶ 268. A bill against a county drain commissioner and the highway commissioners of two townships to restrain the flooding of complainant township's highways, is not open to the objection of multifariousness if the defendants in their several capacities are concerned in maintaining a watercourse which endangers plaintiff's highways and bridges.—Township of Merritt v. Harp, 131 Mich. 174.

¶ 269. Where several parties are joined as complainants the bill must make a common cause for complainants throughout, or it will be multifarious.—Kerr v. City of Lansing, 17 Mich. 34; Brunner v. Bay City, 46 Mich. 236; Winslow v. Jenness, 64 Mich. 84; Jenness v. Smith, 64 Mich. 91.

¶ 270. A bill for the foreclosure of mortgage securities is not bad for multifariousness because it includes with the mortgagors, subsequent mortgagees, grantees and guarantors, and others who have given additional security where all the parties included are interested in the subject-matter and all the agreements secure the debt.—Miller v. McLaughlin, 132 Mich. 234.

¶ 271. A bill of complaint alleging that a deed was given the complainant as security for a debt due a copartnership, which had not been paid nor any proceeding at law taken to collect it, and making the members of such copartnership defendants, does not state two distinct causes of action, and therefore is not multifarious.—Bennett v. Clark, 181 Mich. 690.

¶ 272. A bill averring that the defendants as individuals owed the complainant money on the purchase price of certain lands sold by the complainant to the defendants, that the complainant owed the defendants as partners certain commissions for the sale of the complainant's land, and praying that their accounts be settled and that the defendants be enjoined from prosecuting a suit against the complainant for such commissions, and that certain debtors of the complainant who were garnished therein, be ordered to pay to the complainant the amount they owed it, and for injunctive relief in a suit brought by a third party against the defendants, in which the complainant was garnished, by ordering that the money so garnished be released from garnishment and applied to the settlement of complainant's account with the defendants as individuals and as partners, held not multifarious, since the complainant did not seek to compel such third party and the defendants to litigate their claims in the suit in which the bill was filed and no interference in the suit between such parties was sought.—Long Point Development Ass'n v. McIntosh, 193 Mich. 567.

§ 75. ——Distinct causes.

Bill by distinct parties, see ante § 74.

¶ 273. Where several liens are asserted, and each rests on its own facts, and none is complicated with the rights of third persons, and the only question in common is the validity of the law under which they are made, they cannot properly be disposed of in one litigation upon a bill in equity that is not a bill of peace or a bill to prevent multiplicity of actions.—Southern Michigan Cedar & Lumber Co. v. McDonald, 57 Mich. 292.

¶ 274. A bill seeking to hold several defendants for separate individual frauds is demurrable for misjoinder.—Woodruff v. Young, 43 Mich. 548.

¶ 275. A bill by distinct mill owners to restrain the operation of an upper dam which obstructs their right of flowage below is not multifarious.—Cornwell Mfg. Co. v. Swift, 89 Mich. 503.

¶ 276. A bill may be so framed as to unite a cause to aid an execution with one to reach property not open to execution.—Vanderpool v. Notley, 71 Mich. 422.

¶ 277. Where one of the complainants as pastor, and another as presiding elder, are entitled to the use of a church building for the purpose of conducting divine worship, the pastor being, moreover, entitled to the use of the parsonage in connection with the church, while the rest of the complainants are entitled to the use of the church for the purpose of worship according to its discipline and usages, it cannot be said that a bill is multifarious which seeks as common relief to restrain defendants (all of whom, except one who assumes to be pastor of the church, are trustees thereof) from interfering with the rights and duties of the pastor and presiding elder, from withholding funds, taking collections, paying salary to defend-

ant pastor, or him from acting as minister. —Fuchs v. Meisel, 102 Mich. 357.

¶ 278. A bill by the owners of numerous separate lots, who derive their titles from the same source, to enjoin one claiming a dower interest therein from instituting separate ejectment suits against them to recover such interest, and from prosecuting suits already instituted, is multifarious.—Douglass v. Boardman, 113 Mich. 618.

¶ 279. A bill to set aside a conveyance made by an insane person and to vacate various mortgages given by the grantee is not multifarious in impleading mortgagees who have diverse interests, if the question of sanity is decisive in all cases.—Rogers v. Blackwell, 49 Mich. 192.

¶ 280. A bill is multifarious that seeks to compel an accounting as to the management of an estate, and to enforce complainant's right as devisee, and which charges the executrix with fraud in obtaining from complainant a deed of property, and a codefendant with individual frauds.—Woodruff v. Young, 43 Mich. 548.

¶ 281. Where a creditor seeks to set aside numerous conveyances made by the debtor, in order to accomplish a single object, viz., the satisfaction of his judgment out of the property so conveyed, the bill is not multifarious.—Hulbert v. Detroit Cycle Co., 107 Mich. 81.

§ 76. ——Prayer for diverse kinds of relief.

Bills with double aspect, see post § 78.

¶ 282. A bill is not rendered multifarious by the fact that different kinds of specific relief are asked in relation to the same subject-matter, against the same parties, and in favor of the same persons.—Densmore v. Savage, 110 Mich. 27.

¶ 283. A bill is not rendered multifarious by the introduction of averments and prayer for relief based thereon, to which complainants are not entitled.—Stone v. Pontiac, O. & N. R. Co., 139 Mich. 265.

¶ 284. Though the prayer in a bill is not controlling in determining the question of multifariousness, it is to be considered.—Stone v. Pontiac, O. & N. R. Co., 139 Mich. 265.

¶ 285. A bill is not rendered multifarious if, in addition to stating a case for equitable relief, it contains allegations with reference to another matter, but insufficient to entitle complainant to relief with reference thereto.—Wheeler v. Ocker & Ford Mfg. Co., 162 Mich. 204.

¶ 286. An amendment to a bill of complaint and the prayer thereof held not to render the bill multifarious.—Antoszewski v. City Plumbing Co., 185 Mich. 215.

¶ 287. Where a mortgagee had filed his bill not only for the foreclosure of the mortgage, but also for the correction of the description in the deed by which the land was conveyed to his mortgagor, and sought also to litigate thereby the rights of other parties who claimed adversely to the mortgage, it was held that the bill was not demurrable for multifariousness.—Cummings v. Freer, 26 Mich. 128.

¶ 288. A prayer for declaring a deed to be a mortgage and for foreclosure and sale as an independent remedy is inconsistent with a bill framed to aid proceedings in ejectment by asserting an equitable estoppel against the paper title of defendant and enjoining the making of defense on his paper title; and makes the bill multifarious and demurrable; and if it contains no other requisites of a foreclosure bill it will not support a foreclosure decree.—Livingston v. Hayes, 43 Mich. 129.

¶ 289. A bill is multifarious if filed by complainant as sole attaching creditor to avoid a transaction which, as a general creditor, he seeks to treat as a statutory assignment.—Rollins v. Van Baalen, 56 Mich. 610.

¶ 290. A bill filed to set aside a partition for the fraud of the commissioners appointed to make it may properly ask that the relief be extended to the abrogation of the order by which the commissioners were appointed. —Adair v. Cummin, 48 Mich. 375.

¶ 291. A bill in chancery for partition of lands held in common set forth that defendant had purchased the lands at sales for taxes, which purchases were claimed to be void; and discovery was prayed with respect thereto, and that the same be declared void. Held, that the bill was not multifarious.—Page v. Webster, 8 Mich. 263.

¶ 292. Where a bill is filed to restrain prosecution of an ejectment suit and to declare a boundary line and to correct a mistake in a party wall agreement, an amendment, praying for the same relief as asked in the original bill excepting that the setting aside of the deed instead of the reformation is asked, is not multifarious where in either case it is asked that the legal rights of the parties be declared in the same terms. —Eberle v. Heaton, 124 Mich. 205.

¶ 293. A bill is not multifarious in asking to have testimony in regard to a title perpetuated, and to have cloud upon such title removed.—Cleland v. Casgrain, 92 Mich. 139.

¶ 294. The fact that the statute providing for the maintenance of bills to remove clouds from title does not authorize the assessment of damages in such a suit does not render such a bill multifarious because it

embodies a claim for damages, since complainant would be entitled to such relief only as is consistent with the case stated in the bill.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 295. A bill by the owners of land alleging that they delivered an abstract to one of the defendants, an attorney, for examination: that such attorney advised them that the title was defective and that a bill to quiet title should be filed; that he filed suit against a person who had no title and set out a former chancery proceeding by another person against the defendant in the suit to quiet title and set up that such defendant had ceased to have title because she made no tender; that, as a result of a conspiracy between the attorneys for both parties a decree was rendered in favor of the defendant in the suit to quiet title; that complainant's attorney without authority satisfied the decree and fixed title in the defendant; that complainant's attorney secured a deed to the premises in the name of his mother-in-law, another defendant, and acted as agent in the sale of lots to other defendants; that such attorney in furtherance of the conspiracy refused to allow an appeal from the decree and advised complainant that she had an adequate remedy on her warranty deed; that in pursuance of such conspiracy à suit was brought against the grantor and discontinued after considerable expense to complainant, and praying that title be declared to be in her; that the decree in the suit to quiet title and the subsequent deeds be set aside; that complainant's former attorney be compelled to deliver an abstract of title, repay money paid for services, and that the attorneys for defendant in the suit to quiet title be required to pay the expenses of complainant in the latter suit, in the proceedings against the grantor and in the instant suit, including an attorney's fees, held not to be multifarious, and to set out a case of flagrant fraud.—Kaniak v. Pokorney, 198 Mich. 567. (Ostrander, J., dissenting.)

§ 77. Necessity and sufficiency of averments in general.

Occasion, propriety, contents, and sufficiency of cross-bills, see post, VII, D.

Of averments in answer, see post § 106 et seq.

Propriety of and manner of amendments, see post, VII, E.

Formal matters, caption, signature, verification, etc., see ante, VII, A.

Necessity and sufficiency of verification, see ante §§ 67-69.

Necessity of positive allegations, see post § 78.

Impropriety of hypothetical allegations, see post ¶ 305.

Irrelevancy and impertinency of matter, see post §§ 80-82.

Sufficiency of bill on objection for variance, see post § 161.

Necessity that decree conform to bill, see post § 208.

Sufficiency of bill to sustain granting of complete relief, see post § 221.

Dismissal for informality or defect in pleading, see post § 192.

Disregarding technical and clerical errors, see post § 123; and see Harmless Error.

Amendment of bills, see post § 126 et seq.

Averments and sufficiency of bills of review, see post § 247.

Matters common to pleadings whether at law or in equity, see Pleading.

Pleading adverse possession, see Adverse Possession, V.

Pleading limitations, see Limitations, VII.

Pleading duress, see Duress § 6.

Pleading fraud, see Fraud, III.

Pleading mistake and accident, see Mistake.

Pleading and urging estoppel in pais, see Estoppel, III.

Pleading statute of frauds, see Frauds, Statute of, IV.

Pleading conditions in foreclosure suits, see Foreclosure, III, C.

Necessary allegations to obtain discovery, see Discovery § 4.

Averments in bill for equitable relief from drain proceedings, see Drains § 99.

Averments in foreclosure bills, see Foreclosure, III, C.

In bills to remove highway obstructions, see Highways, XI.

In bills to assert, protect or set out homestead, see Homesteads, VIII, IX.

In suits for contribution and exoneration, see Indemnity, III.

In injunction suits, see Injunctions, III.

In interpleader bills, see Interpleader; Insurance, XX.

In suits for relief from or enforcement of judgments, see Judgments, VI, XII.

In suits to enforce liens, see Liens; Mechanics' Liens, VIII, B; Foreclosure, III, C; Forestry, III (log liens); Vendors and Purchasers, XI.

In bills to redeem or to establish mortgage and for accounting, see Mortgages, IX.

In actions by, against or affecting municipalities, see Municipal Corporations, XVI, A.

In suits for nuisance, see Nuisances, III.

In partition suits, see Partition, II.

In suits by, against or involving partnerships, see Partnership, VI, VII, E.

In suits based on pledges, see Pledges, III.

In suits under Swamp Land Grants or in respect to other public lands, see Public Lands.

In suits to quiet title, see Quieting Title, III.

In reformation bills, see Reformation, III.

In rescission and cancellation suits, see Rescission, VI.

In suits to annul tax sales, see Taxes, XII, C.

In suits to establish, enforce or protect trusts, see Trusts, IX et seq.

Rules of pleading of general application, see 1916 C. C. Rule 21, ¶ 2 et seq.

Matters to be set forth in bill, see 1916 C. C. Rule 24.

[Note. By the New Federal Equity Rules, No. 18, the technical forms of pleadings in equity are abolished. Rule No. 25 prescribes what the bill shall contain and how it shall be stated. Rule 26 regulates joinder of causes, Rule 29 abolishes demurrers and pleas, and Rule 30 regulates the answers. The decisions of the federal courts made under these rules should prove instructive in Michigan practice, because of the great similarity in the rules to those of the Michigan circuit courts. Editor.]

¶ 296. Complainant in equity must so state his case in his bill that if admitted by answer or proved at the hearing the court can decree upon it.—Fox v. Pierce, 50 Mich. 500.

¶ 297. The bill must state such a case that if admitted by the answer or proved at the hearing some relief can be decreed upon it.—Highstone v. Franks, 93 Mich. 52.

¶ 298. A bill should contain allegations of facts and not mere recitals of circumstantial evidence, and should show the theory on which complainant intends to rely.—Wilson v. Eggleston, 27 Mich. 257.

¶ 299. An averment is sufficient which necessarily covers with its language full information of the claim sought to be enforced.—Evans v. Grand Rapids, L. & D. R. Co., 68 Mich. 602.

§ 78. ——Doubleness, uncertainty and inconclusiveness.

Doubleness in pleas, see post § 111a.

Manner of taking objections for uncertainty, see post § 99.

In pleadings at law, see Pleading, I, II.

Positiveness of averments in pleadings to be verified, see 1916 C. C. Rule 27, § 2.

¶ 300. A bill with a double aspect must be consistent with itself. It should not set up different and distinct causes of complaint that destroy each other.—Hart v. McKeen, W. 417.

¶ 301. A bill alleged that defendant proceeded to manage the affairs of a feebleminded grantor and occupied a fiduciary relation to her; that he exercised undue influence over her; that by fraud and deceit he induced her to execute a deed to him, which was not delivered before her death; and that after her death he had said deed recorded and went into occupation of the premises knowing he had no right to them. Held, the bill was not demurrable on the ground that it presented the case in a double aspect and was not consistent.—Gragg v. Maynard, 164 Mich. 535.

¶ 302. Where a case has been prosecuted and decided on a bill that expressly alleged the invalidity of a trust deed, and sought to have it canceled as fraudulent, and as void for being in violation of a prior agreement to execute a will making a different disposition of the property deeded, it was held that the bill was not impeachable for inconsistency, though some of its averments seemed to have been framed on the theory of calling the trustees to account for dereliction of duty, and so of affirming the trust and demanding its execution.—Mundy v. Foster, 31 Mich. 313.

¶ 303. In case of a bill to quiet title an averment that, after he had conveyed certain adjoining premises referred to, the complainant never knew that he had any land left there until shortly before the filing of the bill, was held not so repugnant to an express allegation of possession as to exclude evidence that both were true, and could not be held bad on demurrer.—Howell v. Merrill, 30 Mich. 282.

¶ 304. Facts essential to the complainant's title to maintain his bill and obtain the relief must be alleged positively, and cannot be inferred from other facts stated.—Manning v. Drake, 1 Mich. 34.

¶ 305. An excuse for leaving, that "if the said H. left, etc., he did so upon a good, sufficient and justifiable cause," is too hypothetical and indefinite to answer any legitimate purpose in a pleading.—LeBaron v. Shepherd, 21 Mich. 263.

¶ 306. Where a bill for an accounting alleges that in certain transactions complainant paid to defendant large sums of money stated under a videlicit as amounting to a certain sum, the bill does not state that there is a definite sum due and does not show that complainant is fully informed as to the amount due.—Excelsior Wrapper Co. v. Yund, 176 Mich. 372.

§ 79. ——Descriptions of property, papers or rights.

Inconclusive or hypothetical or inferential pleading, see ante § 78.

¶ 307. The description of premises in a bill which is such as to point them out by a name well known, and which distinguishes them from others, is sufficient.—Goodenow v. Curtis, 18 Mich. 298.

¶ 308. By referring in the bill to a deed or other written instrument as follows: "as in and by the said indenture, reference being thereunto had, when produced, will more fully and at large appear"—the whole document referred to is made a part of the record, although not fully and accurately described in the bill; and the complainant may, at the hearing, avail himself of the portions not recited, as well as of those inaccurately set forth.—Swetland v. Swetland, 3 Mich. 482.

§ 80. Relevancy and propriety of allegations.

See also cross-references, ante under § 77.

Mode and sufficiency of allegations, see ante §§ 77-79.

Needlessness of proof of immaterial allegations, see post § 180.

Striking out irrelevant and scandalous matter, see post § 118.

Averments of excusing reasons for not answering irrelevant parts of bill, see post § 109.

Pleading evidence or conclusions of law, see post §§ 81, 82.

Denial of costs for scandal and impertinence, see Costs § 30.

¶ 309. Where a bill to enforce a vendor's lien joins as defendant a railroad company that has taken possession of a distinct part of the land sold, it properly alleges the obvious facts in regard to such defendant's possession, and prays an answer under oath disclosing the company's position with respect to the property and that the court ascertain its true relation to the contract.—Proctor v. Plumer, 112 Mich. 393.

¶ 310. The statement, in a bill to have a lost or destroyed deed restored, that a codicil in the grantor's will, under which certain legatees would claim title to the land involved except for complainant's prior title, was made in their favor and in no way expresses the wish of grantor, was germane to the main purpose of the suit, when alleged for the purpose of cutting off such claims; and the bill was not multifarious, although it asked that such codicil be set aside, which relief it was beyond the power of the court to grant.—Blackford v. Olmstead, 140 Mich. 583.

§ 81. ——Matters of evidence.

¶ 311. Evidence is not to be set out in a bill.—Hubbard v. McNaughton, 43 Mich. 220.

§ 82. ——Conclusions of law.

Conclusions of law in answers, see post § 107.

¶ 312. General statements in a bill bearing upon the legal effect of a devise which is set out are of no importance and cannot be the subject of an issue.—LeBaron v. Shepherd, 21 Mich. 263.

¶ 313. In a bill to establish title to certain ritualistic work and for an injunction, the allegations that the complainant is owner of the ritual, that it is entitled to use it and that it has amended its articles of association for that purpose, state facts rather than conclusions of law.—Great Hive, Ladies of the Maccabees v. Supreme Hive, Ladies of the Maccabees, 129 Mich. 324.

§ 83. Jurisdictional averments.

Pleading jurisdiction generally, see also Courts § 78.

¶ 314. The jurisdiction of the court of chancery cannot be predicated upon the prayer for relief, but must be based upon the allegations of fact in the information.—Attorney General ex rel. McRae v. Thompson, 167 Mich. 507.

¶ 315. An allegation that complainant believes she would be "hampered and limited in her proof by the strict rules of the common law," in an action at law, does not warrant the interposition of equity, the rules of evidence being the same at law as in chancery.—Pittman v. Burr, 79 Mich. 539.

¶ 316. A bill by the insured in a fire insurance company states a cause of action upon the insurance contract to be tried on the law side of the court and not in a court of equity, where such bill avers that the insured, through mistake and his ignorance of the English language, in his application for such insurance stated incorrectly that there was no incumbrance upon the property covered by the policy; that the existence of the mortgage upon such property in no manner contributed to the destruction thereof; that defendant was in no manner injured or defrauded because of the existence of such mortgage; and that under the statute defendant is not relieved from its liability for the loss so sustained, because of such mortgage.—Ruppert v. Patrons' Mut. Fire-Ins. Co., 145 Mich. 473.

¶ 317. A bill alleged that defendant proceeded to manage the affairs of a feeble-minded grantor and occupied a fiduciary relation to her; that he exercised undue influence over her; and by fraud and deceit induced her to execute a deed to defendant. Held, the allegations of the bill were sufficient to give equity jurisdiction, the question being raised by general demurrer.—Gragg v. Maynard, 164 Mich. 535.

¶ 318. A bill to quiet title to a strip of land between two tracts of land and to fix the boundaries and a cross-bill for the same purpose, held simply to involve a boundary dispute in the light of the pleadings, proofs and other proceedings, and hence not within equity jurisdiction.—Weissert v. Fuller, 188 Mich. 327.

¶ 319. A bill to abate a private nuisance that alleges that the injury amounts to $500 is not bad for setting up a standard of damages that might be recovered at law.—Wilmarth v. Woodcock, 58 Mich. 482.

¶ 320. A declaration alleging a contract whereby a defendant corporation agreed to purchase certain patents of the plaintiff and to employ him, paying him a salary and a portion of the profits and which seeks relief and damages for the fraudulent destruction of profits does not show a fiduciary relation existing between the parties so as to give a court of equity exclusive jurisdiction of the case.—Church v. Anti-Kalsomine Co., 118 Mich. 219.

§ 84. ——Amount in controversy.

Sufficiency of averments to resist motion to dismiss for want of jurisdiction, see also post § 191.

¶ 321. Comp. L. 1897, § 435; How. St., § 11952, does not make an allegation of the amount in dispute jurisdictional.—Brandt v. Luce, 177 Mich. 184.

¶ 322. Whether, in a chancery bill to abate a private nuisance, it is necessary to allege that the injury it does exceeds $100, and whether the suit must fail if it falls below that, quære.—Wilmarth v. Woodcock, 58 Mich. 482.

¶ 323. A court of equity has jurisdiction, at the suit of a lower proprietor, to enjoin an upper proprietor from diverting the waters of a stream, where it appears from the bill that the injuries complained of materially lessen complainant's enjoyment of his property, and that he is remediless at law, although it is not alleged that he is damaged to the amount of $100.—Mastenbrook v. Alger, 110 Mich. 414.

¶ 324. While the failure to show an amount in controversy sufficient to give a court of chancery jurisdiction might not render a bill demurrable, yet it might be sufficient reason for the court's declining to entertain the case when the remedy at law is entirely adequate.—Bay City Bridge Co. v. Van Etten, 36 Mich. 210.

¶ 325. A bill to restrain the collection of a tax sufficiently shows the amount of the tax to be more than $100 if it states the amount to be about $150.—Palmer v. Rich, 12 Mich. 414.

¶ 326. It is not essential to jurisdiction that a bill in equity to enforce the right of a subsequent incumbrancer to redeem from a chattel mortgage should aver the property to be of the value of more than $100 where it discloses that the amount of the lien demanded, which is the proper test, is largely in excess of that sum.—Lucking v. Wesson, 25 Mich. 443.

¶ 327. An objection to a bill for specific performance that it fails to aver that the value of the lands exceeds $100 is not sustained where it appears from the bill that complainant paid more than that sum.—Raymond v. Shawboose, 34 Mich. 142.

¶ 328. The failure to allege that the demand in controversy does not exceed $100 will be regarded as a matter of form, where it appears the debtor has secured it by turning out 1,500 tons of No. 1 iron ore.—Glidden v. Norvell, 44 Mich. 202.

¶ 329. The objection that a bill of complaint did not allege that the disputed property was worth $100, and that the court therefore had no jurisdiction, was considered met where it did allege that the complainant claimed to own it in fee simple, described it as consisting of 360 acres, and stated that defendant had deeded it for the expressed consideration of $15,000.—Abbott v. Gregory, 39 Mich. 68.

¶ 330. The court will assume, in support of the jurisdiction over a bill to restrain the sale of 44 lots located in a thriving and populous city, that they are worth more than $100, in the absence of any allegation of value.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 331. Where a bill to compel the set-off of judgments avers that the amount owing by complainant on one of the judgments is the sum of $100 "over and above any and all claims or liens which * * * any person or persons claim to have against said judgment," it has a sufficient statement of the amount involved to give the court jurisdiction.—Robinson v. Kunkleman, 117 Mich. 193.

¶ 332. Under the rule laid down by Fuller v. City of Grand Rapids, 40 Mich. 395, an objection that a complainant's bill to restrain a township from issuing railroad aid bonds cannot be maintained because it is not shown that the complainant's taxes would amount to $100, will not be sustained where it is alleged that the property subject to taxation, and which might be sold for taxes if unpaid, is of the value of $2,000.—Dodge v. Van Buren Circuit Judge, 118 Mich. 189.

¶ 333. A bill seeking to avoid contracts entered into by the county road commissioners for the purchase of machinery, alleging that the interest of complainants exceeded one hundred dollars, held good on demurrer for want of proper interest.—Brant v. Luce, 177 Mich. 184.

¶ 334. The mere fact that a foreclosure decree is for $50 too much does not make an amount sufficient to give chancery jurisdiction of a bill in the nature of a bill of review attacking such decree.—Sanford v. Haines, 71 Mich. 116.

§ 85. ——As to inadequacy or exhaustion of legal remedy.

Mode of objecting the legal remedy is adequate, see post § 103.

Necessity and sufficiency of allegations in bills for particular relief, see Creditors' Suits §§ 25, 26; Corporations §§ 327, 336; Fraudulent Conveyances, V.

Necessity of allegation as to inadequacy of legal remedy, see also Accounting Suits ¶ 26.

¶ 335. The bill need not show that there is no remedy at law where it is obvious that the injunction which it asks is the only ade-

quate remedy.—Middleton v. Flat River Booming Co., 27 Mich. 533.

§ 86. Averments as to and descriptions of parties and joinder or nonjoinder.

Averments and descriptions of the interests in and relationship of the parties to the subject-matter of the suit, see the specific topics.

Pleading in suits by or against personal representatives, trustees, guardians, and the like, see specific topics such as Estates of Decedents, XI, A; Guardianship, IV; Trusts, IX.

Pleading incorporation of party, see Corporations §§ 189, 193.

Necessary averments to sustain joinder, see Jud. Act, chap. VIII, § 1; Comp. L. 1915, § 12309.

¶ 336. A bill in equity is not fatally defective for want of parties in merely failing to exclude the contingency that some person, having an unknown interest which would not be affected by the suit, is not impleaded as defendant.—Holcomb v. Mosher, 50 Mich. 252.

¶ 337. In a bill for a claim to stock in defendant corporation involving the rights and interests of complainant corporation and its stockholders, it is essential that all the parties in interest be made parties, or that some satisfactory reason for not making them parties be set forth. Such bill should show who the present owners of shares in the corporation are, or it should set forth the efforts to discover them, and should contain the proper averments that the bill is filed on their behalf as well as on behalf of the complainants named. The mere fact that a person, who is proper party complainant, is a nonresident of the state, is no sufficient reason for his not being joined in the suit; nor is the failure to join the heirs of a deceased party in interest excused by the mere averment that the party died in another state, and that since his death diligent inquiry has been instituted and failed to ascertain who and where his heirs are but they are all nonresidents of the state. Such averments are too general and vague.—Westcott v. Minnesota Mining Co., 23 Mich. 145.

¶ 338. A bill to restrain the sale of land on execution, which alleges that defendant levied "as sheriff," sufficiently shows that the suit is against defendant in his official capacity, although he is not described as sheriff in the prayer for relief.—Wight v. Roethlisberger, 116 Mich. 241.

§ 87. Allegations as to doing or offering equity.

Proper mode of objection for want of offer, see post § 100.

Averments in bills for particular relief, see specific topics such as Rescission; Specific Performance.

In bills to redeem from mortgages, see Mortgages, IX.

In bills for relief from taxes, see Taxes, VI, X, XII.

Offer or tender and payment by interpleading complainant, see Interpleader.

¶ 339. An administrator, suing for the cancellation of a title derived from foreclosure of a mortgage, which in fact was a forged one given in lieu of two valid ones, and for the reinstatement of the valid ones, need not offer in his bill to surrender the land and title if the purchase is regarded as having vested in him a title which he could not surrender in his representative capacity.—Linn v. Linn, 122 Mich. 130.

§ 88. Anticipating or rebutting matters of defense.

Anticipating defense of laches or limitations or excusing delay, see post § 89.

¶ 340. Avoidance of a special defense is pleaded by introducing the defense in the bill in the form of pretense and adding matter of reply in the shape of a charge. And if the bill is not so framed originally, a particular defense set up by the answer is not met by amending the bill.—Connerton v. Miller, 41 Mich. 608.

§ 89. ——Laches or limitations.

¶ 341. To justify equitable interference to remove obstructions to a water power that have existed for many years, the bill should make out a very strong case, and should show either that complainants protested at the outset or that circumstances existed which excused the failure to protest. It should also set forth the reasons which excuse the delay in applying for redress.—Bradfield v. Dewell, 48 Mich. 9.

¶ 342. If there be any ground of exception within the statute of limitations to prevent the bar, or ground to rebut the presumption arising from lapse of time, it should be stated in the bill.—Campau v. Chene, 1 Mich. 400.

¶ 343. The particular acts of fraud or concealment necessary to avoid the operation of a statute of limitations should be set forth in a bill by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made.—Beaubieu v. Beaubieu, 23 How. (64 U. S.) 190, 16 L. ed. 484.

§ 90. Necessity and sufficiency of prayer.

Necessity of alternative prayer to sustain alternative relief, see post ¶ 825.

Character of bill as dependent on stating part rather than prayer, see post §§ 146, 147.

Insufficiency of prayer to plead jurisdiction, see ante § 83.

Praying diverse kinds of relief as making bill multifarious, see ante § 76.

Effect of statements in bill to give narrowing character to it and restrict relief prayed, see post ¶ 590.
Effect of alternative prayer to enlarge scope of relief under bill, see post § 209.
Effect of praying damages, see post § 92.
Sufficiency of prayer in bills for particular relief and propriety of relief incident thereto, see specific topics, such as Foreclosure, III; Reformation of Instruments, III; Rescission, VI; Specific Performance, IV.
Specific prayers and paragraphing and numbering same, and addition of general prayer, see 1916 C. C. Rule 24, § 2.

¶ 344. Where a bill in equity which does not make out a case for the specific relief prayed, but is sufficient as a bill to redeem, is not demurred to, the prayer for general relief will be treated as a prayer to be allowed to redeem.—Flanders v. Chamberlain, 24 Mich. 305; Dayton v. Dayton, 68 Mich. 437.

¶ 345. If a bill in equity makes out a clear case under any recognized head of equity jurisdiction, the court must take cognizance of it and grant the appropriate relief, even though the case made by the pleadings and proofs be insufficient to sustain the decree upon the complainant's theory that it was a bill under the statute to quiet his title.—Ormsby v. Barr, 22 Mich. 80.

§ 91. ——Relief or discovery.

¶ 346. Where a complainant, entitled to discovery only, goes on to pray relief, his whole bill is demurrable.—Welles v. River Raisin & G. River R. Co., W. 35.

¶ 347. Where answer under oath is waived, no ground of relief can be set up that rests merely on the necessity of a discovery.—Torrent v. Rodgers, 39 Mich. 85.

§ 92. ——Specific relief or damages.

¶ 348. A bill of complaint seeking a money judgment in a transaction founded on fraud, is demurrable for want of equity.—Reis v. Applebaum, 182 Mich. 582.

§ 92a. Prayer for process.

Abolishment of prayer for process except prayer for injunction or extraordinary process, see 1916 C. C. Rule 24, § 3.

¶ 349. The chancery rule requiring the prayer for process to specify the parties does not make a bill fatally defective for the want of it if they are otherwise identified.—Sheridan v. Cameron, 65 Mich. 680.

¶ 350. Omission of prayer for process does not render bill fatally defective if parties are otherwise identified.—Sheridan v. Cameron, 65 Mich. 680.

C. OBJECTIONS AND DEFENSES, ANSWERS, PLEAS, DEMURRERS, AND MOTIONS ON PLEADINGS.

§ 93. Right and time to make answer or plea.

Time under order allowing answer over after demurrer, see post § 211.
Making admissions in open court, see post § 174.
Necessity of joinder of issue before motion to dismiss, see post § 112.
Time to answer before default, see Defaults § 3.
Proffer of answer to open default, see Defaults § 38.
Proper practice to obtain further time to answer where default has occurred and answer cannot be prepared to open default, see Defaults ¶ 133.
Right to put in answer after default on published service, see Defaults § 29.
Requisites and sufficiency of process and return in respect to time for answer, see Process.
Time within which motions assailing pleadings must be filed and served, see 1916 C. C. Rule 31, § 6.
Extensions of time to plead, see 1916 C. C. Rule 31, § 8.
Time for service of answer or cross-bill, see 1916 C. C. Rule 31, § 3.
Time for service of answer to cross-bill, see 1916 C. C. Rule 31, § 4.

¶ 351. Solicitors for an infant defendant, deeming the appointment of a guardian ad litem invalid but having received from him an uncertified copy of the bill, are not excused from answering by the lack of certification.—Peck v. Kent Circuit Judge, 98 Mich. 639.

¶ 352. An answer by a guardian ad litem is properly interposed, where his infant's solicitors erroneously deeming his appointment invalid and their time for answering not ripe because the copy of the bill served was not certified omitted to answer and he answered without consulting them.—Peck v. Kent Circuit Judge, 98 Mich. 639.

§ 94. Proper party to make objections or defenses.

Manner, requisites and sufficiency of making particular objections and defenses, see post §§ 97-104.
Objection by court of its own motion for multifariousness, see post ¶ 368.
Party entitled to object for purpose of saving question for appeal, see Saving Questions.

¶ 353. For a misjoinder of parties defendant those only can demur who are improperly joined.—Sweet v. Converse, 88 Mich. 1; Torrent v. Hamilton, 95 Mich. 159.

¶ 354. For a misjoinder of defendants only those who are improperly joined can demur.—Bigelow v. Sanford, 98 Mich. 657.

¶ 355. One as against whom there is no misjoinder of claims cannot demur on the ground that the bill is multifarious.—Torrent v. Hamilton, 95 Mich. 159.

¶ 356. The misjoined former owner only can complain where a bill is filed against the vendee and a former owner of the land, who negotiated the sale for the vendor, to enforce a vendor's lien.—Walker v. Casgrain, 101 Mich. 604.

¶ 357. A defendant who is interested in all the matters embraced in the bill, so that as to him the court might make a decree covering them all, cannot raise the objection of multifariousness.—Payne v. Avery, 21 Mich. 524.

§ 95. Joinder in answer or demurrer.

Effect of joint motion to dismiss or demurrer when not sustainable as to all joining therein, see post § 115.

Answer of one as affecting other defendants, see post § 166.

Answer or demurrer by one inuring to others, see post § 96.

Impropriety of guardians joining in pleadings with other parties, see Guardians ad Litem; Guardianship, IV.

§ 96. Answer or demurrer by one inuring to all.

Answer by another as binding one who relies on it, see also post § 166.

¶ 358. Bill to remove a cloud upon complainant's title. As, under the statute of 1840, in order to obtain the decree they sought, the complainants were required to substantiate their own title, it was held that the defense of one inured for the benefit of all.—Stockton v. Williams, W. 120; affirmed in 1 D. 546.

¶ 359. Bill against the grantee named in a deed of lands, and purchasers under him, to set aside the deed for fraud. The grantee answered fully, denying the fraud; and as to the others the bill was taken as confessed. It was held that the defense of the grantee inured to the benefit of the others; and the bill being dismissed as to him was dismissed as to all.—Bucboz v. Lecour, 9 Mich. 234.

§ 97. Particular defenses and objections, how made.

By whom permissible, see ante § 94.

Delay in objecting and waiver thereby, see post §§ 119-121.

Answer or cross-bill as proper method, see post § 98.

Various objections, see post §§ 99-104.

Office and scope of pleas under former practice and objections properly made by plea, see post §§ 111a-111d.

Propriety of motion to strike, see post § 118.

Necessity of proof of defenses as pleaded, see post § 162.

Exceptions to sworn answer as evidence under former practice, see post § 166a.

Mode of pleading or urging fraud, see Fraud, III.

Mode of pleading duress, see Duress § 6.

Mode of pleading mistake or accident, see Mistake.

Mode of pleading or urging estoppels, see Estoppel, III; Former Adjudication, VII.

Mode of pleading or urging statute of frauds, see Frauds, Statute of, IV.

Pleading limitations, see Limitations, VII.

Manner of pleading or urging payment or release, see Payment, IV; Releases, IV.

Necessity and sufficiency of objections for purpose of saving the question for review on appeal, see Saving Questions.

Demurrers abolished and answer and motion substituted, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456; 1916 C. C. Rule 25, 31.

Pleas in abatement and pleas to jurisdiction abolished, and defenses by answer substituted, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456.

Abolishment of pleas and making of defenses available by answer, see 1916 C. C. Rule 25, § 3.

¶ 360. Where a bill does not allege the amount in dispute and the statute provides that where the amount is less than $100 as shown by the bill, the proper procedure of the defendant is not to demur, but to raise the jurisdictional question by plea or answer, although he may insist on the objection at the hearing, where it appears, either by pleading or proofs, that the value in question is less than $100.—Brassington v. Waldron, 143 Mich. 364.

¶ 361. The pendency of a suit at law on the same cause of action is not brought before the court of equity by pleading in abatement, but is usually suggested on motion after answer, unless appearing by the pleading; and upon such motion an election of the remedy is required, to be absolute or qualified, according to circumstances.—Joslin v. Millspaugh, 27 Mich. 517.

¶ 362. Want of jurisdiction in a court of equity must be raised by demurrer when the grounds of objection appear on the face of the bill; and it cannot be questioned after answer and a hearing on the merits.—Coffey v. McGahey, 181 Mich. 225.

§ 98. ——Answer or cross-bill.

Answer to be embodied in cross-bill, when a cross-bill is filed, and affirmative portion of cross-bill to follow without repetition of averments in answer portion, see 1916 C. C. Rule 26, § 2.

¶ 363. A subsequent incumbrancer may take the objection by answer that the mortgage sought to be foreclosed is of a homestead, and invalid for want of the wife's signature. A cross-bill is not necessary for the purpose.—Dye v. Mann, 10 Mich. 291.

¶ 364. Where a portion of the land covered by a mortgage has been conveyed subject to the payment of the entire mortgage by the grantee, the purchaser of another parcel is not obliged to file a cross-bill in the foreclosure suit to protect his rights, but may set out the facts in his answer.—Caruthers v. Hall, 10 Mich. 40.

§ 99. ——Objections to form or manner, uncertainty or indefiniteness.

Special and general demurrers under old practice, see post § 116a.

Motion for further and better particulars when pleading is deemed to be indefinite, uncertain or incomplete, see 1916 C. C. Rule 21, § 8.

[Note. This rule is very similar to New Federal Equity Rule 20, and the federal precedents under that rule may be instructive. Editor.]

¶ 365. An objection that a bill of complaint is inartificially drawn, in that it states the evidence instead of the facts, can be raised only by demurrer.—Hagerman v. Wigent, 108 Mich. 192.

§ 100. ——Failure to offer equity.

¶ 366. The failure of a bill filed for setting aside a tax title to offer to do equity by refunding the tax, is not such an omission as can be taken advantage of on general demurrer.—Greenley v. Hovey, 115 Mich. 504.

§ 101. ——Multifariousness.

¶ 367. The objection that a bill is multifarious should be taken by demurrer, that it may be passed upon by the court before the expense of reference and testimony is incurred.—Burnham v. Dillon, 100 Mich. 352; Miner v. Wilson, 107 Mich. 57.

¶ 368. While the court may of its own motion raise the question of multifariousness, it is not bound to do so, nor to permit the defendants to raise it upon the hearing where full justice can be done upon the record.—Childs v. Pellett, 102 Mich. 558.

¶ 369. Multifariousness in a bill must be taken advantage of by demurrer.—Flynn v. Third Nat. Bk. of Detroit, 122 Mich. 642.

¶ 370. An objection that a bill is multifarious may be raised by demurrer in the court of original jurisdiction.—Kerr v. Rupp, 144 Mich. 269.

¶ 371. Multifariousness is not ground for a general demurrer to a bill filed by the receiver of a defunct fraternal loan and insurance society for a discovery and accounting against the trustees, officers and agents of the company.—Snover v. Boynton, 173 Mich. 539.

¶ 372. The question of multifariousness in a bill can be raised only by demurrer.—Morris v. Kuhn, 190 Mich. 419.

§ 102. ——Misjoinder or defect of parties.

Want of parties as ground for dismissal, see post § 190.

¶ 373. It is a good ground of demurrer to the whole bill that one of the complainants has no interest in the suit, and has improperly joined with others in filing the bill; but there is no such rule in regard to defendants.—Barstow v. Smith, W. 394.

¶ 374. Where fifty-nine persons owing distinct parcels of land fronting upon a street join in a bill to restrain the collection of a tax on their several parcels for grading the street, all alleging the illegality of the tax as the ground for relief, and the questions, as presented by the bill, appear prima facie to depend upon the same proceedings for assessing the tax, the court cannot, on demurrer to the bill, say in advance that the bill is bad for multifariousness or misjoinder. If, in the progress of the cause, the controversy be found to turn upon the legality of such proceedings, or other grounds common to all the complainants, there is no objection to the joinder, and it avoids multiplicity of suits; but should it appear that the multiplicity of issues, or other complications growing out of the joinder, would produce such embarrassment as to overbalance the advantages to be derived from settling the rights of the whole in one suit, it is always competent for the court, of its own motion, to dismiss the bill on this ground.—Scofield v. City of Lansing, 17 Mich. 437.

¶ 375. Objection to misjoinder of plaintiffs in the bill, one being the legal owner and the other the equitable owner, if tenable must be made by demurrer.—Eaton v. Eaton, 68 Mich. 158.

¶ 376. An objection of a want of necessary parties in a chancery suit should be raised by demurrer before answer, where the facts showing the necessity of such parties, if any, are fully disclosed by the bill.—Powers v. Hibbard, 114 Mich. 533.

¶ 377. On an accounting between the trustee and complainant, one of the beneficiaries, praying that the ownership of certain trust property be declared as between complainant and another defendant, and seeking a receivership for the property in question, the objection that beneficiaries were not made parties should have been raised by demurrer before answer.—Snook v. Pearsall, 95 Mich. 534.

¶ 378. The failure to join necessary parties in a bill in equity apparent on the face of the bill must be raised by demurrer; objection comes too late on hearing.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

¶ 379. A bill is open to general demurrer which joins a receiver as defendant and fails to aver that leave to sue him was obtained

from the court.—Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614; Steel Brick Siding Co. v. Muskegon Machine & Foundry Co., 98 Mich. 616.

§ 103. ——Defense of remedy at law.

Disfavor towards objections requiring all evidence to be in before decision is possible, see also ante ¶ 115.

¶ 380. The objection that there is a remedy at law should be taken by demurrer. If the object of the suit is embraced under any of the appropriate heads of equitable jurisdiction, the court will take cognizance of it, notwithstanding there may be a remedy at law, or other circumstances exist which would induce the court to refuse to entertain jurisdiction of the particular case, unless the defendant takes the objection by demurrer, or claims the benefit of it by his answer.—Williams v. City of Detroit, 2 Mich. 560.

¶ 381. The point that an allegation of inadequacy of remedy at law is wanting in a bill must be raised by demurrer.—Mactavish v. Kent Circuit Judge, 122 Mich. 242.

§ 104. ——Defense of limitations or laches.

Manner of pleading or urging limitation of action, see Limitations, VII.

¶ 382. The defense of the statute of limitations and lapse of time may be made by demurrer in equity.—Campau v. Chene, 1 Mich. 400; McLean v. Barton, H. 279.

¶ 383. Laches in filing a foreclosure bill cannot be urged upon pleading and proofs if the action is not barred; the objection should be taken by demurrer.—Baent v. Kennicutt, 37 Mich. 268.

¶ 384. The answer to a bill may raise the defense that relief is barred by the statute of limitations.—Highstone v. Franks, 93 Mich. 52.

§ 105. Office and scope of answer.

Necessity, mode, sufficiency, and completeness of answer, see post §§ 106-108.

Disclaimers, see post § 111.

Waiver of objections by interposing answer under old practice, see post §§ 119-121.

Matters for plea or for answer under former practice, see post §§ 111a-111d.

Answer to cross-bill, see post § 110.

Answer or cross-bill as proper mode of pleading, see ante § 98.

Signature and verification of answer, see ante, VII, A.

Propriety of and manner of amendments, see post § 126 et seq.

Propriety of supplemental or amended answers, see post § 127.

Rule that all defenses shall be made by answer, see 1916 C. C. Rule 25, § 3.

Statutory abolition of demurrers and establishment of answers instead, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456.

[Note. The 29th Rule of the New Federal Equity Rules makes substantially the same practice apply as is provided in Michigan by the statute and the C. C. Rules. The federal precedents should therefore afford instructive authorities.]

¶ 385. Whether an answer can be used in place of a special demurrer for the lack of specific averments of facts that have been broadly enough averred, quære.—Hubbard v. McNaughton, 43 Mich. 220.

§ 106. ——Necessity and sufficiency of allegations.

Alleging various special defenses, see topics referred to ante § 97.

Mode of traverse or admission, see post § 107.

Completeness of answer, see post § 108.

Excuse in answer for not answering parts of bill, see post § 109.

Admissions by failure to answer fully, see post §§ 154, 155.

Sufficiency of answer on objection for variance, see post § 162.

Construction and effect of averments in answers, see post § 148 et seq.

Sufficiency of bill or answer to make answer admissive of facts averred, see post § 152.

Responsiveness of answer to bill for purpose of evidence, see post § 165a.

Specification of grounds of demurrer, see post § 116.

New answer to meet amendments, see post § 144.

Further answer after original partly quashed or expunged, see post § 145.

Necessity of answer to supplemental bill as well as to original bill on appearance after default, see post ¶ 936.

Answers to bills of review, see post § 247.

Provisions for waiver of answer on oath, see Jud. Act, chap. XIV, § 6; Comp. L. 1915, § 12458.

Right to sworn answer when sworn bill is filed, see 1916 C. C. Rule 25, § 1.

Contents and sufficiency of answer, positiveness and averments on information and belief, see 1916 C. C. Rule 25, § 2.

¶ 386. Facts on which defendants propose to rely should be set up in the answer.—Match v. Hunt, 38 Mich. 1.

¶ 387. The answer to a bill in chancery must apprise complainant of the nature of defendant's case, and the latter cannot avail himself of any matters in defense which are not stated in his answer, even though they should appear in his evidence. Accordingly an answer must plead that claims on which a bill to set aside decedent's conveyance in fraud of creditors is founded were not regularly allowed by the action of the legal number of commissioners, if that defense is relied on.—Reed v. Jourdan, 109 Mich. 128.

§ 107. ——Mode of denial, traverse or admission.

Positiveness required in pleas, see post § 111c.

¶ 388. An answer should show facts, and not conclusions of law.—Attorney General v. Oakland County Bank, W. 90.

¶ 389. Where an allegation is made in the bill with divers circumstances, the defendant should not in his answer deny the allegations literally, as laid in the bill, but should answer the point of substance positively and with certainty.—Jones v. Wing, H. 301.

¶ 390. An answer that admits a deed set out in the bill does not sufficiently impeach it by denying its validity in general terms; it should state the facts that are supposed to render the deed invalid, so that the court may pass upon them.—Payne v. Atterbury, H. 414.

¶ 391. The averment in a judgment creditor's bill against a corporation that it has ceased to do business is not, it seems, denied by an answer which admits that the only business done is such as is incident to closing up its affairs, and that it has no available capital.—Turnbull v. Prentiss Lumber Co., 55 Mich. 387.

¶ 392. A general allegation in a creditor's bill against the stockholders of an insolvent corporation, that a large number of subscriptions to the capital stock were not paid at all, while some were paid in worthless patent rights and some in goods at fictitious prices, is sufficiently met by an averment in the answer of an individual stockholder that he has fully paid for the stock subscribed by him.—American Mirror & Glass Beveling Co. v. Bulkley, 107 Mich. 447.

§ 108. ——Completeness of answer.

Excuse for not answering irrelevant parts of bill, see post § 109.

¶ 393. If a defendant submits to answer the whole bill he must answer fully, notwithstanding he might by demurrer or plea to the whole bill have protected himself against a particular discovery.—Gilkey v. Paige, W. 520.

§ 109. ——Excusing failure to answer.

¶ 394. Where irrelevancy is made a ground for refusing to answer a part, it must appear that an answer to such part would, in no aspect of complainant's case as made by the bill, be of service to him.—Gilkey v. Paige, W. 520.

§ 110. Answer to cross-bill.

Admissions by failure to answer cross-bill, see post § 155.

Answer to affirmative portion of cross-bill, see 1916 C. C. Rule 26, § 3.

§ 111. Disclaimers.

Requisites of disclaimer to carry costs, necessity of release with disclaimer, see Costs ¶ 122.

¶ 395. A disclaimer is the proper pleading to set up that a city, sued as a defendant in a suit to quiet title to an alley, has no control over it and therefore should be dismissed as a party; and by answering asserting right in it the city is estopped to say on hearing that it has no claim and should be dismissed.—Vier v. City of Detroit, 111 Mich. 646.

¶ 396. Defendant in a bill to foreclose a vendor's lien cannot properly disclaim in a demurrer to the bill.—Proctor v. Plumer, 112 Mich. 393.

§ 111a. Office, singleness and scope of pleas.

Another action pending at law as matter for motion after answer, see ante ¶ 361.

Doubleness of plea to bill for corporate receiver denying bill generally and also denying insolvency as averred, see Corporations ¶ 880.

Abolition of pleas by statute and by rule, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456; 1916 C. C. Rule 25, § 3.

[Note. Notwithstanding the abolition of pleas by rule and statute the cases under this and the following sections (§§ 111a-111d) may be of some value as authorities on the proper mode of bringing on the objection.]

¶ 397. Objections to the equity of complainant's claim as stated in his bill should be taken not by plea but by demurrer.—Mains v. Homer Steel-Fence Co., 116 Mich. 526.

¶ 398. Where fraud is alleged in defense of a bill, and it consists of a variety of circumstances, it should be taken advantage of by answer, and not by plea.—Carroll v. Potter, W. 355.

¶ 399. One made a defendant to a foreclosure bill as having an interest in the mortgaged premises as subsequent purchaser, incumbrancer, or otherwise, may set up by plea that he claims title in fee by virtue of a tax deed.—Shafer v. Thompson, 109 Mich. 406.

¶ 400. A plea must rest the defense upon a single point. If it contains two distinct points it is bad.—Albany City Bank v. Dorr, W. 317; Carroll v. Potter, W. 355.

¶ 401. A plea should rest the defense upon a single point, and is bad if it contains two distinct points.—Mains v. Homer Steel-Fence Co., 116 Mich. 526.

¶ 402. A plea to a bill which sets up an estoppel, also raises the question of jurisdiction, and also contains a sweeping denial of complainant's averments is bad for duplicity.—Mains v. Homer Steel-Fence Co., 116 Mich. 526.

¶ 403. The trial equity court has power to allow a double plea to stand.—Andrews v. Osborn, 159 Mich. 77.

¶ 404. A plea of a release, unsupported by an answer, is insufficient.—Schwarz v. Wendell, H. 395.

§ 111b. ——Necessity and sufficiency of allegations.

¶ 405. While it is proper for defendant to assert in his plea that he does not confess or acknowledge all or any of the matters set forth in complainant's bill, it is not essential to a good plea that he should do so.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368.

§ 111c. ——Positiveness of plea.

¶ 406. A plea must be positive, and not on belief, when it states a fact within defendant's knowledge, or touching his own acts; but when it relates to the acts of third persons, and not to defendant's own acts, it may be on information and belief.—Parker v. Parker, W. 457.

§ 111d. Plea to part and answer to part.

¶ 407. A defendant may plead to one part of a bill and answer to another; but the defenses must clearly refer to separate and distinct parts. If both are to the same part, the answer overrules the plea.—Clark v. Saginaw City Bank, H. 240.

§ 111e. Replications.

Admissions made by interposing replication, see post § 152.

Statutory abolishment of replications and joining of issues on the answer, see Jud. Act, chap. XIV, § 14; Comp. L. 1915, § 12466.

¶ 408. Issue upon an answer to a petition for execution for deficiency in foreclosure can be taken by replication.—Wallace v. Field, 56 Mich. 3.

¶ 409. Where, by mistake, a replication has not been filed and yet witnesses have been examined by defendant, the court will permit a replication to be filed nunc pro tunc.—Brooks v. Mead, W. 389.

¶ 410. Where the omission to reply was evidently inadvertent and from a mistaken view of the practice, the court did not dismiss the bill, but allowed the complainant to reply and introduce proofs on equitable terms.—Hardwick v. Bassett, 25 Mich. 149.

¶ 411. It lies within the discretion of the trial judge to allow the complainant to file a replication after the expiration of fifteen days from date of filing the answer, despite the provisions of Chancery Rule 12.—Blodgett v. Kent Circuit Judge, 189 Mich. 9.

§ 112. Office and scope of motion to dismiss (or general demurrer).

Demurrer ore tenus, see post § 117.

Matters reached and considered, see post § 114.

Effect of joint and separate demurrers or motions, see post § 115.

Construction of motion or demurrer, see post § 151.

Objections waived by demurring or moving to dismiss, see post §§ 119-121.

Admissions made by demurrer or motion to dismiss, see post § 156.

Incompatibility of disclaimer and demurrer, see ante ¶ 396.

Party entitled to demur, see ante § 94.

Grounds for involuntary dismissal without decision or prejudice, see post §§ 190-193.

Proper decree or disposal of cause on issue made by demurrer, plea or motion to dismiss, see post §§ 210, 211.

Leave to plead over on sustaining demurrer or motion, see post § 211.

Pendency of cause on demurrer on motion as bar to dismissal, see post § 196.

Sufficiency of bill good in part or in one aspect and bad in others, see post § 113.

Prayer for relief in discovery bill as rendering whole bad, see ante § 91.

Answer or demurrer under old practice as proper method of raising objection, see ante §§ 97-104.

Matters proper for plea or demurrer under former practice, see also ante §§ 111a-111d.

Nature and propriety of general demurrer under former practice, see post § 112a.

Demurrers abolished by statute, see Jud. Act, chap. XIV, § 4; Comp. L. 1915, § 12456.

Motion to call up objections formerly raised by demurrer, see 1916 C. C. Rule 31.

[Note. For cases on the similar practice provided for the federal equity courts by the New Federal Equity Rule 29, see federal decisions thereunder.]

¶ 412. A motion to dismiss a bill is a substitute for a demurrer under former practice.—Allen v. Powers, 196 Mich. 622.

¶ 413. A motion to dismiss a bill as insufficient, under the Judicature Act, Pub. Acts 1915, No. 314, chap. XIV, § 4, raises only such questions as previous to the enactment of such law could be raised by demurrer.—Freeman v. Mitchell, 198 Mich. 207.

¶ 414. A motion to dismiss a bill to foreclose a land contract on the ground that the tax provided for in Pub. Acts 1911, No. 91, § 8, How. 2nd Ed., § 1986, has not been paid, before such contract is offered in evidence is not premature, as the filing of the bill constitutes an effort to enforce the contract and it would be idle for the court to inquire into facts as to contracts which it had no power to enforce.—Nelson v. Breitenwischer, 194 Mich. 30.

¶ 415. Under the Judicature Act, Pub. Acts 1915, No. 314, providing that objections to a bill of complaint heretofore raised by plea or demurrer may be raised by motion to dismiss, a motion to dismiss the bill is not proper, except where the jurisdiction is ob-

jected to, until after joining of issue.—Horner v. Knights of Columbus Bldg. Co., 197 Mich. 530.

§ 112a. ——Of general demurrer.

See also post §§ 113-116b.

¶ 416. A general demurrer is one going to the merits of the bill's case, and assigning no particular cause except a want of equity. —Taylor v. Taylor, 87 Mich. 64.

¶ 417. General demurrer for want of equity raises only the question whether there is any equity whatever in the bill.—Cochrane v. Adams, 50 Mich. 16.

¶ 418. Where a bill contains equity enough to furnish the means of amendment it should not be dismissed on general demurrer.—Merrifield v. Ingersoll, 61 Mich. 4.

¶ 419. On general demurrer to a bill in equity general allegations of matters which go merely to make up a completed consideration are good enough, though it is more correct pleading to set them out specifically.—Farwell v. Johnston, 34 Mich. 342.

¶ 420. Defects of form in a bill in equity cannot be taken advantage of by general demurrer.—Glidden v. Norvell, 44 Mich. 202; Day v. Cole, 56 Mich. 294.

¶ 421. It is not ground for general demurrer that a bill does not show that executors, under whom complainant claims, had power to sell, to the exclusion of heirs.—Day v. Cole, 56 Mich. 294.

¶ 422. A general demurrer assigning no particular cause except that there is no equity in the bill is always proper where the bill is defective in substance.—Taylor v. Taylor, 87 Mich. 64.

¶ 423. Grounds for demurrer to a bill which may or may not warrant a denial of the bill on final hearing after the evidence is in, are insufficient.—Union Banking Co. v. Truscott Boat Mfg. Co., 189 Mich. 698.

§ 113. ——Bill good in part or in any aspect.

Effect of joining in demurrer to bill good as to one demurrant, see post § 115.

¶ 424. A general demurrer must be overruled if there is matter in the bill upon which any equitable relief can be granted.—Clark v. Davis, H. 227; Hawkins v. Clermont, 15 Mich. 511; Hoffman v. Ross, 25 Mich. 175; Wilson v. Eggleston, 27 Mich. 257; Glidden v. Norvell, 44 Mich. 202; Wilmarth v. Woodcock, 58 Mich. 482; Darrah v. Boyce, 62 Mich. 480; Carney v. Carney, 63 Mich. 382; Hatch v. Village of St. Joseph, 68 Mich. 220.

¶ 425. A general demurrer will be overruled unless good to the whole bill.—Williams v. Hubbard, W. 28.

¶ 426. A demurrer to a bill cannot be sustained if any of several reliefs prayed for is allowable.—Phillips v. Jacobs, 145 Mich. 108.

¶ 427. A general demurrer cannot be sustained if the bill makes out any cause whatever for equitable relief.—Shaw v. Chase, 77 Mich. 436.

¶ 428. A general demurrer to a bill will not be sustained where there is matter in the bill upon which equitable relief can be granted.—Flynn v. Third Nat. Bk. of Detroit, 122 Mich. 642.

¶ 429. A general demurrer challenges the equity of the case made by the bill, and will be overruled if a case for equitable relief is set out, however imperfectly.—Greenley v. Hovey, 115 Mich. 504; Gilligham v. Ray, 157 Mich. 488.

¶ 430. Where a demurrer is to the whole discovery and relief prayed by the bill, if the complainant is entitled to any part of the relief the demurrer must be overruled.—Thayer v. Lane, H. 247.

¶ 431. If a defendant who should have demurred to discovery only, demurs to both discovery and relief, the demurrer will be overruled.—Edwards v. Hulbert, W. 54; Burpee v. Smith, W. 327.

¶ 432. Where a bill is filed for relief, the discovery is ancillary; and a demurrer which is good to the relief is good to the discovery. —Welles v. River Raisin & G. River R. Co., W. 35.

¶ 433. Where the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery have a further purpose, the complainant may be entitled to it though he has no title to the relief.—Manning v. Drake, 1 Mich. 34.

§ 114. ——Matters reached and considered.

Specification of grounds, see post § 116.

Propriety of demurrer to reach objections, demurrer or answer as proper mode, see ante §§ 97-104.

To challenge bill for misjoinder or multifariousness, see ante §§ 101, 102.

What constitutes multifariousness, see ante §§ 73-76.

What constitutes doubleness and uncertainty or inconsistency, see ante § 78.

Demurrer as proper mode of objecting that legal remedy is adequate, see ante § 103.

Demurrer for laches, see ante § 104.

¶ 434. On demurrer to a bill to restrain the use of church property by an alleged faction, the question whether the members of it claiming to be a majority can by a majority vote withdraw from the general church body and reject pastors appointed by it and take the church property with them, the bill

alone can be considered; and affidavits used on the hearing for a preliminary injunction cannot be considered as in the nature of an answer and must be excluded.—Fuchs v. Meisel, 102 Mich. 357.

¶ 435. The claim that a husband took title in himself and wife for the purpose of defrauding his creditors cannot be considered on general demurrer to a bill filed to restrain the sale of the land under an execution directed against the husband, where the bill shows upon its face nothing of such fraudulent purpose.—Wight v. Roethlisberger, 116 Mich. 241.

¶ 436. Under 1897 Chancery Rule 9a, in considering a demurrer to a bill of complaint, the court need not look further to the substance of the bill than to ascertain whether it is open to the specific objections raised by the demurrer.—Township of Merritt v. Harp, 131 Mich. 174.

¶ 437. On demurrer only those facts stated in the bill of complaint will be considered.—Steele v. Culver, 157 Mich. 344.

¶ 438. The court in passing upon the sufficiency of a pleading, demurred to on general grounds, cannot consider the character of the parties defendant, or the probability of their conspiring to do an unlawful act of the character charged, e. g., where a taxpayer's bill alleges conspiracy on the part of officials of a municipality for the illegal expenditure of public funds; but such matters are properly considered by the court in weighing the evidence, should the case come to trial.—Bates v. City of Hastings, 145 Mich. 574.

¶ 439. In passing upon demurrer to a taxpayer's bill, the court can only inquire whether the pleading is sufficient under the rules of law to make a case, should its allegations be supported by competent proof; and such demurrer admits the facts which are well pleaded.—Bates v. City of Hastings, 145 Mich. 574.

¶ 440. Grounds assigned for demurrer cannot be considered thereon or in advance of the hearing, if resort to the judicial knowledge must be had to make the ground appear.—People v. Michigan Cent. R. Co., 145 Mich. 149; People v. Detroit, G. H. & M. R. Co., 149 Mich. 72; Chapin v. Citizens' Tel. Co., 196 Mich. 331.

§ 115. ——Joint and separate motions or demurrers.

¶ 441. A joint demurrer may be good as to one defendant and bad as to other defendants.—Barstow v. Smith, W. 394.

¶ 442. Where one of several defendants demurs to discovery, on the ground that it would subject him to a criminal prosecution, his demurrer should be confined to such parts of the bill as tend to implicate him in the supposed crime.—Burpee v. Smith, W. 327.

¶ 443. The terms of a demurrer should suggest the errors complained of, and, when two defendants join a demurrer for want of equity solely, neither can be allowed to raise a question not available to both.—Sweet v. Converse, 88 Mich. 1.

¶ 444. Where several defendants join in a general demurrer to a bill to foreclose a mechanic's lien, only such grounds of demurrer will be considered as are available to all of the demurrants.—Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614.

§ 116. ——Specification of grounds.

Special and general demurrers under former practice, see post § 116a.

Statement of reasons in demurrer to bill against corporate stockholders, see Corporations ¶ 1232.

¶ 445. A judgment creditor's bill averred that execution had been returned unsatisfied on a specified day. It was demurred to on the ground that it failed to show that the execution was returned as required by law to entitle complainants to maintain the bill. Held, that the demurrer did not sufficiently present the objection that the date of the return was Sunday.—Kellogg v. Hamilton, 43 Mich. 209.

§ 116a. Special or general demurrers.

General and special demurrers distinguished for purposes of appeal, see Appeal § 38.

¶ 446. Where an injunction bill avers special injury without explaining what, and the answer traverses the averment, the common formula questioning the bill for want of equity is not enough to raise, on the hearing, the point that there should have been greater particularity, especially where it is plain that the want of certainty has caused no prejudice.—Pratt v. Lewis, 39 Mich. 7.

¶ 447. Where a bill to set aside a tax deed as a cloud upon title fails to specify the grounds upon which the sale is claimed to be invalid, or to set forth any facts showing the proceedings to be defective, a special demurrer is properly interposed.—Bump v. Jepson, 106 Mich. 641.

¶ 448. An objection to the form of the answer and cross-bill in that it does not pray for process, should be raised by a special, and not by a general, demurrer.—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104.

§ 116b. Answer serving as demurrer.

¶ 449. An answer to a complaint asking an injunction prohibiting a commissioner from taking depositions, properly raises the jurisdictional question whether said complaint was filed in the proper county, where said answer denies that complainant is en-

titled to relief, prays the same advantage as if defendant had pleaded or demurred to the said bill of complaint, and prays that the same be dismissed.—Titus v. Chippewa Circuit Judge, 168 Mich. 507.

§ 117. Demurrer ore tenus.

Objections open on hearing, see post §§ 119-121.

¶ 450. Where a new cause of demurrer is assigned ore tenus the cause must be coextensive with the demurrer.—Clark v. Davis, H. 227.

¶ 451. On the hearing of a general demurrer to a bill in equity, the defendants may orally assign any cause of demurrer coextensive with the demurrer upon the record. —Burk v. Muskegon Machine & Foundry Co., 98 Mich. 614.

§ 118. Striking out pleadings or allegations therein.

Amendment by striking out one's own pleading and substituting other, see post § 141, also post ¶ 523.

Dismissal of bill without decision for informalities and defects in pleading, see post § 192.

Further answer after expunging part, see post § 145.

Striking bill or pleading in chancery proceeding to set aside tax sales, see Taxes, XII, C.

Rule as to striking from files pleadings not according to proper rules or because of scandal or impertinence, see 1916 C. C. Rule 21, § 10.

¶ 452. A motion to strike a bill from the files is not the proper way to raise an objection to the substance of the bill or to correct the error.—McMann v. Westcott, 47 Mich. 177.

¶ 453. Where a defendant had leave to file a supplemental answer to explain certain ambiguities in his original answer, and he incorporated other matters of defense in his supplemental answer, it was ordered to be taken off the files, with leave to file a supplemental answer in conformity with the directions given in the former trial.—Graves v. Niles, H. 332.

¶ 454. Where a bill is amended by the addition only of a new party defendant, a further answer by a defendant having already answered, is not required, and therefore a new answer containing new defenses is properly stricken.—Casserly v. Wayne Circuit Judge, 124 Mich. 157.

§ 119. Waiver of or delay in making objections.

Objections for misjoinder or to parties, see post § 120.

Objections to jurisdiction, see post § 121.

Policy to disregard objections at hearing unless imperative, see post § 122.

Necessity for objections to pleadings below in order to have review of their sufficiency on appeal, see Saving Questions for Review.

Cross-bill invoking equity as working estoppel to deny jurisdiction of bill for want of equity, see also Courts ¶ 300.

¶ 455. Formal objections are not allowed on the hearing of a cause where they could easily have been made before.—Matson v. Melchor, 42 Mich. 477.

¶ 456. A defendant in chancery attending and examining witnesses before a master on complainant's notice will be regarded as waiving all objections because of failure to serve a copy of the replication.—Brooks v. Mead, W. 389.

¶ 457. The objection that a bill is too indefinite to form the basis of relief cannot prevail after answer, unless there is a lack of such substantial averments as are necessary to make out a case.—Salisbury v. Miller, 14 Mich. 160.

¶ 458. Where a bill in aid of execution alleges fraud, and has been answered, and the parties have been sworn, the objection that the allegations of fraud are too general cannot be raised.—Hubbard v. McNaughton, 43 Mich. 220.

¶ 459. A general demurrer admits the facts stated in the bill, but denies that they make a case for the interposition of a court of equity; and it waives all technical objections. —Caldwell v. Ward, 83 Mich. 13.

¶ 460. Where a demurrer to a bill has been sustained and the amended bill is again demurred to upon a ground which existed in the original bill but which was not set up in the first demurrer, and complainant without objection goes to hearing on the second demurrer and admits the defect and that it cannot be remedied, he is held to have waived any objection to the practice.—Daschke v. Schellenberg, 131 Mich. 103.

¶ 461. The objection that a bill is multifarious should be raised by demurrer and cannot be made for the first time on appeal from a decree on the merits.—Snook v. Pearsall, 95 Mich. 534.

¶ 462. An objection that a bill is multifarious is waived by answering to the merits. —Lyon v. Clark, 137 Mich. 438.

¶ 463. Where complainants against a drain assessment have improperly joined in one complaint, the court will not deny relief, if the question of multifariousness is not raised by the pleadings.—Hinkley v. Bishopp, 152 Mich. 256.

¶ 464. The objection to a bill to quiet title that it does not allege an assertion by de-

fendant of a hostile title comes too late after answer filed and proofs taken, especially where the answer sets up a hostile title.—Cleland v. Casgrain, 92 Mich. 139.

§ 120. ——Objections to parties or for non-joinder.

¶ 465. An objection to a bill in equity for want of parties is not entitled to favor if not made until the hearing; and if well taken then, permission should be granted to amend.—Holcomb v. Mosher, 50 Mich. 252.

¶ 466. An objection for want of parties will not be regarded at the hearing unless the facts which would show the objection to be well taken appear on the record.—Campau v. Campau, 19 Mich. 116.

¶ 467. An objection for want of parties, not taken by any pleading, but raised for the first time at the hearing, will not prevail unless the defect be one that precludes a decree that will do justice as between the parties and fully determine the controversy.—Miller v. Thompson, 34 Mich. 10.

¶ 468. An objection to the misjoinder of complainants is not favored where it has not been taken by special demurrer, but is insisted upon at the hearing after proofs have been taken.—Turner v. Hart, 71 Mich. 128.

¶ 469. Objection for misjoinder made for the first time at the hearing will not be allowed where the court can make a decree which will do entire justice between the parties.—Reed v. Wessel, 7 Mich. 139.

¶ 470. One of two complainants sought to have certain judgments against him decreed satisfied, and the other to have sales made under the judgments declared fraudulent and void, and the relief sought by each depended upon the same state of facts, and the decree, if relief was due to either, would dispose of the whole equities without confusion. Objection to the misjoinder not being taken until the hearing, the bill was sustained.—Reed v. Wessel, 7 Mich. 139.

¶ 471. Where the bill did not seek to reduce trust property to complainants' possession, but merely to place them in a receiver's hands under the court's direction, it is too late for defendants, the trustee and a claimant, after complainants had succeeded on the merits, to object that beneficiaries had not been made parties.—Snook v. Pearsall, 95 Mich. 534.

¶ 472. Defendants were described in the bill as heirs of their father, when in fact they claimed as heirs of their mother. It was held that they were properly made parties as claiming an interest in the property in controversy; it was too late to take the objection for the first time at the hearing that their interest was not properly made to appear by the bill, proofs having been taken, and the proper parties being before the court.—Chipman v. Thompson, W. 405.

§ 121. ——Objections to jurisdiction.

See also post ¶ 847.

Objection that controversy has become wholly legal, see also ante ¶ 105.

¶ 473. Objections to jurisdiction apparent upon the face of a bill to quiet title, are held waived by answer without demurrer.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 474. Want of jurisdiction in the court of equity is waived by the failure to interpose a demurrer until after the joining of issue and the taking of proof.—Coffey v. McGahey, 181 Mich. 225, 233.

¶ 475. A defendant, restrained from trespassing on land under a bill praying that restraint should be "until a judgment in said pending suit at law," cannot urge that an injunction decree determining title to be in complainant is erroneous and that the cause should be relegated to law, where the bill ran for four years without a hearing or a temporary injunction, during which time defendant forbore to prosecute the pending law action, and at the end of that time the parties submitted to a hearing in chancery.—McGaw v. Manning, 145 Mich. 378.

¶ 476. The objection of want of jurisdiction in a bill for a mechanic's lien, because the bill was signed in the name of an agent and verified as such, came too late after the case had been tried and after all the pleadings were in, without any suggestion of want of jurisdiction.—French v. Cardoni, 119 Mich. 402.

¶ 477. An unnecessary bill being filed, and the defendant, instead of demurrer, having submitted an answer, and not in his answer insisting on the objection that the question was triable at law, it was too late to raise the objection at the final hearing on pleadings and proofs.—Stockton v. Williams, W. 120.

¶ 478. Where a demurrer to a bill to set aside an instrument on the ground of fraud treats the instrument as a deed, the demurrant cannot deny the jurisdiction of equity on the ground that the instrument is testamentary in character.—Gragg v. Maynard, 164 Mich. 535.

¶ 479. In a suit in equity involving property, the objection that one hundred dollars is not involved as required by C. L. 1897, § 435, How. 2nd Ed., § 11952, may be made at the hearing.—Brandt v. Luce, 177 Mich. 184.

§ 122. Effect of reserving objections until hearing.

Exclusion of formal objections on hearing that might have been made sooner, see ante § 119.

Waiver of jurisdictional objections, see ante § 121.
Objections for defects of parties, see also ante § 120.
Matters amendable at hearing, see post § 131 et seq.

¶ 480. If, instead of demurring for multifariousness defendants by their answer reserve the privilege of making the objection at the hearing, when the expense of reference and testimony has been incurred, and when the court is put to the trouble of a full discussion of the case, they cannot complain if the court disregards their objection, unless the nature of the case is such that justice cannot be done to the parties upon the pleadings and evidence as then presented.—Burnham v. Dillon, 100 Mich. 352.

¶ 481. When defendants desire to take advantage of multifariousness the proper practice is to demur. But if they reserve the privilege of making the objection at the hearing, when the expenses of taking proofs have been incurred, and the court put to the trouble of a full discussion of the case, they cannot complain if their objection be disregarded. At that stage of the case it is for the court and not the party to take advantage of multifariousness; and unless the nature of the case be such that justice cannot be done upon the pleadings and evidence as then presented, the demurrer at the hearing will be overruled.—Payne v. Avery, 21 Mich. 524.

§ 123. Technical or immaterial objections.

Objections not affecting party objecting, see also ante § 94.
Placing cause on wrong side of the court in doubtful case, see ante ¶ 132.
Entitling in names of both defendants after discontinuance, see also ante ¶ 218a.
Amendment of clerical mistake in names, see post § 126.
Errors or defects regarded as harmless or as cured, and therefore not ground for reversal, see Harmless Error.

¶ 482. When all the parties and the subject-matter of the suit are before a court of equity, and the proofs show that a decree can be entered doing exact justice to all, technicalities in pleadings are to be overlooked.—Bigelow v. Sheehan, 150 Mich. 507.

¶ 483. A date misstated by clerical error may be rejected as surplusage where the bill sufficiently corrects the time.—Bailey v. Murphy, W. 424.

D. CROSS-BILLS.

§ 124. Occasion, propriety and germaneness of cross-bills.

When answer and when cross-bill is proper pleading, see ante § 98.
Cross-bill to bill of revivor, see post § 234.
Restriction of allegations to germane matters, see post § 125.
Declination of jurisdiction because of want of means to enforce prospective cross-bill, see ante ¶ 110.
Pendency of cross-bill as preventing dismissal, see post § 189.
Affirmative relief on cross-bill, see post § 212.
[Note. Inasmuch as the germaneness of a cross-bill always involves the nature and scope of the bill and the relief prayed for by it, the specific topics treating of equitable remedies should also be consulted to ascertain whether a cross-bill may be sustained and, if so, to what end. See cross-references which follow.]
Cross-bill to redeem, or for accounting, or for assertion of superior mortgage in foreclosure, see also Foreclosure, III, C.
Assertion of legal title by cross-bill in suit to quiet title, see Quieting Title, III.
Cross-bill for specific performance to bill for cancellation, see also Rescission, VI.
Cross-bill proper in suit for partnership accounting, see also Partnership, VII, E.
Cross-bills in mechanics' liens suits under the statute, see Mechanics' Liens, VIII, B.
Necessity of cross-bill to try equities on bill in aid of execution, see Creditors' Suits § 26, ¶ 107.
Propriety of cross-bill to question corporate power to hold land on its bill to quiet title, see Corporations ¶ 288.
Right of minority stockholders to file cross-bill on behalf of corporation which refuses, see Corporations § 345, ¶ 1298.
Cross-bills to divorce bills in general, see Divorce §§ 45, 46.
Cross-bill to annul separation agreement to bill for divorce, see also Divorce ¶ 171.
Propriety of cross-bill in mechanics' liens suits, see Mechanics' Liens, VIII, B.
See also other specific topics treating of equitable remedies.
Provision for filing cross-bills for affirmative relief, see 1916 C. C. Rule 26.

¶ 484. A cross-bill is designed for the purpose of enabling a defendant to avail himself of some defense which can only be made complete by granting him some relief against complainant, or against some other defendant.—Andrews v. Kibbee, 12 Mich. 94.

¶ 485. A cross-bill can be sustained only on matters growing out of the original bill and contained in it; nor can such a bill be filed in any case where the complainant therein could not have filed an original bill for the same purpose.—Hackley v. Mack, 60 Mich. 591.

¶ 486. A cross-bill can be sustained only on matters growing out of the original bill and embraced in it.—Root v. Root, 164 Mich. 638.

¶ 487. The language unnecessarily used in Hackley v. Mack, 60 Mich. 604, to the effect that a cross-bill must always be confined to cases when an original bill might have been maintained to enforce the desired remedy, is not to be taken as a rule preventing a

cross-bill to establish a legal right to bonds and to the payment of them upon a bill to restrain defendant from negotiating them; where rejection of such a cross-bill would relegate defendant to multiplicity or circuity and prevent administration of complete justice.—Village of Frankfort v. Schmid, 151 Mich. 85.

¶ 488. A cross-bill is properly filed where the defendant who thereby seeks relief could not get it if complainants should dismiss their bill, or if the court should dismiss it.—Wilcox v. Allen, 36 Mich. 160.

¶ 489. Affirmative relief cannot be granted the defendant in equity in the absence of a cross-bill seeking it.—Barras v. Youngs, 185 Mich. 496.

¶ 490. Prior to the adoption of Chancery Rule 123 a cross-bill was necessary if defendant seeks affirmative relief beyond what complainant's bill would afford him.—Schwarz v. Sears, W. 170; Vary v. Shea, 36 Mich. 388.

¶ 491. In the absence of a cross-bill on a bill to redeem, a decree could not be entered that a sale of the premises be had under the mortgage in case they should not be redeemed.—Schwarz v. Sears, W. 170.

¶ 492. On a bill for the construction of a will it is not proper to interject in the proceeding by cross-bill or otherwise an account of the guardian of one of the testator's children for reimbursement of amounts claimed to have been advanced for such child's support.—Pray v. Railer, 144 Mich. 208.

¶ 493. A legal title may be asserted in equity by cross-bill when the bill seeks to invalidate bonds and an injunction against defendant claiming as a bona fide holder.—Village of Frankfort v. Schmid, 151 Mich. 85.

¶ 494. A mortgagee of street-railway property may, in injunction proceedings by the railway company to prevent the city from revoking its franchise granting it privileges in the streets, file a cross-bill asking for the appointment of a receiver of the property, with power to operate the road, and to borrow money to enable it to meet expenditures required by the terms of its franchise, so as to preserve the property; the subject-matter being substantially the same as that set up by the original bill, and the relief sought being germane.—Union St. R. Co. v. City of Saginaw, 115 Mich. 300.

¶ 495. Complainant and defendant, his wife, were engaged together in conducting a musical merchandise business. Defendant left her husband and started up a rival business in the same city. Complainant filed a bill alleging the marriage and asking an injunction forbidding defendant to conduct her business on the ground that he was entitled to her services. Held, defendant's cross-bill asking for a divorce was germane to the original bill.—Root v. Root, 164 Mich. 638.

¶ 496. On a bill by creditors to set aside certain acts of the assignee of an insolvent, a cross-bill by a defendant admitting the allegations of the bill as to the improper appointment of the assignee and claiming title through tax deeds and a quitclaim deed from the assignor, and praying that title be quieted in it and that a codefendant to whom a claim against it for trespass on the lands in question had been sold by the assignee be enjoined from prosecuting suit therefor pending the determination of the validity of the acts of the assignee, held properly dismissed.—Gordon v. Sherman, 178 Mich. 629.

¶ 497. Where a bill alleges that defendant made false representations as to the value of furniture, which was part of the consideration for certain property conveyed to him, and that he concealed from complainants the amount due on piano contracts and prays for damages and for an injunction restraining defendant from recording the deed to the property, no breach of the covenant of warranty and against incumbrances in the deed to defendant is the subject of relief upon a cross-bill.—McKenzie v. Call, 176 Mich. 198.

¶ 498. The questions of the rendition of services to plaintiff's testatrix in her lifetime by the defendant administrator in his individual capacity or services as such administrator and his disbursements as administrator are not germane to the issue raised by the original bill and answer whether he had secured deeds from plaintiff his coheir by fraud, so as to be the subject of an amendment to the answer in the nature of a cross-bill.—Thomas v. Nicolls, 191 Mich. 489.

§ 125. Contents, form and substance of cross-bill.

[Note. Since, ordinarily, the cross-bill is for relief which might have been had by bill, the pleading of the substantial allegations will be governed by the same rules. Consult the specific topics for precedents on the mode of pleading specific causes.]

Necessity and sufficiency of allegations in bills, see ante § 77 and cross-references there collected.

Necessity and sufficiency of verification, see ante §§ 68, 69.

Bill as original or cross-bill, see post ¶ 587.

Sufficiency as cross-bill where prayer is introduced by amendment, see post ¶ 600.

Right to hearing and reception of proofs on cross-bill, see post § 170.

Sufficiency of cross-bill to sustain retention of cause for complete relief, see post § 221.

Amendments to cross-bills, see post § 128.

Answer to cross-bill, see ante § 110.
Affirmative relief on cross-bill, see post § 212.
Ground for dismissing cross-bill without decision thereon, see post § 193.
Filing bill as cross-bill as cause for dismissal, see post ¶ 774.
Practice rule that answer shall form first division of cross-bill, when cross-bill is interposed, and that cross-bill proper shall be second division, see 1916 C. C. Rule 26.

¶ 499. A cross-bill must be strictly confined to the matters involved in the original cause. Where a bill introduces other distinct matters, it is an original bill and the suits are separate and distinct.—Andrews v. Kibbee, 12 Mich. 94; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

¶ 500. The rule that a cross-bill must be confined to the subject-matter of the original bill does not preclude the introduction by cross-bill of new facts bearing upon that subject-matter.—Powers v. Hibbard, 114 Mich. 533.

¶ 501. A cross-bill merely seeking a discovery that could not constitute a defense to the original bill is demurrable.—Cook v. Wheeler, H. 443.

§ 125a. Answer in nature of cross-bill.

Necessity and sufficiency of signature, see ante ¶ 225.

¶ 502. Chancery Rule 123 (first rules), authorizing a defendant in his answer to present the facts upon which his equity rests without filing a cross-bill, still requires him to state a case for equitable relief touching the matter in question in the original bill; and an answer to a bill to quiet title is insufficient as a basis for affirmative relief if it alleges that the deed under which complainant claims was obtained by fraud, with knowledge, etc., without stating by whom or how the fraud was committed.—McGuire v. Van Buren Circuit Judge, 69 Mich. 593.

¶ 503. When the matter set up in an answer by way of cross-bill is simply a matter of defense it is disposed of by a dismissal of the original bill, and cannot be retained for the purpose of an accounting for rents and profits which may be recovered in ejectment.—McGuire v. Van Buren Circuit Judge, 69 Mich. 593.

¶ 504. It is not the intention of Chancery Rule 123 to deprive a party of any of his substantial rights secured to him by a resort to a cross-bill, but to preserve to him all the benefits to be derived from a cross-bill by stating the substance thereof in his answer; and the complainant is entitled to make defense to matter so set up in the answer as fully as he could have done before the rule was made.—Hackley v. Mack, 60 Mich. 591.

¶ 505. Chancery Rule 123, allowing the benefit of a cross-bill, does not apply to a suit where the answer had already been filed at the time the rule was adopted.—Hackley v. Mack, 60 Mich. 591.

E. AMENDMENTS AND SUPPLEMENTAL PLEADINGS.

Treating defects as harmless or regarding them as amended under the Statute of Amendments, see Harmless Error; Appeal, XII, C.
Amendments at law, see Pleading, VI.
General provisions of the statute of amendments, see Jud. Act, Chap. XVI; Comp. L. 1915, § 12478 et seq.
Rules as to amendments without leave, see 1916 C. C. Rule 28.

§ 126. Grounds and matter of amendment of bill.

Supplemental or amended answers, see post § 127.
Amendments to cross-bills, see post § 128.
Amendments of parties, see post § 129.
Supplying signatures and verifications, see post § 130.
Time, mode and manner and form of amendments, see post §§ 131-137, 141-143.
Propriety of supplemental pleadings, see post § 138.
Motion, showing and order granting leave to amend, see post §§ 139, 140.
New pleadings to meet amendments, see post §§ 144, 145.
Amendments making new case or issues, see post § 134.
Supplemental pleading or amendment as proper way to introduce matters occurring after filing bill, see post § 137.
Stating proposed amendments in motion, see post § 139.
Inconsistency introduced into bill by amendment, see post § 150.
Amendments of divorce bills and cross-bills, see Divorce §§ 50-53.

¶ 506. Matter that constitutes a new bill, or that is inconsistent with or repugnant to the substantive allegations of the original bill, cannot be introduced by amendment.—Ogden v. Moore, 95 Mich. 290.

¶ 507. Where a bill is radically defective for want of definite averments, and is specially demurred to accordingly, complainant should amend, and unless he does so his suit cannot stand.—Jenks v. Hathaway, 48 Mich. 536.

¶ 508. A complainant in foreclosure who seeks to show that certain defendants were estopped from obtaining and asserting title under a prior mortgage should introduce the estoppel by an amendment to his bill.—Connerton v. Millar, 41 Mich. 608.

¶ 509. Leave was granted to amend an injunction bill so as to waive an answer under

oath, an answer not having been filed.—Bronson v. Green, W. 486.

¶ 510. A bill to subject to the payment of a New York judgment an heir's interest in his father's estate averred the heir's insolvency and that complainant had no remedy at law, and prayed a receivership and an injunction. Held, that such bill could properly be amended so as to aver in addition that the judgment was obtained upon personal service and after an exhaustion of the legal remedies in New York, that the heir was a nonresident of Michigan, that the fund sought to be reached was within the jurisdiction of the court where the bill was filed, and that such fund could be reached in no other way.—Earle v. Kent Circuit Judge, 92 Mich. 285.

¶ 511. Such a clerical mistake in a bill as writing complainant's Christian name "Caroline" instead of "Paulina" is amendable as a matter of course as soon as it is pointed out.—Weaver v. Van Akin, 77 Mich. 588.

¶ 512. Amendment is admissible to cure the omission in a divorce bill of the averment that one of the parties resides in the county where suit is brought.—People v. McCaffrey, 75 Mich. 115.

¶ 512a. The refusal to allow a party to a bill for an accounting to amend his pleadings so as to allege the coverture of the other party, and the consequent invalidity of the contract upon which she bases her rights, is not an abuse of discretion, where it would be manifestly inequitable to urge such objection, and the applicant delayed for a long time in seeking to interpose it after learning of the facts.—Feige v. Babcock, 111 Mich. 538.

§ 127. Amended and supplemental answers, pleas and demurrers.

Time for amendment, denial when asked at hearing, see post § 135.

Amendments to objections filed to proceeding to sell lands for delinquent taxes, see Taxes, XI.

¶ 513. Leave to file a supplemental or amended answer is seldom granted, and never without the utmost caution, and when a just and necessary case is clearly made out; and it is then generally confined to a clear case of mistake as to matter of fact, and as to that only.—Graves v. Niles, H. 332.

¶ 514. The court is especially reluctant to grant an application to file a supplemental or amended answer after a considerable lapse of time from the filing of the bill or original answer.—Graves v. Niles, H. 332.

¶ 515. Leave should not be granted to change entirely the character of the defense by supplemental or amended answer, not upon the ground of any actual mistake in matter of fact, nor upon any discovery of new facts, but upon the ground that the defendant did not mean to be understood as he had stated in his answer.—Graves v. Niles, H. 332.

¶ 516. Where there was doubt in regard to the proper application of certain moneys admitted to have been received by defendant, and the answer was obscure, and there was a possibility that great injustice might be done to defendant, the court reluctantly granted an order permitting a separate supplemental answer to be filed as to this particular, and explaining this ambiguity.—Graves v. Niles, H. 332.

¶ 517. A plea may be allowed to be amended for the purpose of placing before the court an additional fact unknown to the defendant when the plea was filed, and consistent with the defense then made. But it will not be permitted for the purpose of setting up a fact or facts inconsistent with the original defense.—Freeman v. Michigan State Bank, H. 311.

¶ 518. Omission of plea setting up dismissal of former bill asking same relief to aver that former decree was on merits may be supplied by amendment.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368.

¶ 519. An infant defendant's guardian ad litem cannot in his answer admit away any of his ward's rights, and if such admission is shown upon the hearing it will be corrected by amendment.—Peck v. Kent Circuit Judge, 98 Mich. 639.

¶ 520. Even though the statute of limitations would bar a new bill, an amendment to an answer in the nature of a cross-bill asserting a mechanic's lien may be allowed under Pub. Acts 1891, No. 179, §§ 10, 27, regulating mechanics' liens procedure, if it seeks, not to introduce a new cause of action, but to state properly the cause of action set up in the original answer.—Smalley v. Northwestern Terra-Cotta Co., 113 Mich. 141.

¶ 521. It is within the discretion of the trial judge to allow amendments to a demurrer in chancery.—Phillips v. Jacobs, 145 Mich. 108.

§ 128. Amendment of or affecting cross-bill.

Germaneness of matter of amendment, see also ante ¶ 498.

Amendment where original bill would be barred, see also ante ¶ 520.

Of cross-bills in divorce cases, see Divorce §§ 50-53.

Amendment of cross-bill on bill to enjoin easement, see also Easements ¶ 160.

¶ 522. In a suit in chancery it is proper to permit defendant to file an amended cross-bill after the cause is at issue where the rights of the parties are complicated and

it is necessary so to do in order to secure a full adjudication thereof.—Brown v. King, 172 Mich, 355.

¶ 523. A motion by a defendant to amend his answer by striking out a cross-bill seeking affirmative relief will not be granted when it would operate to the prejudice of other parties.—Leach v. Dolese, 186 Mich. 695.

¶ 524. A motion to amend an answer to a bill to redeem from an alleged usurious mortgage, by striking out a cross-bill affirmatively seeking the foreclosure of the mortgage, held properly denied when made at the hearing, since the granting of the motion would have prejudiced the complainant by preventing him from asserting the alleged usury. Leach v. Dolese, 186 Mich. 695.

¶ 525. It is an exercise of the discretion of the court on the trial of a suit by a contract purchaser for specific performance of the contract to allow a purchaser of the property from the vendor to file during the hearing an amended answer in the nature of a cross-bill for the removal of the contract as a cloud on his title.—Lake Erie Land Co. v. Chilinski, 197 Mich. 214.

§ 129. Amendments as to parties.

Leave to add parties on sustaining demurrer for want of parties, see post § 211.

Leave to amend before dismissing, see post ¶ 767.

Needlessness of new answer by old defendants on admitting new one, see post ¶ 580.

Terms imposable as condition of leave, see post § 140.

Changes and substitutions of parties, see generally Abatement §§ 19, 20; Parties.

Addition of other stockholders by amendment to bill for enforcement of stockholders' liability to creditors, see Corporations ¶ 1227.

¶ 526. Parties can be brought in by amendment at all stages. Where necessary parties are left out, leave is usually granted to bring them in; but this is not so where they are unnecessary and have been voluntarily left out.—Johnson v. Shepard, 35 Mich. 115.

¶ 527. A trustee in bankruptcy appointed since the commencement of a suit may be brought before the court by an amendment to the bill, and a supplemental bill is unnecessary, as he is a new party claiming only such interest as is acquired by operation of law.—Rennells v. Potter, 198 Mich. 49.

§ 130. Amendments to supply signatures and verifications.

¶ 528. Though a bill should be signed by counsel, yet, if this should accidentally be omitted, the signature will be allowed to be supplied afterwards without costs.—Sill v. Ketchum, H., 423.

¶ 529. Verification of an answer in the nature of a cross-bill for divorce may be supplied by amendment before decree to be entered on remand.—Harrison v. Harrison, 94 Mich. 559.

¶ 530. Where, in a divorce suit, complainant petitions the court to set aside the decree granted defendant under his answer in the nature of a cross-bill, on the grounds, among others, that the verification to the answer fails to negative the existence of collusion, as required by the statute, and that no replication to complainant's answer to the cross-bill was filed, it is within the discretion of the court to permit an amendment of the verification so as to make it conform to the statute, and to permit the filing of said replication.—Daly v. Wayne Circuit Judge, 102 Mich. 392.

¶ 531. The failure to verify an answer as a cross-bill may be remedied on application to the court.—Van Slyke v. Van Slyke, 183 Mich. 536.

§ 131. Time for amendments; amendments on hearing.

Motion, showing and order for leave, see post §§ 139, 140.

Amendment on or after appeal, see post § 136.

For amended cross-bill, see ante § 128.

¶ 532. Under Chancery Rule 16 authorizing an amendment to a bill without order of court at any time before plea, answer or demurrer is put in, a bill may be amended in a pro confesso case after the time limited for appearance.—Bowers v. Chippewa Circuit Judge, 136 Mich. 367.

¶ 533. Amendments not affecting the issue or prejudicing the rights of the defendant may be made at the hearing. Chancery Rule 21 has no application to such a case.—Goodenow v. Curtis, 18 Mich. 298.

¶ 534. Amendments to a bill in equity are discretionary with the court so long as they are not allowed to prejudice the substantial rights of the defendant. They should not be allowed at the hearing, if after amendment the case will be defective on the proofs.—Church v. Holcomb, 45 Mich. 29.

¶ 535. The allowance of amendment of pleadings and proofs on final hearing rests largely in the discretion of the court.—Dodson v. McKelvey, 93 Mich. 263.

¶ 536. An amendment to a bill of complaint, in the nature of a supplemental bill, is properly allowed at the hearing, when substantially the same as the original bill, and the defendant is not taken by surprise.—Antoszewski v. City Plumbing Co., 185 Mich. 215.

¶ 537. Amendments to a bill to meet matters set up in the answer may be allowed at or even after a hearing on pleadings and proofs.—Munch v. Shabel, 37 Mich. 166.

¶ 538. Where the complainant has stated his case defectively, and no demurrer has been interposed, but defendant has only claimed the benefit of a demurrer by his answer, and the case is brought to a hearing on pleadings and proofs, it may be proper to allow the defect in the bill to be corrected at the hearing if the proofs show complainant entitled to relief.—Gorham v. Wing, 10 Mich. 496.

¶ 539. A judgment creditor's bill to set aside a deed as in fraud of his rights under the execution did not aver that the sheriff had levied on the land before the bill was filed. The bill was not demurred to, however, and testimony was taken on the whole issue. Held proper to allow the bill to be amended on the hearing.—Smith v. Sherman, 32 Mich. 637.

¶ 540. A bill defective in its averments will not be amended where the case is essentially defective on the proofs, but may be dismissed without prejudice.—Curtis v. Goodenow, 24 Mich. 18.

¶ 541. The right to permit amendments is broader below than in the supreme court, and is rather a question of terms than of power if the amendment is proper. Where complainant in foreclosure held subsequent mortgages not referred to in his bill, and the answer of a subsequent incumbrancer, impleaded as defendant, based equities upon them, complainant might properly be allowed to so amend his bill at the hearing as to make it aver the facts as to these mortgages.—Slater v. Breese, 36 Mich. 77.

§ 132. ——To meet proofs and cure variance.

Amendment of bill to meet matter in answer after hearing, see also ante ¶¶ 537, 538.
Making amendment on or after appeal, see post ¶ 557.
Pleading at law, amendments to conform to proofs, see Pleading, VI.

¶ 542. A variance between the actual date of judgment and that set forth in a creditor's bill based on it may be corrected by amendment at any time during the proceedings; but if complainant is not confined to the exact date stated in the bill it may not be necessary.—First Nat. Bank of Marshall v. Hosmer, 48 Mich. 200.

¶ 543. Where the bill charged a fraudulent breach of trust, and it was difficult for complainant to get at the actual facts until the testimony had been taken, it was proper to allow the bill to be amended, even at the hearing, so as to secure the ends of justice.—Morrison v. Mayer, 63 Mich. 238.

¶ 544. Where a petition of a bank depositor for an order directing the receiver of an insolvent bank to treat him as a "general creditor" was granted, the court has power, on a subsequent petition, to amend so as to recognize him as a "general depositor" in accordance with the facts.—Kunze v. Tawas State Sav. Bank, 130 Mich. 688.

§ 133. ——To let in new and further proofs.

¶ 545. It is within the discretion of the court, after the cause has been set down for hearing on bill, answer and replication, to permit the bill to be amended and the cause opened for proofs; and the exercise of such discretion is proper in a case where, since the closing of proofs, evidence of material facts has come to the knowledge of the complainant, the existence of which was unknown before, and the facts were of a character rendering it quite proper not to set them out in the bill unless then supposed to be susceptible of proof.—Briggs v. Briggs, 20 Mich. 34.

§ 134. ——Amendments making new case or issues.

Letting in new matter, see also ante § 126.
Making new defenses by amendment asked at hearing, see also post § 135.

¶ 546. An amendment to a bill in equity proposed on the final hearing with the design of introducing or substituting a new controversy in principle will generally be refused. Bills of discovery have in some cases been made bills for relief at an earlier stage of the suit.—Livingston v. Hayes, 43 Mich. 129.

¶ 547. It is very much within the discretion of the lower court to allow a bill to be amended at the final hearing on the pleadings and evidence; and where the amendment would transfer the case to a different head of equity jurisdiction, a dismissal of the bill without prejudice will not be reviewed unless the refusal to allow the amendment was clearly error.—Livingston v. Hayes, 43 Mich. 129.

¶ 548. A bill filed and resisted as merely auxiliary to an action at law cannot be converted by amendment on final hearing into a bill for complete and independent relief under another branch of equity.—Livingston v. Hayes, 43 Mich. 129.

¶ 549. A bill in aid of ejectment proceedings cannot be converted into a foreclosure bill by merely substituting the ordinary prayer for foreclosure in place of the prayer originally made.—Livingston v. Hayes, 43 Mich. 129.

¶ 550. A bill filed by a ward for an accounting of the guardianship made the guardian's executor defendant, alleging that he held funds belonging to the ward; but the testimony showed that the guardian did not receive the money, owing to his neglect

to collect it. Held, that the bill could be amended so as to charge the guardian's estate and to ask an accounting on the ground of such neglect.—Dodson v. McKelvey, 93 Mich. 263.

¶ 551. Leave to amend a bill for cancellation after the close of all the testimony but before argument, by adding the charge that the performance of an agreement to support was not secured by a lien upon the land as agreed, and that for such reason the deed should be set aside, was properly refused upon the ground that it would introduce a new issue in the case.—Pamment v. Warner, 135 Mich. 244.

§ 135. ——Of answer or plea on hearing.

Of cross-bill on hearing, see ante § 128.
Effect of delay on inclination to refuse leave to make supplemental answer, see ante § 127.

¶ 552. In the exercise of a proper discretion, the court may permit a defendant, on the hearing of a bill to foreclose a mortgage, to file an unsworn amended answer, setting up want of notice or knowledge of complainant's mortgage, an answer under oath being waived, and the amended pleading containing no admissions available to the complainant as evidence.—Balew v. Mercier, 75 Mich. 42.

¶ 553. Where, in an action to restrain the flooding of complainant's land, an offer to amend the answer was made after the testimony was all in, without any request being made to take further proof, and the amended answer was inconsistent with the defense already set up, the amendment was properly refused, especially where it appeared that, if the amendment had been allowed, and the testimony considered with reference to it, the defendants had not met the case presented by complainant.—Pluchak v. Crawford, 137 Mich. 509.

¶ 554. It is not an abuse of discretion to permit an amendment, under § 10268, Comp. Laws 1897, How. Ann. St., 2nd Ed., § 12969, and Chancery Rule 16, to an answer on the hearing of a chancery suit, setting up the invalidity of the contract sued on because made on Sunday, especially where the opposite party did not request an adjournment.—Berston v. Gilbert, 180 Mich. 638.

¶ 555. A circuit court may, in the furtherance of justice and in the exercise of a sound discretion, even after a full hearing on the merits of a bill, permit an amendment to an answer germane to the issue raised by the original bill.—Thomas v. Nicolls, 191 Mich. 489.

¶ 556. There is no abuse of discretion on the part of the trial court on a hearing upon petition of a claimant against the receiver of an insolvent banking partnership in permitting an amendment of an answer to conform to the proof where no claim is made that petitioner was denied opportunity to be fully heard and introduce any testimony desired before the matter was finally disposed of.—In re Farmers' & Merchants' Bank of Lawrence, 194 Mich. 200; Smith v. Mosier, Id.

§ 136. Amendment on or after appeal.

Amending record and papers on appeal, see Appeal, XI, F.
Allowing amendments in Supreme Court, see Appeal § 522.
Amendments after appeal, see Appeal § 560.

¶ 557. Amendments to matters germane to the case can be allowed at any time in chancery suits to conform with the proof, protect the substantial equitable rights of the parties and secure the ends of justice even in the appellate court.—City Bank & Trust Co. v. Hurd, 179 Mich. 454.

¶ 558. An objection for the want of a necessary party in chancery was not made until the hearing. The bill made out a case on all other points, and the court granted decree for complainant as prayed. On appeal, the supreme court, in reversing the decree for want of parties, granted leave to amend, and allowed an injunction which had been decreed below to stand until the further order of the court below, to which the cause was remitted.—Palmer v. Rich, 12 Mich. 414.

¶ 559. An administrator having filed a bill to compel the specific performance of a contract for the conveyance of land to his intestate, without making the heirs parties, with prayer that a conveyance be decreed to himself, the court would not allow the bill to be amended at the hearing on appeal by substituting the heirs as complainants.—House v. Dexter, 9 Mich. 246.

§ 137. Mode of pleading facts subsequent to bill.

Supplemental bills after decree in general, see post §§ 237-239.
Provision for filing of supplemental pleadings to aver new matter since bill, see Jud. Act, chap. XIV, § 15; Comp. L. 1915, § 12467.
Rule as to supplemental pleadings to set up matters transpiring or coming to knowledge after filing of original pleading, see 1916 C. C. Rule 29.

¶ 560. Facts which have transpired subsequent to the filing of the bill cannot be set forth by way of amendment.—Hammond v. Place, H. 438.

¶ 561. A supplemental bill is necessary to bring before the court facts which have transpired subsequent to the filing of the original bill.—Hammond v. Place, H. 438.

¶ 562. If material facts have occurred subsequent to the commencement of the suit, the court will give leave to file a supplemental bill; and in doing so will permit other matters to be introduced which might have been incorporated into the original bill by way of amendment. This is especially proper where the matter which occurred before is necessary to the proper elucidation of that which occurred subsequent to the filing of the original bill.—Graves v. Niles, H. 332.

¶ 563. Facts of which complainant has learned since filing his bill, but which occurred before, are not matter for a supplemental bill, but for an amendment.—Wood v. Truax, 39 Mich. 628.

¶ 564. Facts which existed at the time an original bill of complaint was filed, but which were not known to complainant for the reason that they were concealed by the defendants themselves, may be presented to the court by way of amendment instead of by supplemental bill.—Rennells v. Potter, 198 Mich. 49.

¶ 565. Tender and acceptance of payment operating to discharge a mortgage which is being foreclosed by advertisement cannot, if taking place after the mortgagor has filed a bill for an accounting as to the amount due on the mortgage, constitute part of the case made by the bill, though shown by the proofs; but complainant must bring in such new matter by supplemental bill to obtain the relief to which it entitles him.—Fisher v. Holden, 84 Mich. 494.

§ 138. Right and propriety of supplemental pleadings.

Amendment or supplemental pleading as correct practice to bring in subsequent facts, see ante § 137.

Amendment of parties instead of supplemental bill, see ante ¶ 527.

Supplemental answers, see ante § 127.

Amendments and new pleadings on revival of suit or decree, see post § 236.

Grounds for supplemental bills after decree, see post § 237.

Original bills of supplement or in the nature thereof, see post §§ 237-239.

¶ 566. Where by an original bill to recover taxes and interest on a contract for the sale of timber, a court of equity had obtained jurisdiction, the complainant could file a supplemental bill for the taxes assessed subsequent to the filing of the original bill even though all the timber may have been removed. The defendants could not be prejudiced by the court's retaining jurisdiction to settle the entire controversy.—Michigan Iron & Land Co. v. Nester, 147 Mich. 599.

§ 139. Motion and showing for leave to amend.

Necessity of motion or request to prevent final judgment without leave to replead over demurrer, see post § 211.

Leave to plead over demurrer or plea or motion, see post § 211.

Motion for leave to plead over as waiver of irregularity in taking bill pro confesso, see ante ¶ 215.

¶ 567. It is not a matter of course to allow the filing of an amended bill after a cause has been at issue and testimony taken. A special application should be made to the court with a full statement of the facts intended to be incorporated in the amended bill so that the court can judge of the propriety of giving leave.—Hammond v. Place, H. 438.

¶ 568. A complainant wishing to amend his bill must take the first opportunity, after being made acquainted with the defects in it, to ask leave to do so.—Bank of Michigan v. Niles, W. 398.

¶ 569. It is usual, on allowing a demurrer for any cause which the court sees may be obviated by amendment, to give leave to amend on paying costs of demurrer. But where the court cannot see on the argument, from the facts before it, how the objection on which the demurrer was sustained could be removed, it is necessary for the complainant to apply for leave to amend by petition setting forth the additional facts sought to be incorporated in the bill.—Bank of Michigan v. Niles, W. 398.

¶ 570. In an application to amend the defendant's pleading the proposed amendments should be set out.—Freeman v. Michigan State Bank, H. 311.

¶ 571. Where leave is given to amend an answer, a new answer, with the amendments added, must be made, filed and served, or the original answer withdrawn by leave of the court, and the amendments added; or the amendments must refer to the portions of the answer on file intended to be amended, and specify their nature and application.—Mason v. Detroit City Bank, H. 222.

¶ 572. If a statement of fact in his answer is erroneous, defendant should apply to the court, showing how the error occurred, and asking leave to amend the answer, which must otherwise be taken as true against him. —Emerson v. Atwater, 12 Mich. 314.

§ 140. ——Order of allowance, terms and conditions.

Review of ruling on motion to amend, see Appeal § 401.

¶ 573. The court has power to impose terms upon allowing, on the day set for hearing, a bill to enforce a mechanic's lien to be amended by joining as codefendant defendant's wife, the owner of the premises upon which stands the building whereon the labor was performed.—Rugg v. Bassett, 101 Mich. 441.

¶ 574. The court's discretion to impose terms on allowing a party to be joined as co-defendant is not abused by an order requiring, as a condition to such amendment, that within twenty days complainant file a $200 bond for security for costs, and pay a solicitor's fee of $15 and witnesses' fees to be taxed, and that, in the event of his failure to file said bond and amended bill, and otherwise comply with said order, the bill be dismissed.—Rugg v. Bassett, 101 Mich. 441.

§ 141. Manner and form of amendments.

See also ante ¶ 571.

Amendment of course or on motion, showing and leave, see also ante § 139.

Amendment by striking and substituting, see ante ¶¶ 523, 524.

¶ 575. Amendments in the form of affidavits, not referring to the answer, are irregular, and a motion to dissolve an injunction will not be heard upon them.—Mason v. Detroit City Bank, H. 222.

§ 142. ——Treating amendments as made.

Presumption on appeal as to amendments having been made, see Appeal § 369.

¶ 576. Where all the facts entitling defendant to affirmative relief are set up in the answer without a specific prayer for relief, the prayer may be treated as amended and relief granted.—Cooley v. Harris, 92 Mich. 126.

¶ 577. In equity the empty form of amending and praying a temporary injunction or of alleging a threatened obstruction of incorporeal rights under leases and contracts and praying a permanent injunction, will not be insisted to confer jurisdiction, where the merits are gone into by mutual consent revealing a case for equity.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 578. In a suit for specific performance, defendant filed an answer and a cross-bill the latter merely containing denials of the allegations in the original bill; complainant's default was entered for want of an answer, and now defendant's counsel contends that under Chancery Rule 11 the allegations of the cross-bill must be taken as true. Held, however, that the cause having been heard upon proofs on all disputed questions, an order nunc pro tunc will issue setting aside the default, and the cross-claims will be treated as denied in all essential particulars.—Hickman v. Chaney, 155 Mich. 217.

§ 143. ——Reverification after amendment.

Necessity of reverifying divorce bill after amendment, see Divorce § 49.

¶ 579. If any fact is introduced into a divorce bill by way of amendment, the bill must be reverified to negative collusion.—Briggs v. Briggs, 20 Mich. 34.

§ 144. New answer, plea or demurrer to meet amendments.

Demurrer after amendment as abandonment of former plea, see post ¶ 603.

Striking new answer needlessly interposed, see ante ¶ 454.

Right to answer amended pleading, see Jud. Act, chap. XVI, § 2; Comp. L. 1915, § 12479.

¶ 580. When a bill is amended after answer by merely adding another defendant, no new answer by the original defendant is necessary.—Salisbury v. Miller, 14 Mich. 160.

¶ 581. A plea is superseded by amending the bill; and the defendant should plead, answer or demur to the amended bill as if no plea had been interposed before.—Peck v. Burgess, W. 485.

¶ 582. A bill was amended after hearing by adding allegations explaining matters referred to in the answer; held, that a demurrer to the amended bill was null in that it was not confined to the amendments, and did not purport to cover the whole bill, while it pointed out no part of it as demurrable which was separable from the rest.—Munch v. Shabel, 37 Mich. 166.

§ 145. Further answer after partial quashing or expunging.

Leave to plead over demurrer, plea or motion, see post § 211.

¶ 583. Where defendant both answers and demurs to different parts of the bill, and the demurrer is overruled, complainant, to obtain a further answer, must except to the answer already put in by defendant within twenty days after the demurrer is overruled.—Bragg v. Whitcomb, W. 307.

¶ 584. Whether a defendant should be required to answer over, on exceptions, where the disclosure sought is matter of record, quære.—Cummings v. Corey, 58 Mich. 494.

F. CONSTRUCTION, CHARACTER AND EFFECT OF PLEADINGS; ISSUES, PROOFS AND VARIANCE.

§ 146. Character, theory and effect of bill.

Character as affected or determined by prayer, see post § 147.

Pleading construable as petition for rehearing or as bill, see post ¶ 918.

Character of bill as amended bill or supplemental bill, see post ¶ 933.

Character of bill as original or of revivor and supplement, see post ¶ 934.

Bills of review as distinguished from bills of revivor and supplement or from original bills, see post § 240.

Admissions made and issues joined and burden assumed by theory of the bill, see post §§ 152-160.

Rule against shifting theory, see post § 163.

Effect of introduction of inconsistent theories by amendment, see post ¶ 597.
Construction and effect of the averments, see post §§ 148-151.
Cross-bill and answer thereto as bringing matter within scope of record, see also post ¶ 650.

¶ 585. The stating part of a bill of complaint determines its character, and it is immaterial that the prayer for relief is inconsistent.—Raniak v. Pokorney, 198 Mich. 567. (Ostrander, J., dissenting.)

¶ 586. A bill to restrain the prosecution of an action at law cannot be regarded as one of interpleader where the liability of the defendant is merely for a money judgment, and he does not hold any fund to which different parties are making claims. —Michigan Sugar Co. v. Moffett, 183 Mich. 589.

¶ 587. Creditor's bill, to enforce the payment of a judgment, making one a defendant who was alleged to be indebted to, and also the fraudulent grantee of, the judgment debtor. This defendant afterwards filed his bill against the complainant, claiming to have become the owner of the debt for which the judgment was rendered, and of a collateral mortgage given to secure it, and praying to have his title to these securities established. The judgment debtor—who was the mortgagor in the collateral mortgage—and the holder of a prior mortgage, were also made parties, and the bill prayed leave to redeem from the prior mortgage, and the foreclosure of the other. Held, that this was an original and not a cross-bill.—Andrews v. Kibbee, 12 Mich. 94.

¶ 588. A court is not bound by the opinion of the counsel concerning the theory of a bill for relief, but, whatever the purpose of its allegations, is governed by the case actually made by the bill.—Geney v. Maynard, 44 Mich. 578.

§ 147. ——As tested by prayer.
See also ante ¶ 585.
For purpose of deciding demurrer, see post § 156, ¶ 635.
Effect of alternative prayer to enlarge scope of proper relief, rule that decree must conform to bill, see post § 209.

¶ 589. The insertion in a bill in aid of proceedings at law of an inconsistent prayer for distinct independent relief does not change the ancillary character of the suit.—Lewis v. Campau, 14 Mich. 458; Livingston v. Hayes, 43 Mich. 129.

¶ 590. Where the prayer of a bill is broad enough to sustain the relief asked for, and the proof and pleadings warrant it, no statements in the bill that are not of controlling force will be allowed to defeat it.—Taylor v. Young, 56 Mich. 285.

§ 148. Construction and effect of allegations.
Construction for purpose of ascertaining if multifarious, see also ante §§ 73-76.
On hearing of demurrer, see ante § 112 et seq.
Effect of affidavits accompanying bill, see ante § 114.
Construction of amendments with original, see post § 150.
Of motions and demurrers, see post § 151.
Character and effect of bill, see ante §§ 146, 147.
Construction of pleading as bill or information, see ante ¶ 247.
Sufficiency of bill to show jurisdiction, see ante §§ 83-85.
Effect of pleading or failure to plead as admission of facts alleged by adversary, see post § 152 et seq.
What regarded as allegations of fact admitted by demurrer, see post § 156, ¶ 633.
[Note. Many cases of construction of pleadings and allegations therein are presented in decisions that a pleading is sufficient for this or that particular cause of action. It would be improper to take such cases from the specific topics, where they may be found, merely in order to collate them in one general place. See generally the topics referred to ante under § 77.]

¶ 591. A sentence in defendant's answer which is open to more than one construction ought not to be singled out and subjected to a construction which the context shows was not the pleader's intent; nor should relief be based upon such a sentence unsupported by proof and contradicted by defendant's theory and proofs.—Newaygo County Mfg. Co. v. Stevens, 79 Mich. 398.

¶ 592. When a party offers to show an agreement it is to be presumed that he proposes to prove all that is requisite to make the agreement sufficient in law; so, of an offer in a bill of complaint.—Bigelow v. Sanford, 98 Mich. 657.

¶ 593. A bill for an accounting is not bad as alleging that the matters at issue have already been settled, where it alleges that one of the defendants accepted settlement of his claim against the estate of plaintiff's decedent without paying to the estate what was owing by him to the estate, and where it seeks accounting of the amount so unpaid and owing.—Graham v. Graham, 171 Mich. 307.

¶ 594. Under the rule that a pleading is construed most strongly against the pleader an allegation in a cross-bill that the defendant holds by deed without notice of prior conveyance taken as confessed cannot be construed to mean more than a quitclaim deed which being insufficient to prevail over a prior conveyance does not by reason of the pro confesso defeat the complainant's title especially in the light of evidence that

the deed was in fact a quitclaim deed.—Messenger v. Peter, 129 Mich. 93.

§ 149. ——Allegations implied from others.

See the note under the preceding section.

Inferential admissions, see post § 152.

¶ 595. On a bill by judgment creditors in aid of execution to set aside a deed by the debtor, where no positive allegation of possession is made in the answer by defendants, grantees of debtor, but ownership of the premises is repeatedly asserted and it is stated that the land, by reason of the improvements, is worth a certain sum, the matter of possession is presented. Atkinson v. Akin, 197 Mich. 289.

§ 150. ——Amendments and original matter.

Amendment as superseding original, see also ante ¶ 581.

¶ 596. A bill and its amendments constitute but one record, and the answers thereto but one.—Munch v. Shabel, 37 Mich. 166.

¶ 597. A bill and the amendment thereof constitute but one record; and where the bill as amended embraces inconsistent theories based upon repugnant averments, it should be dismissed on demurrer.—Ogden v. Moore, 95 Mich. 290.

¶ 598. There is no inconsistency between an original bill alleging that the sole management of an estate was intrusted to complainant executor, who dealt with investments through a certain agent incurring losses in them, and an allegation in a so-called supplement amendatory of the original bill stating that the two executors joined in appointing such agent.—Cheever v. Ellis, 144 Mich. 477.

¶ 599. An amendment (or supplement in form) to a bill, averring that an agent of executors for making investments was appointed by complainant's executor and defendant, a coexecutor, and that the agent conferred with both, that certain losses occurred through this agent and that the two executors participated in the management of the estate in respect to the affairs conducted through this agent, and that complainant's executor never had the exclusive management of affairs intrusted to this agent, is inconsistent with such part of the original bill as alleged in substance that defendant intrusted practically the entire management of the affairs of the estate to complainant's executor.—Cheever v. Ellis, 144 Mich. 477.

¶ 600. The fact that the original answer to a bill in equity does not contain a prayer for affirmative relief is not a bar to affirmative relief when the amended answer and cross-bill contains such a prayer.—Thomas v. Nicolls, 191 Mich. 489.

§ 151. ——Of motions and demurrers.

¶ 601. A demurrer to a supplemental bill cannot be treated as a general demurrer where it fails to allege a want of equity in the bill and assigns as ground of demurrer that the complainant has not made or stated a case which entitles him to file a bill, or any bill in the nature thereof, or a case which entitles him to the relief prayed for.—Taylor v. Taylor, 87 Mich. 64.

¶ 602. Where a so-called supplemental bill states no newly discovered evidence and merely repleads with amplifications the matter of the original bill and also sets forth all of the original pleadings and evidence, a demurrer may be treated as raising the question whether the whole record presents a prima facie case against defendant for the relief sought.—Cheever v. Ellis, 144 Mich. 477.

¶ 603. Though by amending the bill in response to a plea, the plea is admitted, the new bill standing in place of the former one is not answered by the plea; and accordingly the defendant then demurring treats the case as if no plea had been filed.—Tompkins v. Hollister, 60 Mich. 470.

§ 152. Issues presented and admissions.

Making admissions in open court, see post § 174.

Theory of bill, see ante §§ 146, 147.

Impropriety of general denials or denials in literal terms of bill, see ante ¶¶ 389, 390.

Admissions by failure to plead to bill or cross-bill or by demurrer, see post §§ 154-156.

Effect of answer to make admission, see also ante ¶ 391.

Presumptions and inferences from admitted facts, see post § 157.

Effect of admission or denial to fix burden of proof, see post § 160.

Unsworn answer as admission discharging burden of proof, see also post § 164a.

Taking issue on defective pleadings, see post § 153.

Variance of proofs from bill and record, see post §§ 161, 162.

Replications to join issue under former practice, see ante § 111e.

Disability of guardians to bind infants by admissions, see Guardians ad Litem, III; Guardianship, IV.

Admissions by one defendant to interpleader bill, necessity of traverse by other, see Interpleader.

Taking bill as confessed notwithstanding answer as admission of truth of the answer, see also Defaults ¶ 50.

Sufficiency of answer in bill to quiet title on tax sale to admit service of notice to redeem, see also Taxes, XII, C.

¶ 604. Nothing is regarded as admitted by an answer in chancery unless expressly admitted.—Morris v. Morris, 5 Mich. 171; Morris v. Hoyt, 11 Mich. 9; Young v. McKee, 13

Mich. 552; Hardwick v. Bassett, 25 Mich. 149.

¶ 605. The admissions in a bill or answer in chancery, to be conclusive on the party making them, must be full and unequivocal. They must not be inferred from other admissions, unless the express admissions are so closely connected with the one to be inferred that to disprove the latter would disprove the former.—Schwarz v. Sears, W. 19.

¶ 606. A bill in equity alleged that the defendant had platted certain disputed premises and had caused the plat to be acknowledged and recorded according to the statute. The answer admitted the ownership of the land and the platting and recording as alleged. Held, that the charge and admission amount to a full recognition of the validity of the plat and record.—White v. Smith, 37 Mich. 291.

¶ 607. Under Chancery Rule 10 the allegations of an answer are taken as true where the case is heard on bill and answer.—Gates v. City of Grand Rapids, 134 Mich. 96.

¶ 608. Under 1897 C. C. Rule 10, subd. d, providing that every material allegation in a bill not answered shall be taken as admitted, a defendant who fails to answer an averment of a bill to enforce a mechanic's lien that personal service of the lien statement was not made upon him because of his absence from the county thereby admits it to be true, and no proof need be made thereof.—J. E. Greilick Co. v. Rogers, 144 Mich. 313.

¶ 609. Under 1897 Chancery Rule 10, subd. d, providing that every answer shall contain an explicit "admission or denial of each allegation of the bill" as to which the defendant has knowledge or belief but as to matters alleged of which he has no knowledge sufficient to form a belief, he shall not be required to admit or deny but "shall state his want of such knowledge," and also providing that every material allegation to which defendant "shall not make answer" shall be taken as admitted, a foreclosure bill alleging all necessary facts and the amount due for principal and interest to the date of the bill stands admitted on an answer neither admitting nor denying it but putting complainant to proof.—Hoock v. Sloman, 145 Mich. 19.

¶ 610. Where a replication to a plea is filed, the truth of the plea is the only question to be tried; and, if established, it is a bar to so much of the bill as it professes to cover.—Hurlbut v. Britain, W. 454.

¶ 611. By replying to a plea to the whole bill, instead of setting it down for argument, its validity is admitted, and the only question left for trial is the truth of the facts alleged in the plea.—Little v. Stephens, 82 Mich. 596.

(3 Mich. Dig. 11)

¶ 612. Unless a replication is filed, the complainant in a bill in equity, if he brings the cause to a hearing, cannot help out his case by proof.—Lafrance v. Griffin, 160 Mich. 236.

¶ 613. Nothing in a bill in equity is taken as true without proof unless admitted by the answer, and whether the answer is or is not sworn to, if answer on oath is waived, the rule is the same.—Lafrance v. Griffin, 160 Mich. 236.

¶ 614. Where a bill contains a general charge against a defendant, of co-operation with other defendants to procure a deed to the latter, but makes no specific charge against him predicated upon or sustained by any statement of facts which could be met and denied, admitted or explained by the answer, neither his acts nor omissions are put in issue, so as to be receivable against the others.—Dawson v. Hall, 2 Mich. 390.

¶ 615. The validity of the acknowledgment and record of a plat held to be admitted by the course of pleading in chancery, wherein the bill alleged a plat according to the statute and the answer admitted it.—White v. Smith, 37 Mich. 291.

§ 153. ——On informal or defective pleading.

¶ 616. Introducing facts that should be the basis of an amended bill, in the shape of a supplemental bill, is not a substantial error; the defendants can take issue upon it as they would upon an amended bill.—Hess v. Final, 32 Mich. 515.

¶ 617. Where a bill in equity calls for an answer on oath, and an unsworn answer is put in to which complainant makes replication without objecting, the effect is to permit the answer to stand as unsworn pleading.—Adair v. Cummin, 48 Mich. 375.

§ 154. Admission by failure to plead or answer.

By failure to answer cross-bill, see post § 155.

Failure to admit as equivalent to denial casting burden on party alleging fact, see also post § 160.

Admissions by failure to answer bill fully, see 1916 C. C. Rule 25, § 2.

¶ 618. A material allegation in a bill not answered, is taken as admitted, under the chancery rules, as to a defendant competent to answer.—Nolan v. Garrison, 151 Mich. 138.

¶ 619. Where a defendant defaults in putting in a plea or answer to a bill, he admits every material fact stated therein, and cannot afterwards introduce evidence to controvert its allegations.—St. Louis Hoop & Stave Co. v. Danforth, 160 Mich. 226.

¶ 620. Every material allegation in the bill to which the defendant shall not make

answer is taken as admitted by defendant, under Chancery Rule 10, subd. d.—Lafrance v. Griffin, 160 Mich. 236.

§ 155. Admissions by failure to answer cross-bill.

See also ante ¶ 594.

¶ 621. A replication to an answer by which defendant claims the benefit of a cross-bill under (First) Chancery Rule 123, puts at issue the original case as made by bill and answer; and cross-bill averments in the answer must be answered specifically or a default may be taken.—Coach v. Kent Circuit Judge, 97 Mich. 563.

¶ 622. Failure to file an answer to a cross-bill justifies an order taking it as confessed under 1897 Chancery Rule 11, subd. c.—Messenger v. Peter, 129 Mich. 93.

¶ 623. On a bill by creditors of a corporation against retiring stockholders, on failure to answer a cross-bill denying the validity of the debt, the order pro confesso admits the allegations to be true.—Clark v. E. C. Clark Mach. Co., 151 Mich. 416.

¶ 624. Complainant averred in his bill that the lands in question were in a wild state. Defendants denied this in their cross-bill and averred that they had possession. Held, complainant's omission to specifically deny this averment did not admit possession in defendants.—Beuthien v. Dillon, 160 Mich. 396. (Montgomery, C. J., and McAlvay, J., concurring on the ground that defendants were barred from relief on their cross-bill by their laches.)

§ 156. Admissions by demurring or moving to dismiss.

Assumption of truth of bill on appeal from demurrer without answer, see Appeal § 351.

¶ 625. Demurrer to a bill in equity does not admit the truth of matters that are not relevant or well pleaded, nor the correctness of legal inferences, nor unreasonable deductions of facts, nor unreasonable or inequitable meanings or implications.—Churchill Township v. Cummings Township, 51 Mich. 446.

¶ 626. A demurrer to a bill admits the complainant's case for the purpose of that issue only, and not for the purpose of establishing a right to relief which the proofs might not sustain if defendant should be allowed to answer after his demurrer is overruled.—Cook v. Detroit & M. R. R. Co., 45 Mich. 453.

¶ 627. A demurrer admits the truth of the averments of fact properly pleaded in the bill of complaint.—Traders' Bank of Canada v. Fraser, 162 Mich. 315; Cole v. Cole Realty Co., 169 Mich. 347; Barr v. Packard Motor Car Co., 172 Mich. 299; Olsen v. Williams, 172 Mich. 316; Young v. Reeves & Co., 172 Mich. 363; Levitan v. Houghton Nat. Bank, 182 Mich. 30; City of Owosso v. Union Tel. Co., 185 Mich. 349; Buck v. Lockwood, 193 Mich. 242; Freeman v. Mitchell, 198 Mich. 207.

¶ 628. For the purposes of the argument a demurrer admits the truth of the allegations of a bill of complaint.—Bushman v. Faltis, 184 Mich. 172.

¶ 629. Where a bill alleging fraud is demurred to, the truth of the allegations can only be determined after the testimony has been taken.—Toledo, S. & M. Ry. Co. v. Shafer, 190 Mich. 89.

¶ 630. A demurrer admits facts only. It would not admit the legal construction of a devise to be that which is claimed in the bill.—LeBaron v. Shepherd, 21 Mich. 263.

¶ 631. A demurrer to a bill against a corporation admits its allegation that there is no other creditor but complainant.—Brewer v. Michigan Salt Ass'n, 58 Mich. 351.

¶ 632. On demurrer to a bill, which does not allege that a trust attacked as invalid was by parol, an admission that it was such, coupled with the framework of the bill indicating that a parol trust was relied on, displaces the presumption that where a party offers to show an agreement it is in such form as the statute requires to be a legal one.—Thompson v. Marley, 102 Mich. 476.

¶ 633. An allegation in a taxpayer's injunction bill against the officials of a municipality that the "bonds of the city will be immediately issued and disposed of to innocent purchasers as your orators have good reasons to believe and do believe," is an allegation of fact based upon information and belief, and not a mere allegation of information and belief; and a demurrer to such allegation admits the fact alleged.—Bates v. City of Hastings, 145 Mich. 574.

¶ 634. Where the complainant in a bill for an accounting and for injunctive relief averred that the oral agreement between the parties for an accounting was not a contract enforceable at law but one that could be urged only in equity, held that the averment, being taken as true on the motion to dismiss, it could not be maintained by the defendant that the complainant had an adequate remedy at law.—Long Point Development Ass'n v. McIntosh, 193 Mich. 567.

¶ 635. Complainant's rights upon demurrer are to be tested by the allegations in his bill taken as true, rather than by his prayer for relief.—Laubengayer v. Rohde, 167 Mich. 605.

¶ 636. An objection to the sufficiency of a pleading only admits the facts stated for the

temporary purpose of the pending suit.—Eveland v. Stephenson, 45 Mich. 394.

§ 157. Presumptions and inferences from admitted facts.

Admissions inferable from other admissions, see also ante ¶ 605.

Presumptions and inferences in general, see Evidence, II.

¶ 637. Where a bill to set aside a deed sets up arrangements which are admitted, and which do not appear, as alleged, to be lacking in any legal formalities, it must be assumed that they are legal and could be proved if not admitted.—Victor Sewing Mach. Co. v. Jacobs, 46 Mich. 494.

¶ 638. A complainant sought to redeem lands which he claimed to have transferred as security. Defendant answered that the assignment was absolute. Complainant replied that defendant had invited the transfer in order that the lands might be screened from an unfounded proceeding against complainant. Defendant denied that he so received it, or knew anything about the proceeding, as to which it did not appear whether it was well founded or not except from complainant's testimony that it was not. Held, that defendant could not claim that complainant's averment of the dishonest purpose of the transfer was sufficient ground for refusing to construe the transaction as a mortgage.—Gunderman v. Gunnison, 39 Mich. 313.

§ 158. Burden of proof.

Necessity of proof of matters not admitted, see also post § 164.

Of matters defensive in character, see post § 159.

General rule as to burden, see Evidence, II.

Burden as to particular issues and facts, see specific topics treating of such facts.

¶ 639. A complainant in chancery must be prepared to support his own case and to meet any evidence fairly controverting it.—Morris v. Morris, 5 Mich. 171.

§ 159. ——Matters of defense.

Answer as evidence for answering defendant, see also post ¶ 662.

Variance of proofs from pleading, see post § 162.

¶ 640. While an answer called for on oath is to be received as true so far as it is responsive to the averments of the bill, affirmative matters of defense which are thus set up must be proved.—Hart v. Carpenter, 36 Mich. 402.

¶ 641. Where complainant alleged in his bill a right to certain shares of partnership property, and defendant denied the right, and set up an independent contract to show himself entitled to one-half the shares, the answer was held not to come within the rule of being directly responsive to the allegations of the bill, and the new contract was required to be proved.—Ramsdell v. Millerd, H. 373.

§ 160. ——Effect of admissions or denials.

See also post ¶ 812.

Matters admitted, see ante §§ 152-156.

¶ 642. Where an answer does not admit a fact set up in a bill no denial is necessary; but the failure to admit is equivalent to a denial, and throws upon the complainant the burden of proof.—Hardwick v. Bassett, 25 Mich. 149.

¶ 643. Where the plea to a divorce bill denies the marriage, complainant has the burden of proving it.—Cross v. Cross, 55 Mich. 280.

¶ 644. A bill was filed to restrain the use of an easement to purposes specified in the grant under which it was claimed. The bill set forth an agreement between the parties, by which defendants were allowed to use the easement for the machinery then in use, and alleged a subsequent change in the machinery. The answer (not on oath) alleged that the change was made before the agreement. Replication was filed, but no proofs taken. Held, that the answer in this particular was responsive to the bill, and, as the case stood, complainant could have no relief on this part of the case.—Mandeville v. Comstock, 9 Mich. 536.

¶ 645. If the answer to a bill of complaint is so framed as by its omission or otherwise to admit by implication an allegation (of title) contained in the bill, even if said answer is not upon oath, it should relieve complainants from the burden of proof. The rule that nothing is to be admitted unless expressly admitted is to be interpreted in the light of common sense, and not given a mere arbitrary force.—Shook v. Proctor, 27 Mich. 349; Shook v. Proctor, 27 Mich. 377.

¶ 646. Where a bill in equity charges on information and belief that a transaction is fraudulent, and the answer directly denies it, the complainant has the burden of showing it to be so by independent evidence.—Darling v. Hurst, 39 Mich. 765.

¶ 647. Where a mortgage or other security is set forth and referred to in a bill in chancery, and made a ground of relief, it becomes a necessary part of the record, and if not denied in the answer it needs no formal proof.—Mickle v. Maxfield, 42 Mich. 304.

§ 161. Variance of proofs from pleadings.

Shifting theory on trial or hearing, see post § 163.

Immaterial variance or failure of proofs, see post § 180.

Disregarding facts proved but not in issue, see post § 179.
Basing decree on matters subsequent to filing of bill, see post § 207.
Necessity that decree conform to bill, see post § 208.
Variance in suits for particular relief or object, see specific topics like Fraud, III; Rescission, VI; Specific Performance, IV.
Rules as to variance at law, see Pleading, X.
Joint bill to redeem, necessity of proof of joint claim, see also Mortgages, IX.
Allegations of title by purchase at execution sale and of possession thereunder as sustaining proof of title by adverse possession, see also Rescission, VI.

¶ 648. Where complainant in a bill to quiet title claimed under a sheriff's deed, which both parties treat as applying to the specific property, it cannot be alleged as a variance between the deed and the bill that the deed, though otherwise properly specifying the lots and the name of the village and plat, has omitted the county and state. —Smith v. Brown, 34 Mich. 455.

¶ 649. Relief on a judgment creditor's bill will not be denied on the ground that judgment was entered upon a later date than that stated in the bill, if it appears that the later judgment entry was merely to correct the one relied on, and it does not appear that counsel did not have notice of the correction or were misled by the variance.—First Nat. Bank of Marshall v. Hosmer, 48 Mich. 200.

¶ 650. The fact that a bill for foreclosure of a land contract counts upon that contract alone does not render proof of supplemental agreements subject to an objection of variance, where such supplemental agreements are set up in a cross-bill by the defendant, and answered by the complainant. —Schmidt v. Gaukler, 156 Mich. 243.

§ 162. ——Of defenses and rebuttals from allegations.

¶ 651. A plea that defendant is the bona fide purchaser and owner of an absolute title to lands is not sustained by evidence that he is the owner of a mortgage interest only.—Emerson v. Atwater, 7 Mich. 12.

¶ 652. The defendant can only defend on the grounds set up in his answer.—Van Dyke v. Davis, 2 Mich. 144; Smith v. Brown, 2 Mich. 161.

¶ 653. A defense to a bill in equity fails so far as it depends on any affirmative showing where the evidence can only be used to establish an entirely different defense from that which the answer outlines.—Harrington v. Brewer, 56 Mich. 301.

¶ 654. Where complainant by a general replication puts in issue the truth of a plea that sets up an accord and satisfaction and certain receipts signed himself, he cannot show a mistake in the accord or explain the receipts by parol evidence—Horn v. Detroit Dry-Dock Co., 150 U. S. 610, 37 L. ed. 1199, 14 Sup. Ct. Rep. 214.

§ 163. Shifting theory of case.

Necessity that decree conform to bill and record, see post §§ 208, 209.
Rule against shifting theory on appeal or on retrial after remand, see Appeal §§ 267-269, 465 et seq.; 559 et seq.

¶ 655. A complainant will not be permitted to shift the position taken in his bill of complaint, but is bound by the case therein made.—Huggett v. Case, 61 Mich. 480.

¶ 656. A complainant seeking to have his deed construed as a mortgage is confined to the ground on which he filed his bill, and cannot afterwards claim that he was unduly influenced to execute the paper as a deed.—Tilden v. Streeter, 45 Mich. 533.

§ 164. Effect of pleadings as evidence.

Effect as admissions, see ante §§ 152-156.
Pleadings as admissions or declarations against interest made out of court and as such receivable in evidence in other suits and actions, see Evidence, VII, C.
Use of sworn pleadings as affidavits on motions for interlocutory relief, see Motions and Orders; Injunctions, IV; Receivers, II, A.

¶ 657. A bill in equity is no evidence for complainant; and where the case is submitted on bill and answer, and no exceptions are filed to the latter, relief must be based on the admissions in the answer. And if it denies or does not admit any averment that is material to the prayer for relief, the bill must fail.—Wiegert v. Franck, 56 Mich. 200.

¶ 658. A bill in equity is not evidence for complainant; and, since a sworn answer must be taken as true, where the case is submitted on bill and answer, and no exceptions are filed to the latter, relief must be based on the admissions in the answer; and, if it denies or does not admit any averment that is material to the prayer for relief, the bill must fail.—Fields v. Colby, 102 Mich. 449.

§ 164a. ——Of unsworn answer.

Effect of admissions or denials on burden of proof, see ante § 160.

¶ 659. Where answer on oath is waived and replication is filed, the answer is not evidence, but complainant may use the answer as an admission by defendant of any facts stated in it necessary to establish his case. But he cannot use one part and exclude other parts relating to the same subject that would be responsive to the bill had

the answer been under oath.—Durfee v. McClurg, 6 Mich. 223.

¶ 660. The answer without oath is a mere pleading, and of no effect as evidence. So far as it admits the case made by the bill, it relieves the complainant from proof. So far as it controverts that case, it puts the complainant to his proof. But so far as it alleges any new matter of avoidance, or any matter the burden of proving which would naturally rest upon the defendant, it is of no effect without proof.—Morris v. Hoyt, 11 Mich. 9.

§ 164b. ——Attached documents or copies.

¶ 661. A deed is not made evidence by attaching to an answer in chancery what is alleged to be a copy of it; this only amplifies the pleading.—Shepard v. Shepard, 36 Mich. 173.

§ 165. Sworn answer as evidence.

See also ante ¶ 658.

As to affirmative matters of defense, see also ante § 159.

Necessity, requisites and sufficiency of verification, see ante §§ 68-70.

Exceptions to answer, see post § 166a.

Unsworn answer as receivable admission, see ante ¶ 659.

Effect of sworn answer to sworn bill as evidence, see 1916 C. C. Rule 25, § 1.

¶ 662. When an answer is called for on oath, whatever is responsive to the bill is evidence for as well as against defendant. —Schwarz v. Wendell, W. 267.

¶ 663. Where the bill waives answer under oath, a sworn answer has no greater effect than one unsworn.—Van Inwagen v. Van Inwagen, 86 Mich. 333.

¶ 664. A grossly evasive answer cannot have the force of one that shows apparent good faith.—Fairbairn v. Middlemiss, 47 Mich. 372.

¶ 665. An answer to a judgment creditor's bill, used in opposition to a motion for the appointment of a receiver before the time for replying has expired, can only be treated as an affidavit.—Rankin v. Rothschild, 78 Mich. 10.

§ 165a. ——Responsiveness and particularity.

Burden of proof as to new matter not responsive, see also ante ¶ 641.

¶ 666. If a fact stated in the bill, and answered by defendant, is material to complainant's case, or is a circumstance from which a material fact may be inferred, the answer, in such case, is responsive to the bill, and is evidence in the cause.—Schwarz v. Wendell, W. 267.

¶ 667. An answer may sometimes be evidence of a fact not stated in the bill; as where the bill sets forth part of complainant's case only, instead of the whole, and the part omitted, and stated in the answer, shows a different case from that stated in the bill, and is not in avoidance merely.—Schwarz v. Wendell, W. 267.

¶ 668. A bill to foreclose a mortgage alleged it to have been given for an actual indebtedness to an amount named, which still remained unpaid. Answer on oath was called for, and the answer which was filed purported to set forth the circumstances under which the mortgage was given, showing it to have been in part for money advanced, and in part for property at a valuation which the party had failed to convey according to agreement. Held, that the answer was responsive to the bill and was evidence.—Robinson v. Cromelein, 15 Mich. 316.

¶ 669. Where an answer does not show a different case from that set up in the bill, but sets up new matter in avoidance, it is not evidence of such new matter.—Schwarz v. Wendell, W. 267; Attorney General v. Oakland County Bank, W. 90; Van Dyke v. Davis, 2 Mich. 144; Hunt v. Thorn, 2 Mich. 213.

¶ 670. A judgment creditor's bill, filed to reach property acquired by the debtor's wife under various transfers made by him, called for answers under oath. The wife denied that any of the transfers made were to hinder or defraud creditors of her husband or of the firms to which he belonged, or to shield any of his property, and averred that at the time of the conveyances she believed her husband and the firms to be solvent. The answer was held responsive, and not being excepted to was sustained, though it would have been well to set forth in detail all circumstances connected with the transfers made.—Hubbell v. Grant, 39 Mich. 611.

§ 165b. ——Assumptions of truth.

¶ 671. A sworn answer to a bill in equity is taken to be true where the cause is heard on bill and answer.—Ruhlig v. Wiegert, 49 Mich. 399.

¶ 672. A sworn answer to a bill in equity is taken to be true in all points where the cause proceeds to a hearing on bill and answer only.—Huyck v. Bailey, 100 Mich. 223; Fields v. Colby Highway Com'r of Iosco Township, 102 Mich. 449.

¶ 673. An answer to a bill in equity is to be taken as true, where the cause is heard on bill, demurrer, and answer.—American Mirror Glass Beveling Co. v. Bulkley, 107 Mich. 447.

¶ 674. When no replication is filed the answer is received as true and is evidence.—Durfee v. McClurg, 6 Mich. 223.

§ 165c. ——Weight and conclusiveness.

¶ 675. A sworn answer is not conclusive, and, while treated as evidence, is subject to

the same rules as to weight as any other evidence.—Newlove v. Callaghan, 86 Mich. 301.

¶ 676. A bill being filed to reach land for which it was alleged the husband had paid, taking title jointly to himself and his wife to defraud his creditors, a sworn answer was filed alleging that title was so taken in order that the survivor should take and that the consideration was paid principally from the wife's money. Held, that although the answer was evidence, it was not conclusive, and was of little weight in view of the defendant's refusal to testify how much the wife paid.—Newlove v. Callaghan, 86 Mich. 301.

¶ 677. The denial of fraud in an answer under oath is not conclusive on the court if the facts and circumstances of the case are such as irresistibly to lead the mind to a different conclusion.—How v. Camp, W. 427.

¶ 678. A defendant cannot, by his answer, vary the terms of a written contract.—Schwarz v. Wendell, W. 267.

¶ 679. A written contract that is complete in itself being set up in a bill in equity and produced in proof, it was held that it was not impeached by an averment in the sworn answer that it constituted but part of the entire contract of which the residue was reduced to writing and in complainant's possession, nor by contradictory and unsatisfactory parol proofs of an agreement not supplementary to the writing produced and proved.—Rogers v. Odell, 36 Mich. 411.

¶ 680. Since the statute of 1861 the defendant's answer on oath, responsive to the bill, is to be regarded as of the same force only which it would have were it the defendant's deposition as a witness.—Roberts v. Miles, 12 Mich. 297.

¶ 681. By his answer defendant had alleged the consideration of a certain deed (decreed by the court to be a mortgage) to have been a debt to a certain amount. The answer estops him from showing that a larger sum was due.—Emerson v. Atwater, 12 Mich. 314.

¶ 682. Where the answer is called for on oath, and the defendant of his own knowledge fully and fairly negatives any allegation of the bill, complainant can have no relief depending upon that allegation, unless the answer is overcome by more than the equally full testimony of one witness.—Roberts v. Miles, 12 Mich. 297.

¶ 683. The rule calling for more than one witness amounts simply to this: That there can be no decree in favor of complainant unless the evidence preponderates in his favor; and that where answer and opposing witness are equally fair and explicit, there can be no such preponderance.—Roberts v. Miles, 12 Mich. 297.

¶ 684. If defendant, after having answered, is called upon to stand as a witness under the statute of 1861, and furnishes the means of destroying his own answer, and corroborating complainant's case, his testimony on the oral examination and cross-examination is preferable to his answer.—Roberts v. Miles, 12 Mich. 297.

§ 166. Answer of one affecting other defendants.

Answer or demurrer by one inuring to all defendants, see ante § 96.

As admission receivable against others, see ante ¶ 605; and see also Evidence, VII, C, 2, 3.

¶ 685. The assignee of the grantee in a deed absolute in form interposed, to a bill to redeem, the plea of a bona fide purchase without notice, which plea, on the hearing, was found untrue. Held, that as he was then undefended except by the answer of his grantor, and was entitled to all the benefits of that, so, also, he was concluded by its statements—e. g., as to the amount due—to the same extent as his grantor himself.—Emerson v. Atwater, 12 Mich. 314.

§ 166a. Exceptions to answer as evidence.

¶ 686. Complainant cannot examine as a witness a defendant against whom he seeks relief; if such defendant's answer was insufficient, he should except, and if his testimony was sought to facts not stated in the bill, it should be amended.—Thomas v. Stone, W. 117.

¶ 687. A complainant in a judgment creditor's bill is not entitled to file exceptions to the voluntary answer of an officer of a defendant corporation, especially if the answer be an express denial of the charges made in the bill.—McCreery v. Bay Circuit Judge, 93 Mich. 463.

VIII. TRIAL AND HEARING.

A. IN GENERAL.

§ 167. In general; manner, time and notice.

Hearing on issues of law, see post § 168.

Hearing and trial of preliminary and dilatory fact issues, see post § 169.

Hearing on cross-bills, see post § 170.

Offering, taking and receiving proofs, see post §§ 171-178.

Striking out or rejecting proofs, see post § 181.

Admissibility and sufficiency of proofs, see post § 179.

References and making up issues for juries, see post, VIII, B.

Making amendments on hearing, see ante § 131 et seq.

Practice on entering decree, see post §§ 202, 203.

Calendaring cause for hearing, see Calendar.

Propriety of judge taking account instead of referring it, see Accounting Suits § 10.

Practice in hearing of chancery appeals, see generally Appeal, XII.
Trial de novo on appeal, see Appeal, XII, H.
On divorce bills, see Divorce § 85 et seq.
Taking proofs on default, see Defaults § 23.
Proceedings for discovery and inspection, see Discovery.
Errors regarded as harmless or as cured and therefore not ground for reversal, see Harmless Error.
Mode of taking proofs and hearing evidence, see post § 175 et seq.
Power to consolidate or sever suits, see Jud. Act, chap. VIII, § 1; Comp. L. 1915, § 12309.
Rules for conduct of trials and opening statements, see 1916 C. C. Rule 42.

¶ 688. A circuit court cannot decline to hear a cause in chancery, where either party has regularly claimed a hearing in open court, unless an order has been made upon good cause shown, directing it to be proceeded in otherwise. Such a case may be placed on the docket, and a mandamus lies to compel the court to proceed in it as right and justice may require.—People ex rel. Stebbins v. Barry Circuit Judge, 27 Mich. 170.

¶ 689. Issues of fact arising in cases where a court of chancery has jurisdiction are always tried by the chancellor, unless, in his discretion, he calls a jury for an advisory verdict to aid him in determining the facts (Comp. Laws, 1897, § 462), and if the case is properly one for equitable adjudication, the litigants' constitutional right to a trial by jury is not invaded.—Cole v. Cole Realty Co., 169 Mich. 347.

¶ 690. The circuit judge has a right to hear a case of accounting without a reference to a commissioner, but when he does so he should proceed as a commissioner would, and the parties should make their complaints of his action in such form that, if the case is appealed to the supreme court, the precise matters in controversy will be indicated by the record.—Barnebee v. Beckley, 43 Mich. 613.

¶ 691. The circuit judge has a right to hear an account without referring the taking of it.—Roelofs v. Wever, 119 Mich. 334.

¶ 692. In a foreclosure case the court may dispense with a reference to compute the amount due and may make its own computation.—Ireland v. Woolman, 15 Mich. 253; Vaughan v. Nims, 36 Mich. 297.

¶ 693. A decree made without notice of hearing, or on notice insufficient in point of time is erroneous.—Jenny v. O'Flynn, 5 Mich. 215.

¶ 694. Where, after overruling a demurrer in a foreclosure suit, the bill was taken as confessed by defendant, and the case referred to a commissioner to compute the amount due, the case heard on the commissioner's report, and decree of foreclosure made without notice of hearing to the defendant, who had appeared, but all the other proceedings in the case were regular, and no exception was taken by the defendant to the commissioner's report, and no application made to the court below for relief, held, that the supreme court would not, on the ground of want of notice of hearing alone, reverse the decree made below.—Martin v. McReynolds, 6 Mich. 70.

§ 168. On issues of law and demurrers.

Right to put in proofs, see post § 171.
Proper decree or disposal of cause, see post §§ 210, 211.
Pendency of hearing on demurrer as preventing dismissal, see post § 196.
Costs for failure to bring on and dispose of case on demurrer, see Costs § 31, ¶ 107.
Motion to bring on in advance matters of defense formerly made by plea, see 1916 C. C. Rule 25, § 3.
Rules for calling up petitions and motions for hearing, see 1916 C. C. Rule 15.

¶ 695. Separate hearings ought not to be had on the demurrer clause in the replication. Where a regular demurrer is not filed, if the case cannot be risked on a demurrer, it is better to proceed on the facts and amend the bill if necessary.—Zabel v. Harshman, 68 Mich. 270.

¶ 696. The practice of a separate hearing on a demurrer clause in an answer is condemned.—Brassington v. Waldron, 143 Mich. 364.

¶ 697. When defendants in a chancery suit have answered, and in their answer inserted the usual demurrer clause, and replication is filed the case must go on to hearing upon the issues joined and a final decree must be rendered. Questions of law on the demurrer cannot then be tried.—Gray v. Eldred, 144 Mich. 23.

§ 169. On preliminary and dilatory issues of fact.

Effect of withholding objections until hearing, waiver by delay, see ante §§ 119-122.
Proper decree or disposal of cause, see post §§ 210, 211.

¶ 698. Suit at issue on replication cannot be heard and disposed of piecemeal; and dismissal, before testimony closed, on ground that statute of limitation bars complaint, is erroneous.—Goodrich v. Goodrich, 66 Mich. 522.

¶ 699. Defendant entered a plea to a bill in chancery, and, no replication being filed, noticed the same for argument. After the lapse of twenty days, complainant, claiming that defendant should have secured an order of reference to a master to obtain a report

as to the truth of the plea, petitioned for an order that the bill be taken as confessed, which order was denied. Upon argument, the plea was sustained; and, after the lapse of ten days, the complainant not having taken issue on the plea, a decree was made dismissing the bill. Held, that the practice pursued was that prescribed by (First) Ch. Rule 25, which contemplates that the truth of the plea shall be determined after issue joined.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368.

§ 170. On cross-bill.

¶ 700. The trial court in chancery is bound to hear evidence to support the claims set out by defendant in her answer and cross-bill.—Davis v. Wardowski, 164 Mich. 561.

§ 171. Right to offer proofs.

On cross-bill, see ante § 170.

¶ 701. The cause having gone to trial in open court on an issue of fact, the judge refused to receive evidence, and dismissed the bill for want of equity. Held, that the dismissal was erroneous. The complainant was entitled of right to put in his evidence, since in no other way could he render his statutory right of appeal effectual.—Hewlett v. Shaw, 9 Mich. 346.

¶ 702. The procedure of entering a decree for a complainant upon bill and answer, without hearing any testimony, was disapproved; since under such a practice, if the Supreme Court had disagreed with the trial court on the legal propositions, a final disposition could not have been made on the record.—Culy v. Upham, 135 Mich. 131.

¶ 703. A bill should not be dismissed without giving complainant an opportunity to take proofs when it is brought on for hearing on pleadings and proofs to be taken in open court.—Wyandotte Public Schools v. Harding, 157 Mich. 86.

¶ 704. Where issue is joined on demurrer, complainant is nevertheless entitled to put in his proofs and have the case come up on the facts.—Lamb v. Jeffrey, 41 Mich. 719.

§ 172. Extension of time to take proofs.

Reopening for further proofs, see post § 173.

¶ 705. Where a party applies for leave to take testimony after the time allowed by the rules has expired, he must state in his application what he expects to be able to prove by the witnesses he seeks leave to examine.—Thayer v. Swift, W. 384.

¶ 706. Where complainant had allowed the time given by the rules for taking testimony to expire, without showing any excuse for neglect, except that his counsel were occupied with other business, the motion was denied.—Thayer v. Swift, W. 384.

¶ 707. It is within the jurisdiction of the lower court to grant an order extending the time to take testimony, the cause shown being that the party's solicitor told him at the time that the court was not ready, and that said solicitor departed from the state and has not returned.—Becker v. Saginaw Circuit Judge, 117 Mich. 328.

¶ 708. Upon an application, made with leave at the hearing, for further time to take additional testimony upon the subject-matter of amendments to a bill and answer, the showing should point out what facts were expected to be proved, so that the court could determine upon their relevancy and importance. And where a party has failed in his showing for time to take proofs out of court, permission to him to take further proof in open court at the hearing, being a provision to that extent in his favor, will authorize no complaint on his part.—Slater v. Breese, 36 Mich. 77.

§ 173. Reopening for further proofs.

Rehearings, see post §§ 229-232.

Occasion and propriety of taking further proofs and having reargument on motion of chancellor, see post ¶ 910.

Extension of time for proofs, see ante § 172.

Amendment to let in further proofs, see ante § 133.

¶ 709. Whether a chancery suit will be reopened in order to permit the introduction of further proof, rests in the discretion of the court.—Cowan v. Anderson, 184 Mich. 649.

¶ 710. It is often proper to open proofs generally and allow further testimony to be taken on both sides, but it is matter of discretion.—McClung v. McClung, 40 Mich. 493.

¶ 711. Where there is nothing to hinder a party from taking his proofs within the time allowed by the rules, and from cross-examining the witnesses of his opponent, and he neglects to do so, he cannot get leave afterwards to bring in contradictory testimony without a strong showing that justice requires it, and that he has not been so far at fault as to have forfeited his claim to favor.—McClung v. McClung, 40 Mich. 493.

¶ 712. A complainant may have special equities making it proper to reopen proofs for his benefit without allowing defendant to put in further testimony.—McClung v. McClung, 40 Mich. 493.

¶ 713. A defendant in contempt cannot have leave to introduce proofs after the time allowed by rule has expired.—McClung v. McClung, 40 Mich. 493.

¶ 714. After the proofs have been taken, especially if they have been taken in open court, it is not proper upon the hearing to

open the case generally for the reception of further proofs, nor to open it at all without special reasons, and then usually for the admission only of formal or documentary evidence, or of testimony that has been overlooked by excusable inadvertence.—Wendell v. Highstone, 52 Mich. 552.

¶ 715. It is in general within the discretion of the judge to open a cause for further proofs at any time before decree. But where a party who seeks to open a case to set up proof of facts not set out in the pleadings in such manner as to have entitled him to introduce the testimony in the first instance, fails in his petition to point out what the testimony sought to be offered will show, opening is an excess of power.—Wagar v. Bowley, 104 Mich. 38.

¶ 716. Where several years elapse after the commencement of a suit for partnership accounting, and the record of the proceedings prior to a reference to a commissioner to state the account is very voluminous, embracing testimony taken at great expense in several states, and the circumstances are such as to show clearly that the omission of certain testimony is the fault of the party claiming its benefit, an order permitting such testimony to be taken is properly denied.—Feige v. Babcock, 111 Mich. 538.

¶ 717. Where it appeared that the issues were so important that they should not be disposed of without proofs being taken on both sides, and where the failure on defendant's part to take proofs was due to the illness of one of its solicitors, the vacating of an order closing proofs entered on the belief that a commissioner's order extending time for proofs was unauthorized was compelled by mandamus.—Lansing Lumber Co. v. Ingham Circuit Judge, 108 Mich. 305.

¶ 718. Since the manner of taking of testimony in a chancery case lies largely in the discretion of the court, it is not an abuse thereof to hear further proof after final submission of a cause, after ample notice to the solicitor for the opposite party, who, although present at the taking of such further proof, refused to take part in the proceeding. However, the better practice is to make a motion to take such testimony, and to properly notice it for hearing.—Hayward v. Chase, 181 Mich. 614.

§ 174. Admissions and confessions in open court.

Admissions by the pleadings, see ante § 152 et seq.

Trial practice generally in making and receiving judicial admissions by counsel, see Trial, V.

Sufficiency and effect of stipulations as evidence or for admission of evidence, see Stipulations.

¶ 719. A solicitor has no authority to make admissions for his client in a proceeding, as for a contempt, to enforce a civil remedy. The defendants can only be bound by written admissions, made part of the record, so as to be examinable on appeal.—Scott v. Chambers, 62 Mich. 532.

§ 175. Introduction and reception of evidence.

On trial of issues before jury, see post § 184.

Right to present evidence bearing on cross-bill, see ante § 170.

Right to put in proofs and extension of time for same, see ante §§ 171, 172.

General practice in examining witnesses and offering, introducing, receiving, and striking evidence, see Trial, V.

Statutory provisions for taking proofs in same manner as at law, see Jud. Act, chap. XVII, § 1; Comp. L. 1915, § 12489.

¶ 720. Under the Judicature Act, Pub. Acts 1915, No. 314, chap. XVII, § 5, the authority of the court over introduction of evidence in chancery cases is greater than under the old practice, and the court is required to rule authoritatively upon all objections, and parties cannot, as a matter of right, continue a line of evidence against sustained objections.—Atkinson v. Akin, 197 Mich. 289.

¶ 721. All testimony offered in a chancery cause should be admitted, and if admitted subject to objection an appeal from the ruling thereon brings up the whole testimony.—Bilz v. Bilz, 37 Mich. 116.

¶ 722. Under ordinary circumstances the circuit judge should not exclude testimony in a chancery case, but should admit, subject to objection, all that is offered.—Merson v. Merson, 101 Mich. 55.

¶ 723. The circuit judge cannot absolutely reject testimony, taken in open court in a chancery suit, unless the testimony is of a nature so scandalous as to be improper to appear in the record.—Meech v. Lee, 82 Mich. 274.

¶ 724. Testimony may be taken by consent as well before as after an issue in fact has been joined.—Woods v. Monroe, 17 Mich. 238.

§ 176. ——Examination or production in open court.

General rules for examination and cross-examination of witnesses, see Examination of Witnesses.

Mode of interrogating witnesses, see Examination of Witnesses.

Examination of opposite party on stand as witness and cross-examination, see Examination of Witnesses.

Manner of taking testimony of parties in open court in divorce suits, see Divorce §§ 86-88.

Statutory provision that testimony shall be taken in open court unless referred, see Jud. Act, chap. XVII, § 1; Comp. L. 1915, § 12489.

Order to parties and witnesses to testify in open court, practice to obtain, see 1916 C. C. Rule 36.

¶ 725. The failure of a party to a chancery case to demand an examination of witnesses in open court by giving notice as provided by Comp. Laws 1897, § 10188 (How. 2nd Ed., § 12966), does not deprive the court of the right to make an order for such examination on his own initiative.—Judd v. Judd, 192 Mich. 198. (Stone, C. J., and Brooke and Ostrander, JJ., dissenting.)

¶ 726. The formal notice that evidence is to be heard in a chancery suit in open court, provided by Comp. Laws 1897, § 10188, may be waived.—Tarsney v. Wayne Circuit Judge, 152 Mich. 641.

¶ 727. Where stipulations for continuances of a chancery suit, correspondence between the attorneys, and their conduct in open court, indicate that the evidence in a chancery suit is to be given in open court, the formal notice required by Comp. Laws 1897, § 10188, is waived.—Tarsney v. Wayne Circuit Judge, 152 Mich. 641.

¶ 728. The right to an examination of the witnesses in a chancery suit in open court cannot be claimed until the cause is at issue as to all of the defendants, or until those who have not answered have been defaulted.—Kelly v. Wayne Circuit Judge, 90 Mich. 264.

¶ 729. A demand for the examination of witnesses in open court is of no force if not made within ten days after the cause is at issue, and a defendant who has failed to make such a demand is not entitled to have the benefit of one made by a codefendant as to whom the suit has been dismissed.—Gray v. Franks, 86 Mich. 382.

¶ 730. A witness once examined is not to be re-examined to the same facts without an order of the court; but he may be as to other facts, or new matter arising out of the testimony of other witnesses.—Sawyer v. Sawyer, W. 48.

¶ 731. Pub. Acts 1903, No. 31, providing that in Wayne county either at law or in chancery cases may be placed on a trial list, "and said cause shall then be in condition after a lapse of one week, to be tried as the judges of said court may from time to time direct," does not imply that in that county testimony in a foreclosure suit may be taken in open court without the notice required by Comp. L. 1897, § 10188, and 1897 Chan. Rule 14, subds. (b) and (c).—Hoock v. Sloman, 145 Mich. 19.

¶ 732. The taking of proofs as to the amount due on a note and mortgage from the date of the bill to the date of decree, amounts to no more than the making of a computation by the court, where the amount of the note due and unpaid stands admitted by the answer in a foreclosure suit; and it is therefore not objectionable as a taking of proofs in open court without proper notice.—Hoock v. Sloman, 145 Mich. 19.

¶ 733. Comp. L. 1897, § 491, providing for examination of a complainant as to payments made, and that it may be done either before a master or in open court, applies only in cases of absent, concealed or nonresident defendants; and therefore does not warrant the taking of such proofs in a foreclosure suit where the defendant is in court.—Hoock v. Sloman, 145 Mich. 19.

§ 177. ——Documents.

¶ 734. It is not a matter of course to allow a deed to be proved at the hearing; but a satisfactory excuse must be given for the failure to prove it before the master.—Bachelor v. Nelson, W. 449.

¶ 735. The documentary evidence referred to in Rule 56 had reference to documents which prove themselves. But to entitle a party to use such documentary evidence, there must have been an order entered for taking proofs, to give the opposite party an opportunity of exhibiting witnesses relative thereto, or of introducing countervailing proofs.—Bachelor v. Nelson, W. 449.

¶ 736. Where the assignee of a mortgage files his bill to foreclose, setting forth the mortgage and assignment, he may, upon the notice required by Chancery Rule 61, have an order to prove the assignment as an exhibit at the hearing under Rule 56.—Jerome v. Seymour, H. 255.

§ 178. ——Objections and exceptions to evidence.

See also ante ¶¶ 720-722.

On trial of issues to jury, see post § 184.

Making and sufficiency of objections to save question for review, see Saving Questions.

Embodying evidence and objections in the record for appeal, see Appeal, VI, D, XI, B.

Provisions as to practice in receiving evidence when objected to, see Jud. A chap. XVII, § 5; Comp. L. 1915, § 12493.

¶ 737. Formal defects in testimony are waived by not moving to suppress.—Botsford v. Botsford, 49 Mich. 29.

§ 179. Admissibility and sufficiency of proofs.

Sufficiency of proofs sustaining relief leaving part of averments unproved, see post § 180.

Effect and sufficiency of pleadings as evidence, see ante § 164 et seq.

Weight and conclusiveness of sworn answers under former practice, see ante § 165c.

Assumption of truth of answer where hearing is on bill and answer, see ante §165b.

Sufficiency of proofs of particular facts and issues, see specific topics treating of such facts and issues.
Sameness of rules in equity and at law, see also ante ¶ 315; and see Evidence, III.
Judicial notice in general, see Evidence, I.
Presumptions of law in general, see Evidence, II.
Presumptions against person failing to produce available evidence or hindering production by others, see Evidence, II.
Competency of secondary, opinion, hearsay, character, or documentary evidence, or of parol evidence respecting contents of writings, see generally Evidence, IV-VIII.
Admissibility of tangible objects or demonstrations addressed to the senses as well as to the mind, see Evidence, IX.
Exclusion of evidence incompetent because relative to transaction had with one since deceased or become incompetent, see Witnesses, IV, A.
Sufficiency and weight of the proofs, see generally Evidence X (which is restricted to the general rules); and see specific topics treating of the various rights, acts and facts to be proven.
Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, VI.
Degree and clarity of proof required in rescission or other suits where parol evidence is relied on to establish equities taking case out of the rule requiring writings, see Frauds, Statute of, IV; Reformation, III; Rescission, VI; Specific Performance, IV; Trusts, IV, XII.
Sufficiency of evidence on appeal, see Appeal, XII, C, E, 1.
Sufficiency of proof of execution and delivery of instrument, see Execution of Instruments, III.

¶ 738. Facts proved, but not put in issue by the pleadings, cannot be regarded at the hearing.—Cicotte v. Gagnier, 2 Mich. 381: Warner v. Whittaker, 6 Mich. 133; Bloomer v. Henderson, 8 Mich. 395; Barrows v. Baughman, 9 Mich. 213; Peckham v. Buffam, 11 Mich. 529; Dunn v. Dunn, 11 Mich. 284; Wurcherer v. Hewitt, 10 Mich. 453; Covell v. Cole, 16 Mich. 223; Harlow v. Lake Superior Iron Co., 41 Mich. 583.

¶ 739. Where a bill was filed to set aside a mortgage as fraudulent, and neither the mortgage, the bill nor the answer contained any reference to a promissory note accompanying the mortgage, held, that the absence of such a note was not involved in the issue, and evidence with respect to it, which was objected to when taken, must be disregarded at the hearing.—Bloomer v. Henderson, 8 Mich. 395.

¶ 740. Evidence not tending to establish the case made by the bill is not regarded. —Gorham v. Wing, 10 Mich. 486.

¶ 741. Where a bill in equity is ambiguous in its statement of oral agreements that are essential to the relief sought, and the proofs are loose and incongruous, and do not preponderate in favor of the substance of the case stated, no relief can be granted.—Craig v. Bradley, 26 Mich. 353.

¶ 742. A court of chancery will not determine on the evidence that an award was fraudulent merely because it is urged that a jury would have done so, if the question was before them.—Michels v. Western Underwriters' Ass'n, 129 Mich. 417.

§ 180. Necessary proofs; partial failure of proofs.

Matters admitted by the pleadings, see ante § 152 et seq.
In cases heard on bill and answer, see also ante § 164.
Taking proofs on default, see Defaults § 23.
Issues necessary to be proved at law, see Pleading, IX.
Matters not requiring proof in injunction suit, see also Injunctions, III.
Sufficiency of proof of one alleged ground in injunction suit, see Injunctions, III.
Sufficiency of proofs for quieting title, other allegations being unproved, see also Quieting Title, III.

¶ 743. Where there is such a fundamental difference between the facts alleged in a bill in equity and those set up by the answer that the bill and answer alone will not support a decree, the complainant cannot have relief without introducing proofs to sustain his bill.—Ruhlig v. Wiegert, 49 Mich. 399.

¶ 744. The proof of allegations in a bill which are not material to complainant's equities, and which might have been omitted without affecting the case, is not essential. —Edsell v. Briggs, 20 Mich. 429.

¶ 745. Allegations in a bill which are not supported by proof do not prevent relief if there are allegations supported by proof which are sufficient grounds for equitable relief.—Guntzviller v. Gitre, 195 Mich. 695.

¶ 746. Relief is properly granted where the facts are sufficient to justify it, even though the bill asserts a claim broader than the facts which it discloses warrant; as where complainants against waste claim that they are owners, whereas the conveyance set up in the bill amounts to no more than a mortgage.—Webster v. Peet, 97 Mich. 326.

§ 181. Striking out or rejecting proofs.

Suppression of improper proofs or depositions taken on reference, see post § 186.
Striking out evidence at law, see Trial, V.
Suppression of depositions, see Depositions. VI.

¶ 747. A divorce case containing grossly improper testimony taken before a commissioner ought to have it stricken out and the

case should be heard on what properly remains; and on appeal the Supreme Court so considered it.—Page v. Page, 51 Mich. 88.

B. REFERENCE OR ISSUES TO JURY.

§ 182. Reference or commission in general.

[Note. The subject of Reference has been made a specific topic by that name. The general law of references should be there consulted, including (I) Occasion and propriety of reference, (II) Procedure for reference and for appointment of master or referee, (III) Scope of reference and hearing on reference, (IV) Report and findings, and return to court, (V) Proceedings and hearing on the report and exceptions to it, (VI) Decree and findings by court, recommitment or new reference, (VII) Compensation, fees and costs.]

Form of decree for reference, avoidance of finality in form, see post ¶ 807.

References in foreclosure suits to make computations, see Foreclosure, III, V.

Applicability to equity of statutes for taking depositions, see Depositions § 1.

Taking depositions on notice in chancery proceedings, see ante § 1.

Mode of taking testimony on depositions, see Depositions.

Sufficiency of process and underwriting thereon to sustain reference and attendance for examination, see Process.

Rules regulating proceedings before commissioners, see 1916 C. C. Rules 51-54.

¶ 748. A court of chancery may sometimes award issues or other modes of inquiry, in order to satisfy its own conscience, where the testimony on well-defined issues is conflicting.—Wendell v. Highstone, 52 Mich. 552.

¶ 749. Where the defendants in a chancery cause have elected under the statute to have the case tried in open court, the circuit judge has no power at chambers to order the proofs to be taken before a commissioner.—Eslow v. Township of Albion, 27 Mich. 4; Eslow v. Township of Albion, 32 Mich. 193.

¶ 750. An order to take testimony before a commissioner cannot be entered until the expiration of the time allowed for claiming examination in open court; (Ch. Rule No. 47), and this cannot be claimed until the cause is at issue as to all defendants or until those who have not answered are defaulted.—Hall Lumber Co. v. Gustin, 54 Mich. 624.

¶ 751. The right of the court to direct an accounting before a commissioner in a proper case is not taken away by a demand for the examination of witnesses in open court.—Shouler v. Bonander, 80 Mich. 531.

§ 183. Trial of issues by jury.

General law of juries and jurors, see Jury.

Mode of trial by jury, see Trial.

Issues to jury in divorce and annulment suits, see Divorce § 85; Marriage, IV.

Provision for submission of issues of fact to jury, see Jud. Act, chap. XVIII, § 21; Comp. L. 1915, § 12593.

§ 184. ——Offers, objections and reception of evidence.

¶ 752. Although on an issue sent to a jury all objections as to competency of evidence are to be reserved and the evidence received, a jury cannot pass upon the competency of testimony, but must consider all the testimony before them and come to a conclusion thereon.—Collins v. Jackson, 43 Mich. 558.

¶ 753. In the submission of any special question to a jury, whether the verdict is to be regarded as final or as advisory only, the same rules of evidence should be observed as in the ordinary jury trial; otherwise the verdict has little weight.—Worthington v. Major, 94 Mich. 325.

§ 185. Operation and effect of verdict or report.

See also ante ¶ 753.

Report as basis for decree, see also post ¶ 811.

Review on appeal of findings of fact based on jury verdict or findings, see Appeal, XII, E, 1.

Reports of master or referee, exceptions thereto and settlement thereof, see Reference.

¶ 754. A verdict on a feigned issue in chancery does not bind the court, and a decree may be rendered against it (as to effect of verdict when case is heard in open court, see Laws 1887, Act No. 267).—Dunn v. Dunn, 11 Mich. 284; Willard v. Magoon, 30 Mich. 273.

¶ 755. The verdict of jury upon questions of fact given to it in chancery cannot be final.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

§ 186. Suppression of improper proofs or depositions.

Use or suppression of depositions, see Depositions, VI.

¶ 756. Where an order to take proofs was duly entered, but notice was not given within the thirty days required by Chancery Rule 47, and the examination of a witness was objected to before the master on that ground, the deposition was suppressed.—Bachelor v. Nelson, W. 449.

¶ 757. A rightful claim to have the testimony taken in open court has the effect to suppress depositions prematurely taken by the other party.—Hall Lumber Co. v. Gustin, 54 Mich. 624.

¶ 758. Depositions taken after proofs closed are not to be read, though no motion

to suppress is made.—Abbott v. Alsdorf, 19 Mich. 157.

¶ 759. Where defendant was improperly examined his deposition was suppressed, and the taking thereof by complainant held not to amount to a release to him.—Norris v. Hurd, W. 102.

IX. INTERLOCUTORY PROCEEDINGS AND DECREES.

§ 187. In general.

Parties entitled to notice of proceedings, see ante § 59.

Procedure on rehearing, bill of revivor, bill of supplement, or bill of review, see post, XI.

Inapplicability of term "decree" to interlocutory orders in cause, see post ¶ 806.

Provisions in final decree for future contingencies or for reservation of questions and further inquiry, see post §§ 215, 216.

Conditions requisite to rendition of decree, see also post ¶ 797.

Pendency of interlocutory proceeding as preventing dismissal, see post § 189.

[Note. Nearly all matters of interlocutory procedure are treated in specific topics, as shown by references immediately following. They should be consulted.]

On divorce bills, see Divorce, VIII.

Contempt proceedings, see Contempt.

Injunctions and injunction procedure, see Injunctions.

Ne exeat writs, see Ne Exeat.

Sequestration, see Sequestration; Corporations, § 234.

Receiverships in general, see Receivers.

Appointment of corporate receiver pending demurrer to bill, see Corporations § 239.

Proceedings under decree for accounting, taking the account, see Accounting Suits; Reference.

Decree for partition to be followed by partition and confirmation decree, see Partition, III.

Impounding assets on railroad foreclosures to pay labor claims, see Railroads, VI.

Motion practice in general and necessity for notice and hearing on motions, see Motions and Orders.

Interlocutory decrees as res adjudicata, see Former Adjudication.

Review of interlocutory or provisional orders for relief or protection of interests, see Appeal § 411.

Appealability of order dismissing cross-bill, see Appeal § 46, ¶ 213.

Appealability of order striking pleadings, see Appeal § 46.

Appealability of order on petition for leave to plead or intervene, see Appeal § 47.

Review of order granting or denying leave to plead, see Appeal § 397.

Reviewableness of intermediate or interlocutory decrees as anterior parts of appealable final decrees, see Appeal, III, XII, B, 2.

¶ 760. The practice of inserting in interlocutory decrees directions and abstract rulings on future contingencies, condemned as leading to confusion.—Patterson v. Hopkins, 23 Mich. 541.

X. DETERMINATION AND DISPOSAL OF CAUSE.

A. DISMISSALS WITHOUT DECISION OR PREJUDICE.

Divorce decrees in general, see Divorce, VII.

§ 188. Voluntary discontinuance or dismissal.

Grounds for involuntary dismissal, see post §§ 190-193.

Dismissal as to one of several parties, see post § 195.

Time and stage or condition of cause, see post § 196.

Order of dismissal and entry of same, see post § 198.

Discontinuance or dismissal of divorce suit, see Divorce §§ 81-84.

Voluntary dismissals at law, see Discontinuance.

¶ 761. The complainant may, at any time before there has been an interlocutory or final decree in a cause, dismiss his bill, of course, on payment of costs.—Seymour v. Jerome, W. 356.

¶ 762. A consent decree adjusting and determining the rights of adverse claimants in and to a judgment upon an insurance policy operates as a discontinuance of the suit as to the company, which was made a nominal party defendant, so that it cannot thereafter file a cross-bill therein.—Cartwright v. Johnston, 110 Mich. 312.

§ 189. ——Pending cross-bill or interlocutory proceeding.

Stage or condition of cause for involuntary dismissal, see post § 196.

¶ 763. Where an interlocutory order had been entered by consent of parties, operating as an adjudication to some extent upon the rights of the parties, the court refused to allow complainant to dismiss.—Seymour v. Jerome, W. 356.

¶ 764. After a consent order has been entered for a mutual accounting before a commissioner the defendant has acquired rights; and the complainant cannot, by a common order, dismiss his bill and cut off the accounting.—Wyatt v. Sweet, 48 Mich. 539.

¶ 765. The complainant in a divorce bill will not be permitted to dismiss his bill upon payment of costs pending a determination, under an order of reference, of an application by defendant for temporary alimony and solicitor's fees.—Clutton v. Clutton, 106 Mich. 690.

§ 190. Grounds for involuntary dismissal.

Time and stage or condition of cause, see post § 196.
As to one of several parties, see post § 195.
Motion and showing to dismiss, see post § 197.
Right to put in proofs, see ante § 171.
Dismissal of information and retention as bill, see ante ¶ 247.
Dismissal of bill of review, see post § 250.
Conditions for voluntary dismissal, see ante §§ 188, 189.
Grounds for dismissal without prejudice, see post § 194.
Dismissals finally and with prejudice, see post, X, B.
Dismissal with prejudice on demurrer or plea or motion, see post §§ 210, 211.
Grounds at law, see Discontinuance.
Dismissal on extinction of right sued on, see also Abatement § 7.
Impropriety of dismissal of foreclosure bill which all defendants allow to be taken as confessed, see also Defaults ¶ 55.
Failure to furnish security for costs, see Security for Costs, II.

¶ 766. Want of necessary parties is good ground for dismissing a bill on the hearing, and it will be done the more readily where the facts disclosed by the proofs fail to make out a strong case on the merits.—Westcott v. Minnesota Min. Co., 23 Mich. 145.

¶ 767. Chancery will not dismiss a bill for want of parties without allowing leave to amend, when the bill is not demurred to on that ground, and the defect is only pointed out on the argument.—Woodward v. Clark, 15 Mich. 104.

§ 191. ——Want or defect of jurisdiction.

Statutory rule for dismissal of suits not involving $100, see Jud. Act, chap. VI, § 3; Comp. L. 1915, § 12301.

¶ 768. Where, in a suit respecting property (not a foreclosure suit, or between partners), the bill shows the amount in controversy to be less than $100, the court must dismiss the bill whether the objection of want of jurisdiction is taken by the defendant or not.—Gamber v. Holben, 5 Mich. 331.

¶ 769. Where a bill filed by the remainderman to restrain the cutting and removal of the timber standing on the land by a purchaser from the life-tenant charges that the threatened removal of the timber will damage the estate $350, and the answer asserts the value of the timber to be no more than $25, and, for aught that appears, the timber may have a particular value to the estate, the contention that the pleadings show the amount in controversy to be less than $100, and that for this reason the bill should have been dismissed, cannot be sustained.—Huyck v. Bailey, 100 Mich. 223.

¶ 770. Where upon a bill filed by the lessee in a renewal lease of the right of cutting ice to restrain the cutting thereof, it appears that the renewal of the lease for more than the current year is invalid, the bill is properly dismissed if it does not show that any injury complainant might suffer from not being allowed to gather ice for one year would be sufficient to give the court jurisdiction.—Oliver v. Olmstead, 112 Mich. 483.

¶ 771. On a bill to enjoin a trespass where the bill failed to show the value of the property in controversy, and the answer claimed the benefits of a demurrer, followed by replication, but did not plead the inadequacy of the amount in controversy, there is nothing to warrant a dismissal under Comp. L. 1897, § 435, providing that suits where the matter in dispute does not exceed $10 shall be dismissed, and no such order should have been made until after the proofs showed such inadequacy; the allegation of amount in dispute not being made jurisdictional by the statute.—Brassington v. Waldron, 143 Mich. 364.

¶ 772. The dismissal of a bill to enjoin trespass and to quiet title will not be decreed on the ground that the proceeding should have been at law rather than in chancery where the case has been heard upon the merits, and without objection, and without raising that question.—Lawrence v. Kirby, 147 Mich. 432.

¶ 773. Where a woman brought an action for divorce in Washtenaw county, the defendant answering that she fraudulently induced him to enter into the marriage, and before the determination of the action the latter brought suit in the court of another county for the annulment of the marriage on that ground, the latter suit will be dismissed.—Van Slyke v. Van Slyke, 183 Mich. 536.

§ 192. ——Informal or defective pleadings or proceedings.

Dismissal of defective bill of review, see post § 250.

¶ 774. A bill filed as a cross-bill in a case not proper for it is not to be dismissed for that reason if it prays affirmative relief.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 775. A bill in equity which is demurrable as to the specific relief prayed, on the ground that the complainant has an adequate remedy at law, but which also contains a prayer for general relief, will not be dismissed on the hearing for that reason, where the defendant has not demurred, but has answered without claiming the benefit of a demurrer, and both parties have introduced evidence upon the whole merits of the case, provided it states a case proper for any equitable relief, and the evidence supports the case so made.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 776. As a bill not fatally defective or past remedy by amendment is not to be dis-

missed upon the demurrer clause in the answer, a bill filed by a mortgagee and foreclosure purchaser to restrain removal by the mortgagor of machinery upon the mortgaged premises should not be dismissed at the hearing, where defendant has not demurred, merely because it does not directly allege that the articles are fixtures, or because it fails to show any claim by defendant, or any threat on his part to remove the machinery. —Smith v. Blake, 96 Mich. 542.

§ 193. ——Of cross-bill.

¶ 777. A cross-bill by the corporation to a bill by a stockholder, in which cross-bill the corporation alleges that a sum due to D. for wages was taken by plaintiff as a credit to himself and his stock acquired partly against it, and asking an accounting, was dismissed without prejudice on a statement in counsel's brief that D. had sued the corporation for such wages.—Essex v. Essex, 141 Mich. 200.

¶ 778. Defendant started a suit for injunction against one Reed, who was cutting timber from defendant's land, in order to protect himself for advances made to Reed who gave the timber as security and then proceeded to ship it out independently of defendant. This suit being dismissed by consent, complainant filed suit for injunction against defendant, laying claim to the timber. Defendant filed a cross-bill asking affirmative relief. Held, it was as much complainant's as defendant's duty to make Reed a party and the affirmative relief could not be denied defendant on account of his failure so to do.—Brown v. King, 172 Mich. 355.

§ 194. Dismissal without prejudice.

See also ante ¶ 540.

Dismissal without prejudice rather than allow new case by amendment, see ante ¶ 547.

Dismissal without prejudice as reason to deny reinstatement, see post ¶ 795.

¶ 779. A bill cannot be dismissed without prejudice where a new bill must necessarily cover the same ground.—Gale v. Gould, 40 Mich. 515.

¶ 780. Leave, on dismissing a bill, to sue again in equity should not be granted without some equitable reason, and is properly denied where the amount involved is trifling and there is a legal remedy.—Gamble v. City of East Saginaw, 43 Mich. 367.

¶ 781. A bill which seeks relief on the mistaken assumption of a fact which does not exist, but which is the only ground relied on, should be dismissed without prejudice.—Chandler v. Jenks, 50 Mich. 151.

¶ 782. The dismissal of a judgment creditor's bill may be without prejudice where the sole ground of dismissal is that lands sought to be reached by it were beyond the jurisdiction of the court.—Krolik v. Bulkley, 58 Mich. 407.

§ 195. Discontinuance or dismissal of one party.

Dismissal of one to retain suit for complete relief of other parties, see post § 220.

Effect of order of partial dismissal, see post § 199.

In actions at law, see Discontinuance §§ 2-4.

Dismissal against defaulting complainant, see also Defaults ¶ 80.

¶ 783. Discontinuance was allowed as to an unnecessary party who had died after decree.—Howe v. Lemon, 37 Mich. 164.

¶ 784. Discontinuance as to a deceased party defendant is needless.—Howe v. Lemon, 47 Mich. 544.

¶ 785. A city is not entitled to a dismissal of a bill against it to quiet title to land laid out for an alley, on the ground that it has no control over the alley, and therefore is not a proper party, where it asserted in its answer its right and authority in the premises. —Vier v. City of Detroit, 111 Mich. 646.

¶ 786. A bill for injunction against a drain commissioner and highway commissioners for deepening certain drains so that complainant was flooded, will be dismissed as to the highway commissioners on its appearing that the wrong and damage was due to the acts of the drain commissioner alone and that they did no unlawful act contributing to the injury.—Township of Merritt v. Harp, 141 Mich. 233.

§ 196. Stage or condition of issues and cause.

Pendency of cross-bill or interlocutory proceeding as obstacle to voluntary discontinuance, see ante § 189.

¶ 787. A bill cannot be dismissed for want of prosecution while the demurrer is pending. The defendants may themselves expedite the case by noticing the demurrer for argument.—McVickar v. Filer, 24 Mich. 241.

¶ 788. A suit in equity at issue on replication cannot be heard and disposed of piecemeal. A dismissal before the testimony is closed, on the ground that the statute of limitations bars complainant, is erroneous.—Goodrich v. Goodrich, 66 Mich. 522.

§ 197. Motion and showing to dismiss.

Motions to dismiss under Judicature Act equivalent to demurrers, hearing on such motions, and decisions thereon, see ante §§ 112, 168, post §§ 210, 211.

¶ 789. It is irregular to dismiss a bill in equity, on motion, for want of jurisdiction, upon grounds required to be supported by proofs, except it be accomplished by way of what may be treated as a final hearing upon pleadings and the facts brought in by way

of stipulation.—Attorney General ex rel. Foster v. Lake County Sup'rs, 33 Mich. 289.

§ 198. Order and effect of dismissal.

Effect of dismissal of part of defendants or of conditional dismissal, see post §§ 199, 200.

Reinstatement of cause and parties, see post § 201.

Relief on cross-bill upon dismissal of bill, see post § 212.

Of dismissal of bill of review for defects, see post ¶ 994.

Entry of discontinuance of suit nunc pro tunc, see Discontinuance ¶ 17.

Effect of irregular voluntary dismissal in record of decree on the merits, conclusiveness of the decree, see Former Adjudication, II, B.

¶ 790. The effect of a voluntary dismissal of a bill in chancery is the same as an adverse one, if made on the hearing, when the merits are involved.—Edgar v. Buck, 65 Mich. 356.

¶ 791. If an order entered by complainant, dismissing his bill, is operative, he cannot be affected by subsequent irregularities in practice disregarding it.—Wyatt v. Sweet, 48 Mich. 539.

§ 199. ——As to portion of parties.

Dismissal of one as carrying dismissal of others defaulting, see also ante ¶ 359.

¶ 792. The dismissal of a bill to enjoin the disclosure and use of trade secrets as to some defendants, is held not to leave the complainant without a cause of relief against the remaining defendant, an employee who learned them by reason of his employment. —Sanitas Nut Food Co. v. Cemer, 134 Mich. 370.

§ 200. ——Of conditional dismissal.

Items and amounts of costs, when imposed as condition, see Costs §§ 5, 55 et seq.

¶ 793. If complainant has leave to dismiss conditionally, the defendant, until the condition is complied with, may consider the case as in court or out of court, at his discretion; he may either proceed in it or consider it dismissed, and apply to the court to enforce payment of his costs.—Jerome v. Seymour, W. 359.

§ 201. Reinstatement of cause or parties.

Reinstatement at law, see Discontinuance §§ 8-10.

¶ 794. Parties as to whom a bill has been dismissed by complainant after decree can only be brought back by the usual process; and an order rescinding the discontinuance could not bring them in and hold them bound by the previous decree and proceedings.—Johnson v. Shepard, 35 Mich. 115.

¶ 795. Complainant filed a bill in December, 1907, to enjoin the defendant administrator from collecting a judgment against a third person, and secured a temporary injunction. The hearing of the cause was adjourned from time to time at the request of the complainant, and was adjourned from April 9, 1910, to April 16, 1910, upon the distinct understanding that no further adjournment would be granted. On April 16, 1910, a decree was entered dismissing the bill for want of prosecution. Complainant petitioned the court to set aside this decree, alleging that he was informed on April 14, 1910, that his principal attorney would not be able to try the case; that he had relied on said attorney to manage the cause for him; and that he was informed by one of his attorneys that the court would undoubtedly grant an adjournment to enable him to secure counsel. The matters involved in the suit were not complicated. No effort was made by complainant after learning of the withdrawal of his counsel, to prepare for the hearing, and no excuse was given other than the general statement that it was then too late to employ other counsel for the hearing. Held, there was no abuse of judicial discretion in the order of the trial court refusing to set aside the decree dismissing the bill, where the effect of the decree was simply to dissolve the injunction and where it gave leave to complainant to file a new bill within sixty days to determine the merits of the case.—Burton v. Snow, 165 Mich. 530.

B. FINDINGS AND DECREE; PROPER RELIEF.

[Note. In so far as the law is general to both judgments at law and decrees in equity, endeavor has been made to collect all the precedents under the topic Judgments and Decrees, which see. The changes in procedure leading up to the Judicature Act and embodied therein, have made many of the technical rules relating to decrees of small importance. So much of the force of the precedents under such rules as now remains is likely to be of greater value in a general topic than in the highly specific topic of Equity.]

Costs in chancery cases below and on appeal, see Costs.

§ 202. Rendition, entry and record.

Hearing and trial on preliminary issues and issues of law, see ante §§ 168, 169.

Application and notice to enter final decree, see post § 203.

Rendition or announcement, entry and record of the judgment, see Judgments, III.

Entry or amendment nunc pro tunc, see Judgments, III, V.

Practice and proofs on entering decrees against infants, see Infants, VII.

Record proper for appeal, see Appeal § 99.

Inclusion of original pleadings as parts of record on appeal from decree after amendments, see Appeal § 99.

Return to lower court for enrollment, see Appeal § 144, ¶ 616.
Enrollment of decree, notice of enrollment and papers to be included in the roll, see 1916 C. C. Rule 55.

¶ 796. The court will not adjudge upon a part of the case; it will not make a final decree until the case is properly presented in such form as will enable the court to make a final disposition of the case, and do justice to all the parties.—Graham v. Elmore, H. 265.

¶ 797. A final decree, or an interlocutory decree which, in a great measure, decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the court.—Graham v. Elmore, H. 265.

¶ 798. Where there are joint defendants, the complainant cannot, upon a pro confesso obtained against one before the cause is at issue or in readiness for hearing against the other, enter a final decree and issue execution thereon against the party against whom the bill has been taken as confessed, and leave the cause to proceed against the other defendant.—Graham v. Elmore, H. 265.

¶ 799. The rule that a decree will not be made until all parties in interest are before the court is inapplicable where some cannot be made parties.—Michigan State Bank v. Hastings, 1 D. 225.

¶ 800. Where a decree in chancery is made before all of the defendants have been brought in or have appeared, and the case is then appealed, the decree will be vacated and the record remanded for further proceedings in the chancery court.—Schwab v. Mabley, 47 Mich. 512.

¶ 801. A decree entered immediately upon the overruling of a demurrer to the bill is premature and irregular. The proper practice is to grant defendant leave to answer, and upon his failure within the time granted to answer, then to enter final decree.—Creasey v. St. George's Soc. of Detroit, 34 Mich. 51.

¶ 802. The order to confirm a decree against nonresidents being a matter of right after seven years, and the statute requiring the defendants to appear within that time, the omission to enter such order is immaterial.—King v. Harrington, 14 Mich. 532.

¶ 803. ——Application and notice.
Necessity of notice of hearing, see also ante ¶¶ 693, 694.

¶ 803. Applications for final decree must be made at a general term even though they be based on a default. An application to dismiss a bill is one for final decree.—Higgins v. Carpenter, H. 256.

¶ 804. Good practice requires that a defendant who has appeared in the cause should have such notice of the entry of the decree as will give him an opportunity to attend and be heard upon the settlement thereof.—Detroit Fire & Marine Ins. Co. v. Renz, 33 Mich. 298.

¶ 805. Under Comp. L. 1871, §§ 4967, 4968, How. St., §§ 6491, 6492, when a decree is entered in vacation, notice must be given to the opposite party.—McClung v. McClung, 39 Mich. 55.

§ 204. Nature, form and finality.
Decree for conveyance as a conveyance, see post § 227.
Requisites and sufficiency of the decree, see post §§ 205-212.
Propriety of the relief granted, see post §§ 213-222.
Propriety of dismissal at hearing without decision, see ante ¶¶ 766, 768 et seq., 775, 776.
Dismissals without prejudice, see ante § 194.
Propriety of dismissal on demurrer, plea or motion, see post §§ 210, 211.
Retention instead of dismissal to grant complete relief, see post §§ 219-222.
Affirmative relief on cross-bill notwithstanding dismissal of bill, see post § 212.
Necessity of cross-bill or answer standing as cross-bill to sustain affirmative relief, see also post ¶ 841.
Nature of judgment or decree, and its kind or class, see Judgments, I.
Finality of decree for purpose of res adjudicata, see Former Adjudication, II.
Appealable decrees and orders, see Appeal, III.
Final and interlocutory decrees and orders for purposes of appeal, see Appeal, III, B.
Notice of filing decree to fix time for appealing, see Appeal § 74.

¶ 806. The term decree is not applicable to the interlocutory orders made for the furtherance of suits, but belongs to such adjudications as settle some right or liability pertaining to the substance of the controversy.—Haines v. Haines, 35 Mich. 138.

¶ 807. The practice of making decrees final in form, which consists in part of a reference to a commissioner to take an account between the parties, is objectionable.—Enos v. Sutherland, 9 Mich. 148.

§ 205. Requisites and sufficiency in general.
Form and finality, see ante § 204.
Basis in pleadings and proofs and conformity of decree to them, see post §§ 206-209.
Decree on issue made by demurrer or motion, see post §§ 210, 211.
Affirmative relief, see post § 212.
Propriety and sufficiency of the relief and completion of relief, see post §§ 213-222.
Requisites, form, terms and substance, parties, entirety and severableness, see Judgments, II.

Character of jurisdiction for personal judgments, see Courts §§ 41, 42; Judgments, II, A.
Process essential to personal judgment, see Process.
Chancery decree on appeal, see Appeal § 493 et seq.
Necessity of disposing of case so as to admit of effective appeal, see Appeal § 1, ¶ 11.

¶ 808. A decree should define with precision the rights which it assumes to declare and protect.—Bradfield v. Dewell, 48 Mich. 9.

¶ 809. A decree, reciting the death of a defendant in foreclosure before the bill of complaint was filed and dismissing as to her, disposes of the objection that as she had not appeared or been brought into court the cause was not ready for hearing when proofs were taken.—Miller v. Miller, 48 Mich. 311.

§ 206. Basis for decree.

Matters confessed or taken as true on demurrer or motion, see ante § 156.
Proved or admitted facts where case is heard on bill and answer, see ante § 164.
Right to put in proofs in order to have basis for appeal, see ante § 171.
Conformity of decree to bill and record, see post §§ 208, 209.

¶ 810. A decree may be made between co-defendants grounded upon the pleadings and proofs between complainant and defendants.—Thurston v. Prentiss, 1 Mich. 193.

¶ 811. The decree of a court in a matter of reference is based on the testimony taken before the referee and not on the referee's conclusions, when they are excepted to.—Heath v. Waters, 40 Mich. 457.

¶ 812. Where the answer is such that the burden lies upon complainant to overcome it, and he does not reply or introduce proofs, he is entitled to no decree as to any matter not admitted.—Hardwick v. Bassett, 25 Mich. 149.

§ 207. ——Matters subsequent to filing of bill.

Variance in proofs, see ante § 161.

¶ 813. A court of equity may, in many cases, grant relief justified by the conditions existing at the time of decree, since it is not bound like a court of law to confine its relief as of the date of the institution of the action.—Lansing Co. v. Rogers, 183 Mich. 334.

§ 208. Conformity of decree to bill.

Conformity of default decree to bill, see post § 224; and see also Defaults § 24.
Conformity of judgments to pleadings, issues and verdicts or findings, see Judgments, II, B.

¶ 814. The court adjudges according to the case shown and issues raised by the pleadings.—Smith v. Rumsey, 33 Mich. 183.

¶ 815. No relief can be given on unproved allegations nor on evidence establishing a case not stated in the bill.—Thayer v. Lane, W. 200; Jerome v. Hopkins, 2 Mich. 96; Cicotte v. Gagnier, 2 Mich. 381; Warner v. Whittaker, 6 Mich. 133; Bloomer v. Henderson, 8 Mich. 395; Bomier v. Caldwell, 8 Mich. 463; Barrows v. Baughman, 9 Mich. 213; Wurcherer v. Hewitt, 10 Mich. 453; Peckham v. Buffam, 11 Mich. 529; Dunn v. Dunn, 11 Mich. 284; Perkins v. Perkins, 12 Mich. 456; Moran v. Palmer, 13 Mich. 367; Converse v. Blumrich, 14 Mich. 109; Hubbard v. Winsor, 15 Mich. 146; Payne v. Avery, 21 Mich. 524; Fosdick v. Van Husan, 21 Mich. 567; Harwood v. Underwood, 28 Mich. 427; Jones v. Wells, 31 Mich. 170; Rudd v. Rudd, 33 Mich. 101; Ford v. Loomis, 33 Mich. 121; Harlow v. Lake Superior Iron Co., 41 Mich. 583; Connerton v. Millar, 41 Mich. 608; Livingston v. Hayes, 43 Mich. 129; Elliot v. Amazon Ins. Co., 49 Mich. 579; Kelly v. Kelly, 54 Mich. 30.

¶ 816. A complainant must recover, if at all, upon the case he has made in his bill, and not upon a different case made for him by the defendants in their answer.—Jerome v. Hopkins, 2 Mich. 96.

¶ 817. Matters not set up in a bill but only in the answer are not thereby put in issue and cannot properly be adjudicated.—Miles v. Skinner, 42 Mich. 181.

¶ 818. A court of equity cannot grant relief based upon a case substantially different from that stated in the bill, nor involving other or additional parties.—Walker v. Detroit Transit R. Co., 47 Mich. 338.

¶ 819. Where the bill based the claim to relief entirely upon an alleged error in the village plat referred to in complainant's deed, while the evidence showed that the plat was correct, but that the description in the deed was erroneous in referring to the plat for the description of the land conveyed, held, that no relief could be given, as the bill made one case and the evidence another.—Peckham v. Buffam, 11 Mich. 529.

¶ 820. On a bill by one tenant in common to foreclose a mortgage on the property held in common, it is not competent for the court to decree a partition, even though the relief is shown to be just.—Payne v. Avery, 21 Mich. 524.

¶ 821. Where a bill for an accounting is filed only on the theory of a partnership in the ownership and operation of a farm, and prays for an accounting in respect to said copartnership and for general relief, a claim for an accounting as secondary relief as to an alleged partnership in stock dealing concerning which evidence is introduced is inconsistent with the case made in the bill, and is beyond the power of the court to grant.—Miller v. Casey, 176 Mich. 221.

¶ 822. Where a bill to restrain statutory foreclosure of a real estate mortgage for an alleged excessive amount and for an accounting to determine the amount due alleges that, while defendant claimed and sought to foreclose the mortgage for a stated amount, there was in fact no such sum due upon such mortgage, either for principal or interest, or any amount, and prays that defendant may come to a just and equitable account with complainant as to the amount of money due and owing upon the mortgage and notes, if any, complainant being ready and willing and offering to pay whatever sum is due on the mortgage and notes, the court may, under the issues, although complainant alleges that the excess amount claimed by defendant arose from the failure to give credit for payments made, grant relief as to such excess where it finds that the failure to give credit was in fact due to improper computation of interest.—Lowe v. Schuyler, 187 Mich. 526.

¶ 823. If the complainant's case depends upon a condition which he has not performed, he cannot have relief based upon proof of an excuse for performance which he has not set up in his bill.—LeBaron v. Shepherd, 21 Mich. 263.

§ 209. ——General or alternative prayer.

Sufficiency of prayers in general, see ante § 90 et seq.

Granting appropriate relief under general prayer where bill does not sustain specific prayer, see also ante § 90.

Complete relief though not prayed for, see post ¶ 865.

Rule against shifting theory of case, see ante § 163.

¶ 824. A general prayer for relief in a bill merely enlarges the special prayer as the case may warrant, and the relief granted must always be consistent with the case made by the bill.—Miller v. Casey, 176 Mich. 221.

¶ 825. A court of equity will not grant alternative relief where the bill of complaint does not pray for such relief.—Case v. Bogart, 188 Mich. 297.

¶ 826. A bill fully setting out necessary facts and alleging that complainant loaned money to defendant with which to pay a mortgage, in reliance upon defendant's promise to execute a new mortgage to complainant for the amount advanced, asking, as specific relief, that defendant be required to execute such mortgage, but containing a prayer for general relief, will support a decree adjusting set-off between the parties, and subrogating complainant, to the amount of his claim, to the rights of the holder of the mortgage prior to its discharge.—Van Voorhis v. Bond, 110 Mich. 3.

§ 210. Decree on issue made by motion, plea or demurrer.

See also ante ¶¶ 775, 776.

Impropriety of dismissal unless defects are not amendable, see post § 211.

Leave to plead over, see post § 211.

Time to answer on overruling demurrer before rendering decree, see ante ¶ 801.

Necessity of entry of order overruling plea before taking further proceedings in cause, see ante § 60.

Appealable decrees on pleas, see Appeal § 40.

Appealability of orders on demurrers under the statute, see Appeal § 38.

Appealability of demurrer to cross-bill, see Appeal § 38.

¶ 827. Where the complainant takes issue upon the defendant's plea, and on the hearing the plea is found not to be true, he will be entitled only to the same decree as if the bill had been taken as confessed; and if the allegations of the bill do not entitle him to any relief whatever, the bill will be dismissed.—Hurlbut v. Britain, 2 D. 191.

¶ 828. If the allegations in a bill do not entitle complainant to any relief, the bill should be dismissed for that cause, notwithstanding a plea to the bill, on which issue was taken, is found not to be true since the bill then stands confessed for such relief only as may be proper.—Hurlbut v. Britain, 2 D. 191.

¶ 829. Where, upon a bill to quiet title, the question of the good faith of complainant's purchase is presented, and is not met by the plea or demurrer, so that an issue of fact remains which may be raised, it is erroneous to dismiss the bill on allowing the plea and demurrer.—Lafferty v. People's Savings Bank, 70 Mich. 210.

¶ 830. Under the rule that a general demurrer to a bill must be overruled as to the whole bill where the latter contains any grounds for equitable relief, it was error to sustain such a demurrer in part and overrule it in part.—C. H. Little Co. v. Woodworth Ave. Cemetery Assn., 135 Mich. 248.

¶ 831. On a bill to restrain a city from taking for public use water from property adjoining property of complainants, on the ground that by so doing the water is taken from complainants' property and the region thereabout, and thus deprives the owner of the land of the water for domestic and agricultural purposes, without compensating the owner for his loss, held that as the question was one of public importance the demurrer to the bill should be overruled, and the defendant should be required to answer so that decision might be on the proofs.—Osborne v. City of Ann Arbor, 189 Mich. 96.

§ 211. ——Leave to amend or plead further.

See also ante ¶¶ 569, 776.

Further answer after partial quashing, see ante § 145.

Motion for leave as waiver of irregularity in entry of pro confesso decree, see ante ¶ 215.

¶ 832. A bill should not be dismissed on demurrer unless the defects are not amendable or the complainant declines to amend.—Lamb v. Jeffrey, 241 Mich. 719.

¶ 833. Where, on the allowance of a special demurrer the objection can be obviated by striking out the objectionable feature, opportunity should be given for amendment.—Bigelow v. Sanford, 98 Mich. 657.

¶ 834. Under Chancery Rule 9, subd. e, requiring an opportunity to amend a bill after demurrer sustained, such amendment will not be allowed where the demurrer goes to the merits of the whole bill and its defects are such as not to be amendable.—Macomber v. Cottrell, 162 Mich. 718.

¶ 835. Where a demurrer to a bill in aid of execution is sustained because the execution did not issue until the period of limitation had elapsed for the original decree, complainant is properly given leave to amend so as to set up an alleged estoppel of defendants by reason of their conduct in delaying the issuance of their execution and procuring a stay of proceedings.—Albert v. Patterson, 167 Mich. 162.

¶ 836. A bill should not be dismissed on demurrer for want of a formal party, but leave should be given to amend.—Palmer v. Rich, 12 Mich. 414.

¶ 837. A complainant has the right to amend a demurrable bill if desired, but the court cannot assume that it so desires, and there being no such showing in the record of a proceeding to foreclose a lien upon stock, by a corporation, a peremptory dismissal is not improper.—Aldine Mfg. Co. v. Phillips, 118 Mich. 162.

¶ 838. In an action to enjoin the sale of personalty on execution, it was held error to dismiss complainant's bill without leave to file an amendment where plaintiff claimed to have learned on the trial for the first time that defendant had sold collateral given to secure his claim and had not applied the amount realized on such sale towards the payment of the claim.—City Bank & Trust Co. v. Hurd, 179 Mich. 454.

§ 212. Affirmative relief to defendants; decree on cross-bill.

Necessity of cross-bill to sustain affirmative relief, see also ante § 124.

Insufficiency of answer alone to sustain relief not conformable to bill, see ante § 208.

Waiver of default preventing relief on cross-bill, see post ¶ 886a.

Grounds for dismissal of cross-bill without decision, see ante § 193.

Provision to ascertain sum due defendant and for dismissal if not paid, see post ¶ 856.

Adjudging nonliability of defaulting defendant where that appears by the bill, see also post ¶ 889.

Power on accounting to decree balance for defendant without cross-bill, see Accounting Suits ¶ 44.

¶ 839. A cross-bill cannot be maintained if the defense to the original bill fails, where both are based on the same facts.—Hall v. Harrington, 41 Mich. 146.

¶ 840. The dismissal of an original bill does not carry with it a cross-bill where such cross-bill sets up additional facts relating to the subject-matter of the original bill and asks affirmative relief.—Griffin v. Griffin, 118 Mich. 446.

¶ 841. Where a defendant has neither filed a cross-bill nor asked affirmative relief in its answer, it is entitled at the most only to a dismissal of the bill.—McManus v. City of Petoskey, 164 Mich. 390.

¶ 842. Where a bill to correct a description in a deed is dismissed, defendants having asked for no affirmative relief, a decree cannot be made determining the title to the land.—Tuthill v. Katz, 174 Mich. 217.

¶ 843. Complainant vendor brought a bill to foreclose a land contract. Defendant answered that a twenty-three-foot strip of the lot conveyed was owned by adverse possession by a third party, and asked the court to compel complainant to account to him for overpayment. Held, the court was authorized to grant affirmative relief under such answer, and settle all rights between the parties.—Nelson v. Gibe, 162 Mich. 410.

¶ 844. Where a bill for injunction is filed to prevent a contractor and subcontractor from interfering with the completion of a building after default by the contractor, and the contractor fails to answer but suffers the bill to be taken as confessed, an intervening assignee of the rights of the contractor and subcontractor in money due on a portion of the contract is not entitled, upon a cross-bill, to a personal decree against the owner upon such claim unless the contractor gives satisfactory assurances to the owner, or gives notice and files with the clerk of court a release and satisfaction of all demands and claims growing out of the contract.—La Tour v. Hibbler, 188 Mich. 140.

¶ 845. On a bill to cancel a mortgage and note upon the ground that it was procured by fraudulent representations by defendant that no contest of the will would be made by

anybody, the court, upon finding that the note and mortgage are supported by a consideration, will not grant complainant relief to the extent of allowing her a certain portion of the expense of the litigation in establishing the will, as authorized under the agreement, where the answer does not claim the benefit of a cross-bill and does not ask to foreclose the mortgage, and the bill is not framed according to any theory of an abatement or reduction of any portion of the mortgage for such reason.—Sellers v. Perry, 191 Mich. 619.

¶ 846. On a bill by a creditor of a corporation to whom the majority of the stock of the corporation had been pledged by the principal stockholder as collateral security for the indebtedness of such corporation, to cancel two mortgages, one of which was given by the corporation to the stockholder and assigned to another person, and the other to such other person as security for the payment of a bond given as guaranty for the payment of other indebtedness to a bank, held that as the defendant mortgagee had not in her answer prayed for a foreclosure, such a decree was improper and should be vacated on her motion.—Osborn v. Detroit Kraut Co., 193 Mich. 664.

§ 213. Propriety and sufficiency of relief.

Personal coercive nature of relief and remedies, see also ante ¶¶ 107, 108.
As dependent on maxims and principles of equity, see also ante, I.
Provisions for contingencies in the future, see post § 215.
Reservation of questions and issues for further inquiry, see post § 216.
Compensation as proper relief, see post § 217.
Completeness of the relief and retention of bill to that end, see post §§ 218-222.
Several relief to several parties, see post § 214.
Affirmative relief to defendants, see ante § 212.
Proper relief on bill of review, see post § 249.
Proper relief in particular actions and suits, see specific topics treating of the suit in question or of the right or remedy involved. A list of the principal topics will be found referred to ante under § 77.
Decree in creditors' suits, see Creditors' Suits § 34.
Scope and terms of relief in suits for setting aside drain proceedings or drain taxes, see Drains § 111.
Impropriety of injunctions suspensive of legal rights without trial thereof, see Injunctions, V.

¶ 847. Where a complainant seeks relief of an equitable character in a case where there is also a legal remedy, and the defendant answers without taking this objection, he may be properly subjected to a decree granting the relief prayed if it is within the equitable powers of the court.—Bennett v. Nichols, 12 Mich. 22.

¶ 848. The court will consider, in connection with the other circumstances in the case, the consequence of its decree, and will see to it that an oppressive or unjust result is not reached.—Perrin v. Lepper, 72 Mich. 454.

¶ 849. When all of the parties are before a court of chancery, although representing different interests, such a decree may be rendered as justice demands.—Antoszewski v. City Plumbing Co., 185 Mich. 215.

¶ 850. After land was sold and the purchaser was in possession under a contract calling for future payment, he sold at an advanced price under a contract calling for payment in instalments of which the earlier were to be paid to the original vendor until he was paid up. The other payments were to be made to the original purchaser. This was assented to in writing by the original vendor, who "accepted the said (second purchaser) in payment." One payment was made and the original vendor then made a deed to the second purchaser in order to enable him to mortgage the land and raise the money to complete the payments, which was done without fraud and without notice. Held that on a bill to cancel the deed and mortgage and for specific performance by the original purchaser, joining all the other parties as defendants, it was proper to allow the mortgage to stand as a lien and to cancel the deed and direct conveyance by the original vendor to the original purchaser.—Fountaine v. Leveque, 108 Mich. 614.

¶ 851. On a bill for reformation of a deed by one common tenant to the other, so as to make it express their intention that all the timber should be reserved to the grantor, and to declare the ownership of plaintiff to said timber with a license to remove same, an injunction against claim or interference by the grantee with the timber is sufficient relief, where it appears that the timber has meanwhile been cut and removed, coupling with it an adjudication that the plaintiff is so entitled.—Smith v. Wakeman, 114 Mich. 611.

§ 214. Joint and several relief.

Answer by one defeating bill as carrying judgment for all defendants, see ante ¶ 358.
Decree against part of defendants, others being dismissed, see also ante ¶ 792.
Rendition of decree against joint defendants, one confessing bill, see also ante ¶ 798.
Decree between codefendants on pleadings and proofs had between complainants and defendants, see ante ¶ 810.
Relief on cross-bill on dismissing bill, see ante § 212.
Party entitled to enforce one of several provisions of decree, see post § 228.

¶ 852. Although the decree is an entirety, it may embody different requirements of the respective parties against whom it is pronounced.—Kephart v. Farmers' & Mechanics' Bank of Michigan, 4 Mich. 602.

¶ 853. A court of equity cannot define and secure the rights of one litigant without reference to the corresponding rights of the other.—Hoxsie v. Hoxsie, 38 Mich. 77.

§ 215. Provisions for future or contingencies.

Provisions for contingencies in interlocutory decrees, see ante ¶ 760.

¶ 854. On accounting in equity begun pending a trover action, where the facts of the latter cause were set up by cross-bill improperly, the court decreed that when the trover action was decided there should be a proper credit.—McGraw v. Dole, 63 Mich. 1.

¶ 855. In a proceeding between two secret benevolent societies, in which complainant was enjoined from competing with defendant in the field occupied by the latter, by using the same ritual, secret work, badges, etc., the court on settlement of the decree, refused to investigate and determine whether complainant's proposed new ritual, etc., sufficiently differed from that used by defendant; as such action would require the answering of questions relating to controversies which had not arisen.—Great Hive L. O. T. M. of Michigan v. Supreme Hive L. O. T. M. of World, 135 Mich. 392.

§ 216. Provisions as to further inquiry and procedure.

Making ancillary and supplementary decrees, see post § 226.

Reservation of questions on appeal or remand for determination on retrial, see Appeal § 512 et seq.

¶ 856. A decree ordering a reference to ascertain amounts due defendant and granting relief on condition of their repayment should fix the time within which repayment is to be made after confirmation of the report of the reference; and further provide that in case of default the bill be dismissed. —Match v. Hunt, 38 Mich. 1.

§ 217. Compensation as relief.

Retention for compensation as at law as complete relief, see also post § 222.

Compensation for fraud on denying rescission, see Rescission, VI.

Compensation in lieu of specific performance, see Specific Performance, IV.

Compensation for damages from nuisance instead of injunction, see Injunctions, V; Nuisances, III.

Allowance in suits to quiet title of value of improvements, see Quieting Title, III.

Allowance of owelty in partition, see Partition, IV.

¶ 857. The court is not bound, in all cases where compensation can be made, to give relief; for the party seeking relief may have so conducted himself as to have lost all claim to its interposition; but where this is not the case, and it is equitable under the circumstances that relief should be given, it is competent for the court to give it.—Chipman v. Thompson, W. 405.

¶ 858. Damages are not recoverable in equity where no case for equitable relief is made out to which the damages would be applicable or subsidiary.—Bourget v. Monroe, 58 Mich. 563.

¶ 859. Damages are not recoverable in chancery where the grievance asserted is a fraud committed by one person upon another in a dealing in personal property; they are to be awarded at law by a jury.—Teft v. Stewart, 31 Mich. 367.

¶ 860. Equity has jurisdiction to give compensation for the damages sustained by a fraudulent execution of a trust.—Morrison v. Mayer, 63 Mich. 238.

¶ 861. The maxim that equity having entertained jurisdiction for one purpose may retain it for the purpose of doing complete justice, applied so as to allow compensation to complainants for damages caused by the erection of a trestle upon their land, although injunctive relief to compel the removal of the track in question was denied.—Lane v. Michigan Traction Co., 135 Mich. 70.

§ 218. Completeness of relief.

Withholding decree until cause is in condition for complete relief, see ante § 202.

Retention of bill to complete the relief, see post §§ 219-222.

Completeness of relief proper in particular suits, see specific topics, e. g., Accounting Suits §§ 9, 12; Creditors' Suits, III, IV; Foreclosure, III, D; Indemnity, III, B; Injunctions, V; Mortgages, IX; Reformation, III; Rescission, VI; Restoration of Papers; Specific Performance, IV; Quieting Title, III.

¶ 862. Equity is entitled to do complete justice between the parties in a controversy before the court; and accordingly may retain a cross-bill to determine legal rights attacked by the bill.—Village of Frankfort v. Schmid, 151 Mich. 85.

¶ 863. The power in equity to grant complete relief when jurisdiction is once taken cannot be extended to persons not parties to the suit, and whose rights a party to the suit cannot take by assignment.—Cochran Timber Co. v. Fisher, 190 Mich. 478.

¶ 864. Complainants filed a bill to obtain a construction of certain instruments whereby the property of their debtor became vested in one of the defendants as trustee for credi-

tors, certain of whom were preferred. The bill prayed that the instruments be decreed to amount to a common-law assignment and the preferences be declared void, that the trustee render an account as to his doings, which were alleged to have been fraudulent, and that a receiver be appointed to take charge of the property. Before any proofs were taken, the court, upon the hearing of a motion for an injunction and a receiver, entered a decree dismissing the bill, which was controverted by answer, based upon a finding that the instruments were merely securities, and could not be construed as a common-law assignment. Held, that the court was in error, as complainants were entitled to be heard, in any event, upon the question of the fraud of the trustee.—Albion Malleable Iron Co. v. First Nat. Bank, 116 Mich. 218.

¶ 865. A bill in equity to remove a cloud from the title of stock arising from a contract made between several parties to control said stock, contained several defendants. A cross-bill to enforce the contract contained several defendants. Held, that equity would enter a decree so as to settle up the rights between all parties, although such relief as between certain defendants was not prayed for.—Scripps v. Sweeney, 160 Mich. 148.

§ 219. Retention of bill to complete the relief.

Rule that relief must be feasible, see post § 220.

Sufficiency of the bill or cross-bill to sustain complete relief, see post § 221.

Administration of legal relief to make relief complete, see post § 222.

Retention to decree compensation, see also ante ¶ 861.

Retention in specific kinds of suits, see topics treating of them, e. g., Injunctions; Rescission; Reformation; Specific Performance; Quieting Title.

Retention of cause or part of it on appeal, see Appeal § 496.

Retaining cross-bill on disposing of original bill on appeal, see Appeal ¶ 2195.

Retention of accounting suit to render personal decree, see Accounting Suits ¶ 45.

Retention of divorce bill as bill for injunction to protect property rights, see also Divorce ¶ 415.

Retention of bill to adjust dower and do complete relief, see also Dower ¶ 111.

¶ 866. Equity having once acquired jurisdiction may retain it to give such full relief as will finally dispose of the controversy.—Whipple v. Farrar, 3 Mich. 436; Miller v. Stepper, 32 Mich. 194; Wallace v. Wallace, 42 Mich. 326; Drayton v. Chandler, 93 Mich. 383; In re Axtell's Petition, 95 Mich. 244; Culver v. Avery, 161 Mich. 322; Hamilton v. Wilcox, 167 Mich. 551; Buck v. Lockwood, 193 Mich. 242.

¶ 867. Where the court had determined that the equitable title was in complainant, assignee of the purchaser of land at execution sale, and the period for redemption was past, it decreed a surrender of the possession to him instead of leaving him to his remedy by ejectment.—Whipple v. Farrar, 3 Mich. 436.

¶ 868. Matters in a bill in aggravation are not to be considered where the main case fails.—Smith v. Walker, 57 Mich. 456.

¶ 869. Where a widow is compelled to resort to equity to obtain her dower and share in her husband's estate, the court will retain jurisdiction for the purpose of disposing of the whole question of dower, mesne profits and distribution.—Miller v. Stepper, 32 Mich. 194.

¶ 870. A bill to prevent forfeiture of a timberland contract because of a shortage in the amount of the timber, may be retained for the purpose of allowing damages for the shortage.—Chase v. Boughton, 93 Mich. 285.

§ 220. ——Feasibility of complete relief.

¶ 871. When it can be done without disregarding rules of right, the court, having once assumed jurisdiction, should put an end to the controversy.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 63 Mich. 645.

¶ 872. The fact, that a township of Bay county is joined as a defendant in a suit to restrain a continuance of trespasses in Saginaw county, is not an obstacle to the retention of the bill; since, if it be true that the township is not suable save in Bay county, it may be dismissed from the suit, which can continue as to individual defendants.—Davis v. Township of Frankenlust, 118 Mich. 494.

¶ 873. This court cannot on dismissing a bill for specific performance brought to enforce a contract for the sale of land for a right of way of a railroad determine the damages of the defendant in having had her land taken where the possession was wrongful inasmuch as Const. art. XVIII, § 2, provides that in taking private property for private use the necessity and compensation for such taking shall be ascertained by a jury.—Grand Rapids, G. H. & M. R. Co. v. Stevens, 143 Mich. 646.

¶ 874. Where a bill is filed against an administrator and the subsequent grantees of a contingent interest in real estate, to set aside such deed upon the ground that it was without consideration and was given without knowledge as to existing rights, and for an accounting by such administrator, the fact that the deed cannot be set aside because the land is in the possession of innocent purchasers for value, and the accounts are not mutual and an adequate remedy exists at law, does not deprive equity jurisdiction to retain the cause to compel an accounting from the administrator.—Parks v. Brooks, 188 Mich. 645.

§ 221. ——Sufficiency of bill or cross-bill.

Sufficiency of bill by creditor to be retained for general equitable relief, see Creditors' Suits § 25, ¶ 94.

Retention of creditors' bill against administrator as bill by him for benefit of creditors, see Creditors' Suits ¶ 139.

¶ 875. The rule that a court of equity having jurisdiction for one purpose, may, and usually will, retain jurisdiction to settle the entire controversy has no application where equitable jurisdiction is not made out by the bill itself.—Allen v. Heft, 200 Mich. 593.

¶ 876. Complainant brought a bill in equity to cancel on the ground of fraud a contract for the purchase of a printing press from defendant, and to have the notes given in payment therefor given up. Held, on denial of the bill, that equity would, in order to settle up the controversy, grant defendant's cross-bill asking for performance from the plaintiff by payment of the price and damages and costs, the cross-bill being sustainable to grant complete relief.—Grabill v. Barnhart Bros. & Spindler, 160 Mich. 81.

¶ 877. Although a bill in equity may contain allegations proper in a bill to quiet title, and include this object in the prayer for relief—while not maintainable on this ground alone, because the complainant is not shown to be in possession, yet, if it also sets forth acts which show a well-established ground of jurisdiction, such as the cancellation of a mortgage, which, though paid, is nevertheless held as an outstanding and existing security—a court of equity will retain the bill and decree the surrender and cancellation of the mortgage.—Jones v. Smith, 22 Mich. 360.

¶ 878. Where judgment creditors file a bill in aid of execution, and join as defendants prior attaching creditors, who have levied upon the land to satisfy a judgment rendered in the attachment suit, and who also hold a mortgage upon the property having priority over complainants' lien, and who in their answer claim the benefit of a cross-bill, and pray for the foreclosure of their mortgage, a statutory foreclosure of which was enjoined in said suit at the instance of complainants, the court on dismissing the bill should decree such foreclosure.—Harrington v. Upton, 78 Mich. 28.

§ 222. ——Matters outside of equity jurisdiction; remedy at law.

Compensation for condemnation ascertainable only by constitutional jury, see ante ¶ 873.

Decree for payment of price of goods as complete relief on bill for fraud in sale, see also ante ¶ 876.

¶ 879. Where rescission of a land contract has been denied because the loss to the vendee—arising from a few inches' deficiency—was insignificant, the suit will not be retained for the purpose of making compensation when the amount of the damage is less than $100.—Steinbach v. Hill, 25 Mich. 78.

¶ 880. A bill by an administrator sought the surrender of a note payable by him as an individual but belonging to his decedent, and it also sought for the delivery of other personal property alleged to belong to the estate. The bill was sufficient as to the note and as to the other personalty complainant's title was not disputed. Held that though replevin or trover might have been maintained for such other personalty, yet the right being admitted complainant would not be relegated to law; the court having jurisdiction of the cause, the surrender of this property should be decreed notwithstanding that the remedy at law was adequate.—Wales v. Newbould, 9 Mich. 45, per Christiancy, J.

¶ 881. A bill in chancery is properly dismissed where complainant has by other means obtained all of the relief to which he is entitled, except damages for defendant's wrongful act for which there is a complete legal remedy.—Pulezer v. Kucharzyk, 116 Mich. 92.

¶ 882. The fact that a complainant will be liable in damages for wrongful injunction under a decree dismissing a bill will not ordinarily confer jurisdiction in a court of equity where it would not otherwise be retained.—Crosby v. Hutchinson, 126 Mich. 56.

¶ 883. While equity will retain jurisdiction to settle controversies for which courts of law afford adequate relief when they are involved with and grow out of an equitable cause which gives the chancery court jurisdiction, the bare pleading, in connection with them, of equitable rights not proven, does not confer jurisdiction to try such controversies, which otherwise are of exclusive law jurisdiction.—Schook v. Zimmerman, 188 Mich. 617.

¶ 884. The rule that equity, once having obtained jurisdiction, will retain it to give such full relief as will finally settle the controversy, applies in a proceeding to enjoin continuing trespasses by forcibly seizing logging improvements with the intention of retaining control for an entire season, and to award damages for the trespass, where the injunction was dissolved on giving bond and the case retained, but repetition of the trespass is threatened.—Hall v. Nester, 122 Mich. 141.

¶ 885. In a suit to set aside an order of probate court and to restrain its enforcement, equity is not deprived of jurisdiction on the ground that the order was void and hence available defensively, in an action of law where jurisdiction has once been assumed under a plea to the merits.—Lothrop v. Duffield, 134 Mich. 485.

¶ 886. The maxim that equity having obtained jurisdiction it should dispose of every question involved, applied so as to award damages for trespass, in an injunction proceeding to enjoin continuing trespass.—Rhoades v. McNamara, 135 Mich. 644.

C. DEFAULTS AND CONFESSIONS.

§ 223. In general.

Admissions and confessions by pleading, see ante § 152 et seq.

Failure to answer as admission or confession, see ante §§ 154-156.

Rendition of decree on confession by one joint defendant, see ante ¶ 798.

Rehearing of decree taken pro confesso, see post § 230.

[Note. The general law of defaults and the practice of taking bills as confessed for want of answer are treated in the topic Defaults, which see. The cross-references following point out where the particular matters will be found which pertain to defaults in equity.]

Proofs necessary to enter decree pro confesso, see Defaults § 2.

Notice to appearing defendants before taking decree as confessed, see Defaults § 7, ¶ 27.

Decree as to one bad because decree pro confesso as to other essential thereto was invalid, see Defaults ¶ 29.

Affidavit and motion to enter decree pro confesso, see Defaults § 10 et seq.

Order and entry of default, see Defaults § 15.

Matters admitted by allowing bill to be taken pro confesso, see Defaults §§ 17, 18.

Matters admitted by default of answer to cross-bill, see Defaults § 17.

Motion or petition and showing to open decree pro confesso, see Defaults § 37.

Proffer of answer or plea on motion to open decree pro confesso, see Defaults § 38.

Disregarding imperfect or incomplete copy served as laches preventing opening of resultant default, see Defaults ¶ 97.

Appealability of consent or default decree, see Appeal § 37.

Conclusiveness of decrees entered on consent or confession, see Former Adjudication, II, V.

Collateral attacks on default judgments and decrees, see Judgments, VII.

¶ 886a. A default and an order pro confesso is practically waived in so far as it might estop the defendant from maintaining a cross-bill, where the cross-bill is really filed and both cases are argued together and treated as a single litigation.—Johnson v. Van Velsor, 43 Mich. 208.

§ 224. Scope and terms of decree.

Propriety and sufficiency of the relief granted, in so far as the same does not depend on the default character of the decree, see ante § 213 et seq.

General law of judgments other than that of the taking, entering and opening of defaults, see Judgments.

General law of res adjudicata and estoppel by default decrees, see Former Adjudication.

Modes of correcting default decree, see also post ¶ 890.

Conformity of decree pro confesso to bill as confessed, see Defaults § 24.

¶ 887. Where there is a default at the hearing, a complainant can take no decree except such as would be authorized by the state of the pleadings had there been no default.—Hardwick v. Bassett, 25 Mich. 149.

¶ 888. Where a defendant appears but refuses to plead, the decree pro confesso cannot be based on anything not contained in the bill either originally or by way of amendment.—McMahon v. Rooney, 93 Mich. 390.

¶ 889. Where complainant's own showing proves that a person impleaded as defendant is not a proper party, such defendant will be declared not liable even though he did not appear and defend.—Pool v. Horton, 45 Mich. 404.

D. CORRECTION, AMENDMENT AND VACATION OF DECREES.

§ 225. In general; mode and propriety.

[Note. Except for the matters treated post, division XI, the correction, amendment and vacation of judgments and decrees is treated in Judgments. The opening of defaults is treated in Defaults, VI. For more particular references, see those which follow.]

Reinstatement of cause after dismissal, see ante § 201.

Vacation of decree taken before all necessary parties were brought in, see ante ¶ 800.

Rehearing and the procedure for it, see post §§ 229-232.

Bills to revive, to supplement, to review, or to carry decrees into execution, see pos. XI.

Necessity of answer to both supplemental and original bills by defendant appearing after default, see post ¶ 936.

Amendment of judgments or decrees in same court by motion or petition, see Judgments, V.

Suits to set aside judgments, or for injunction against enforcement or other relief, see Judgments, VI.

Alteration and amendment of divorce and alimony decrees, see Divorce, VII, IX, X, B, E.

Opening defaults and letting defendants in to plead, see Defaults, VI.

Right to appeal and general law of appeals, see Appeal.

Trial de novo on appeal, see Appeal, XII, H.

Modification or correction on appeal, see Appeal, XIII, C.

Rules for review of equity findings on the evidence, see Appeal, XII, E, 1.
Statute of amendments, grounds on which judgments and decrees on confession may be reversed, impaired or affected, see Jud. Act chap. XVI, § 5; Comp. L. 1915, § 12482.

¶ 890. When a decree has been enrolled upon default after appearance, it can be opened for re-examination only on bill of review, and an order setting aside such a decree, and, on petition filed, dismissing the bill for a demurrable defect in the original cause, is irregular and erroneous.—Maynard v. Pereault, 30 Mich. 160.

¶ 891. Opening a decree and permitting a defendant to come in and defend is a matter within the sound discretion of the court when applied for within a reasonable time. Whether it should be done by bill of review or petition depends upon the situation and circumstances of the case.—Low v. Mills, 61 Mich. 35.

¶ 892. A substantial amendment asked after the close of the term at which the original decree was rendered, and after the time for appeal has passed, should not be permitted; the appropriate remedy under such circumstances and the only one where the decree has been enrolled, being by bill of review.—Reynolds v. Reynolds, 115 Mich. 378.

§ 226. Supplementary and ancillary decrees.
Nature and qualities of bills of review, see post § 240.
Decree of revivor, see post § 235.
Decree on bill of review, see post § 249.
Ancillary and supplementary orders in divorce cases after decree, see Divorce, VII, X, E.
Appealability of amendatory and supplementary decrees, see Appeal § 43.
Effect of appeal to transfer jurisdiction to higher court, see Appeal, IX.

¶ 893. Where a case remains in court upon equities reserved and for future supervision, orders subsequent to the decree can be made as circumstances require.—Loud v. Winchester, 52 Mich. 174.

¶ 894. A lower court cannot make a supplementary decree in a chancery case while an appeal is pending in the supreme court on the original decree.—Beal v. Chase, 31 Mich. 490.

¶ 895. Orders and decrees respecting the right of the Village of Highland Park to empty sewage into the sewers of the City of Detroit, and reserving to the court power to take further action on the application of either party on the subsequent change of existing conditions, require such application to be by supplemental petition.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

E. CONCLUSIVENESS, OPERATION AND EFFECT OF DECREES.

§ 227. In general.
Duty to prepare deed for conveyance as decreed, see post ¶ 901.
[Note. The entire doctrine of estoppel and bar by decree, including the matters and causes and also the persons concluded or barred, is treated in Former Adjudication. The doctrines as applied to judgments at law are also treated there. The doctrine, that a judgment is not collaterally assailable by the parties thereto or their privies for any mere error or irregularity, but only for some jurisdictional defect in the proceedings or for fraud on the court procuring the making of the decree or judgment or for mistake or accident likewise operating to procure the making of the judgment, is fully treated in Judgments, VII. Presumptions indulged on the record, when the judgment is collaterally assailed, see Judgments, VII; Courts § 80.]
Estoppel to claim under and attack decree at same time, see also Estoppel, III, A.

¶ 896. Stipulations between parties, or signed by the parties to be bound in a chancery suit, and filed with the papers in the cause, may be considered in determining the interpretation of the decree.—Thayer v. McGee, 20 Mich. 195.

¶ 897. A decree requiring defendant to convey has the same effect as a voluntary conveyance to break adverse possession.—Gower v. Quinlan, 40 Mich. 572.

¶ 898. A decree for the rescission of a deed and for reconveyance may stand in lieu of the conveyance until made.—Thorn v. Thorn, 51 Mich. 167.

¶ 899. A decree for the specific performance of a land contract cannot relate back to the date of filing the bill for the purpose of bringing trespass against the lessee of a defendant who holds the legal title and actual possession.—Goetchius v. Sanborn, 46 Mich. 330.

F. SATISFACTION, PERFORMANCE AND ENFORCEMENT OF DECREES.

§ 228. In general.
[Note. The matters denoted by this division are in the main fully treated elsewhere for reasons which will be obvious on reading the cross-references which follow.]
Provision for dismissal on failure of complainant to pay sum due defendant to be ascertained, see ante ¶ 856.
Remedy to recover parcel allotted in partition, see post ¶ 924.
Mode and sufficiency of payment or discharge of judgments generally, see Judgments, XI.

Medium and sufficiency of payment and tender, see Payment, I.
Payment or deposit in court, see Payment, I, B.
Application of payments, see Payment, III.
Pleading and proof of payments, see Payment, V.
Recovery of payments made under mistake or improperly, see Payment, VI; Implied Contracts, II.
Restitution on reversal of judgment, see also Executions, XIII.
Actions or suits, writs and process to enforce decrees and judgments, see Judgments, XII; Assistance, Writ of.
Possessory process on judgment, see Judgments, XII.
Enforcement by execution process, see Executions.
Contempt proceedings and attachment of the person to coerce obedience to decree and performance of it, see Contempt.
Judicial sales, see Judicial Sales; and see also Foreclosure, III, E; Partition, IV.
Power of chancery to enforce decrees by execution against property or person, see Jud. Act, chap. XXIII, § 150; Comp. L. 1915, § 12965.
Modes of enforcement other than by execution, see Jud. Act, chap. XXIV, § 1 et seq.; Comp. L. 1915, § 12966 et seq.
Necessity of enrollment before enforcement, see 1916 C. C. Rule 55, § 1.

¶ 900. Enforcement of a decree can be demanded only by those to whom it gives affirmative relief; on appeal they are the parties provided for by the appeal bond, and on a bill of review they cannot object that the decree was not performed.—Mickle v. Maxfield, 42 Mich. 304.

¶ 901. One who has been ordered to execute, acknowledge and deliver a deed containing a special covenant of warranty cannot be held guilty of contempt in disobeying such decree until such deed has been presented to him for execution, and he has refused: he is not bound at his peril to prepare it.—Berry v. Innes, 35 Mich. 189.

XI. REHEARING, AND BILLS OF REVIVOR, SUPPLEMENT AND REVIEW.

Suits to impeach or set aside decrees or judgments, see Judgments, VI.
Suits to restrain enforcement of judgments or decrees, see Judgments, VI; and see also Injunctions.
Relief against executions, see Judgments, VI; Executions, X; Injunctions, II, B.
Parties to bills for relief from judgments, see Injunctions, III; Judgments, VI, B.
Suits to relieve infants, see also Infants, VII.
Mandamus to compel judicial action in allowing leave or granting relief, see Mandamus, II, V.

§ 229. Rehearings in general.

Stipulation for rehearing, see post § 231.
Grounds for allowing or denying rehearing of default decree, see post § 230.
Laches in suffering default as ground for refusing rehearing, see post ¶ 916.
Relative scope and distinction of rehearings and bills of review, see post ¶ 991.
Bills of review after enrollment, see post § 240 et seq.
Grounds and propriety of leave to file bill of review, see post § 241.
Grounds for rehearing on appeal, see Appeal, XIV.
Laches and diligence in seeking rehearing on appeal, see Appeal § 545.
Power of trial court to grant rehearing after appellate decree, see Appeal § 564.
Appealability of order granting or denying rehearing, see Appeal § 50.
Sufficiency of case to review ruling or petition for rehearing, see Appeal § 192.
Review of discretion as to rehearing, see Appeal § 414.
Rehearing of divorce suit for remissness of wife's guardian ad litem, see Divorce ¶¶ 341, 342.
Showing and grounds for rehearing, see 1916 C. C. Rule 56.

¶ 902. A rehearing will not be granted where a party by lapse of time has lost his right to appeal.—Benedict v. Thompson, W. 446.

¶ 903. A motion for rehearing that has been delayed until after the time allowed for taking an appeal has expired is too late if the laches is not excused.—Warner v. Juif, 38 Mich. 662.

¶ 904. The circuit court in chancery has power to grant a rehearing before enrollment, even after the time for taking an appeal has expired.—Barnes v. Kent Circuit Judge, 97 Mich. 212.

¶ 905. For a trial court to refuse a motion for a rehearing of a chancery case after the failure of the applicant to perfect an appeal within the statutory time, is not an abuse of discretion.—Perkins v. Perkins, 181 Mich. 166.

¶ 906. Rehearing was properly denied where no relief could be granted which would not be practically allowing two applications for a rehearing,—one granted and not acted on, and another a substantial repetition of it,—without a willingness to comply with the practice, and after a longer delay than would support an appeal.—Bope v. Ferris, 77 Mich. 299.

¶ 907. Rehearing as to decree for compensation will be allowed a trustee who, it appeared, had properly managed trust estate, where such decree was entered before opportunity had of proving the value of such services.—Hodges v. McDuff, 76 Mich. 303.

¶ 908. Where the only positive testimony in his own behalf came from the complainant, and after the hearing a rehearing was asked on a showing of newly discovered evidence that complainant had made statements contradicting his evidence in material points in such a way as to be decisive of the case, held, that the rehearing should have been granted.—Sheldon v. Hawes, 15 Mich. 519.

¶ 909. A rehearing upon a decree declaring a deed a mortgage, on the ground that one to whom a portion of the land had been conveyed by the defendants was not made a party, was properly denied where no injury to defendants by the failure to bring in such party was shown, and where complainant claimed that the deed was not recorded and he was unaware that such party had an interest.—Roelofs v. Wever, 119 Mich. 334.

¶ 910. Where the judge in a chancery case after announcing his decision, but before signing the decree, concludes that he had an improper conception of the law and facts, and desires additional light, it is his duty to require further testimony and reargument. —J. L. Hudson Co. v. No-Name Hat Co., 174 Mich. 109.

¶ 911. Refusal of rehearing in an equity suit held no abuse of discretion where the testimony offered was merely cumulative.—Marquette Lumber Co. v. Albee, 196 Mich. 127.

¶ 912. A motion by defendant for a rehearing of a suit for the specific performance of an agreement for the extension of an oral lease on the ground of newly discovered evidence is properly refused where the evidence, a sublease by complainant in which he stated he had no lease, was merely cumulative, and such evidence could have been discovered while the trial was in progress,—Charlet v. Teakle, 197 Mich. 426.

¶ 913. Denial of rehearing in equity will be sustained where the record does not show that the court below acted improperly in taking an account without referring it, or that any complaint was there made on that ground, or that the petition for rehearing was based on such a ground.—Roelofs v Wever, 119 Mich. 334.

¶ 914. A rehearing was properly denied upon a decree that a deed should be treated as a mortgage and directing the making of certain payments, on the ground that a house built by defendants should have been considered in the rendition of the decree; where, although the opportunity for considering such house was afforded upon the hearing, there was nothing to indicate that the defendants offered proof upon the subject or even called the attention of the court to it, and where the latter omission appeared from the petition.—Roelofs v. Wever, 119 Mich. 334.

§ 230. ——On consent or pro confesso decrees.

¶ 915. Where a decree has been entered by consent, a party who knew what the decree was, and to whom no misrepresentations were made in obtaining it, is properly denied a rehearing.—Hodges v. McDuff, 76 Mich. 308.

¶ 916. In a bill for specific performance of a land contract a petition for a rehearing after a decree pro confesso assigning as reasons for not appearing that the defendant expected to adjust the matter and that it "entirely slipped his mind" shows laches and the decree should not be opened on technical grounds or unless grave injustice will result. —Wilkinson v. Kneeland, 125 Mich. 261.

§ 231. ——Stipulation for rehearing.

¶ 917. A stipulation reciting a decree avoiding certain taxes and that the same questions were involved in the case at bar and giving ten days after decision and the filing of an opinion by the supreme court in the first case to petition for rehearing or to perfect an appeal in the case at bar, will control and will warrant a rehearing as stipulated; though the decree entered under the stipulation provided that it should be without prejudice to the right of the state to hereafter enforce payment, and it is not necessary to resort to a new proceeding under the statute as in case of failure to render a decree.—Auditor General v. Smith, 95 Mich. 132.

§ 232. ——Application and procedure for allowance.

Grounds for allowing or denying, see ante §§ 229-231.

Showing of reasons, see also ante ¶¶ 913, 914.

Applications for rehearing and practice thereon, see 1916 C. C. Rule 56.

Time for application for rehearing, see 1916 C. C. Rule 56.

¶ 918. E. filed a bill to assure his title to land recovered from him by H. in a previous suit; he asked also that a former decree be declared void, or that a rehearing be allowed on the grounds that false testimony had been given in the previous suit; that after the decree both parties had agreed to a settlement, but that H. had repudiated the bargain when it was too late for E. to appeal; and that there was newly discovered evidence. Held, that this was merely a bill for a rehearing, and that, not being sworn to, it could not stand as a petition for a rehearing under Chancery Rule 81.—Eveland v. Stephenson, 45 Mich. 394.

§ 233. Bills of revivor.

Supplemental bills, see post §§ 237-239.

What constitutes bill of revivor and supplement as distinguished from original bill, see post ¶ 934.

Elements of supplement and revivor in bills of review, see post § 240.

Cross-bill to revivor bill, see post § 234.
Order or decree of revivor, see post § 235.
New pleadings or amendments, see post § 236.
Practice for revival under the statutes, see Abatement § 20.
When original bill is necessary under the statutory practice, see Abatement § 20.

¶ 919. A bill of revivor lies to bring in only those who claim by operation of law in consequence of the death of the original party, and one who takes by deed from defendant must come in by original bill.—Barnett v. Powers, 40 Mich. 317.

¶ 920. Titles that do not arise by operation of law on the death of a party cannot be brought into a case without a new suit, or an original bill in the nature of a supplemental bill or bill of revivor.—Barnett v. Powers, 40 Mich. 317.

¶ 921. Where the entire subject-matter of a suit in chancery is assigned by the complainant, the suit becomes defective, and can no longer be prosecuted in his name after the assignment is brought to the notice of the court; and the only mode in which the assignee can revive or get the benefit of the original suit is by filing an original bill in the nature of a bill of revivor and supplement.—Webster v. Hitchcock, 11 Mich. 56; Perkins v. Perkins, 16 Mich. 162.

¶ 922. The assignee of the subject-matter of a suit in chancery may, without the previous leave of the court, and in the name of a new solicitor, file the original bill in the nature of a bill of revivor and supplement necessary to get the benefit of the original suit.—Webster v. Hitchcock, 11 Mich. 56.

¶ 923. Where a mortgagor dies after a bill has been filed to foreclose the mortgage, but before he is served with subpœna, the suit can be revived by petition against his heirs.—Stevenson v. Kurtz, 98 Mich. 493.

¶ 924. A bill of revivor and supplement based on a partition decree to recover the land will not lie; ejectment for distinct parcels of land must be brought against each separate holding.—Walsh v. Varney, 38 Mich. 73.

¶ 925. A wife is neither an heir nor a legal representative of her husband and accordingly cannot be brought in by a bill of revivor in a foreclosure suit which omitted her. Original bill is necessary.—Barnett v. Powers, 40 Mich. 317.

§ 234. ——Cross-bill to bill of revivor.

¶ 926. In a suit for the construction of a deed conveying water privileges, and for an account of an excess of water claimed to have been used by defendants, in which a bill of revivor and supplement is filed by purchasers of defendants' interest, stating that they have become the owners of such interest, and entered into possession, and that controversies have since arisen between them and complainant as to the quantity of water used, and denying that they have misapplied or wasted any water, complainant may set up by way of cross-bill that such purchasers have bought additional interests, and have reconstructed their mill and changed the water wheel in an improper manner, and are using a specified amount of water in excess of that to which they are entitled under their several grants.—Powers v. Hibbard, 114 Mich. 533.

§ 235. ——Order or decree of revivor.

¶ 927. It is sufficient that an order of revivor made on the suggestion of defendant's death recites the petition upon which it is based.—Stevenson v. Kurtz, 98 Mich. 493.

§ 236. ——Amendments and new pleadings.

¶ 928. Where a complainant in chancery dies, the suit is revived by an order substituting his representative as complainant, without amendment of the bill.—Webster v. Hitchcock, 11 Mich. 56.

¶ 929. Where, on the death of the complainant, a chancery suit is revived by a statutory order in the name of the administrator and heirs, it is unnecessary to file amendments alleging the death, devolution of the estate, and the withholding of rights from the new complainants, with a prayer for relief corresponding to that originally made; but, if filed, they do not prejudice the defendant and may be disregarded as surplusage.—Webster v. Bailey, 31 Mich. 36.

§ 237. Supplemental bills.

Propriety of supplemental pleadings before decree passed, see ante § 138.
Amendments in nature of supplemental bill, time when allowable, see ante § 131.
Supplemental pleading or amendment as proper way of introducing matters occurring after bill is filed, see ante § 137.
When supplemental bill requisite to bring in new interests and parties, see ante § 233.
Supplemental petition to make ancillary decree on later facts, see also ante ¶ 895.
Elements of supplement in bills of review, see post § 240.
Grounding supplemental bill on necessity for asserting right first arising after decree, though right existed before, see post ¶ 955.
Subsequent matters as extraneous to bill of review, see post § 249.
Supplemental creditors' bill to reach after-acquired assets, see Creditors' Suits § 27.
Procedure to change decree for custody of children, need for original new suit, see also Divorce ¶ 444.

¶ 930. A supplemental bill after a decree must be strictly in aid of that which the court has done, and it cannot be filed for the purpose of introducing a completely new case.—Austin v. Hayden, 190 Mich. 528.

¶ 931. Where an original bill of complaint is filed by the receiver of an insolvent partnership for an accounting, and for an adjudication of the respective rights of numerous creditors and to restrain them from instituting separate proceedings, and to enjoin defendants from selling property claimed by complainant as receiver of the partnership, a supplemental bill which involves an issue between creditors of one of the partners, of whose property complainant was also receiver, and the same defendants as to the right to assets of the partner, seeks for relief not germane to the original cause.—Austin v. Hayden, 190 Mich. 528.

¶ 932. Where the purpose of an original bill for an accounting by the receiver of a partnership against defendants was to secure a money decree against defendants, and such decree was satisfied, a supplementary bill by such complainant, as receiver for an individual partner, against the same defendants, involving the right to assets of such partner, is not in aid of the original bill, so as to constitute a proper supplementary bill.—Austin v. Hayden, 190 Mich. 528.

¶ 933. A so-called supplemental bill filed pursuant to leave to review a decree and to enforce any right of contribution the complainant might have against defendant under a former decree, which right of contribution might have been enforced under the original bill by allowing amendment and remanding it when on appeal, is not technically a bill of supplement when it sets up no new matter but merely amplifies what was alleged in the original bill; but, having been made under an order allowing it to be filed and stating the purpose of the bill, and all parties having understood such purpose, it was not error to make it as a supplemental bill though in fact an amended bill.—Cheever v. Ellis, 144 Mich. 477.

¶ 934. A bill for a decree against the purchaser of complainant's stock for an alleged violation of the agreement of sale, and for dividends alleged to have been earned by such stock prior to its sale, of which dividends complainant alleges to have been fraudulently deprived, is not a bill of revivor and supplement, but an original bill, although it sets forth in full a bill in a former suit, which to all intents and purposes had been abandoned, in which the complainant sought to restrain the mismanagement of the affairs of defendant corporation in which he was a minority stockholder and asks for an accounting and a receiver.—Phillips v. Jacobs, 145 Mich. 108.

§ 238. ——Application and leave to file.

¶ 935. A petition for leave to file a supplemental bill in an action to foreclose a mechanic's lien is properly denied where it is filed long after the party requesting it had given notice of appeal from the decree rendered by the trial court.—Zilz v. Wilcox, 190 Mich. 486.

§ 239. ——Parties and procedure.

Effect of delay, time to apply, see ante § 238.
Construction and scope of demurrer to supplemental bill, effect to reach defects in original bill, see ante § 151.

¶ 936. If nonresident defendants appear and answer after decree, and after supplemental bill filed to execute the same, and no further proceedings are taken in the original suit, they must answer the supplemental bill if they would protect the rights acquired by so appearing and answering the original bill.—Griggs v. Detroit & M. Ry. Co., 10 Mich. 117.

§ 240. Bills of review or in the nature of bills of review.

What constitutes technical bill of review, see also post ¶ 980.
Petition for relief or bill of review as better practice, see also ante § 225.
Amount necessarily in controversy to give jurisdiction, see ante ¶ 77.
Contents and averments of the bill of review, see post § 247.
Scope of the review, see post § 249.
When bill of review is necessary to open default decree, see Defaults ¶ 129.
Bill of review to obtain alimony where not granted or reserved by divorce decree, see Divorce § 123.
Petition for relief as remedy rather than appeal, see Appeal § 3.
Appealability of leave or denial of petition for review, see Appeal § 47.
Review of grant or denial of leave to fill bill of review, see Appeal § 397.

¶ 937. Any bill whose main purpose is to obtain a new hearing of a controversy already decided, either as question of law or on the same or additional testimony, is a bill of review, or in the nature of a bill of review, even though it involves matters of supplement or revivor, or other additional elements.—Eveland v. Stephenson, 45 Mich. 394.

¶ 938. A bill of review is one brought to have a decree of the court reviewed, altered or reversed.—Dodge v. Northrop, 85 Mich. 243.

¶ 939. Bills of review seek to review or re-examine causes upon their merits.—Chapman v. Chapman, How. N. P. 18.

¶ 940. A bill filed for the purpose of obtaining the vacation of a decree obtained by the defendant against the complainant on the ground that the subpoena was fraudulently served does not raise the question as to the merits of the former cause and is not a bill of review.—Chapman v. Chapman, How. N. P. 18.

¶ 941. A bill of review lies where a foreclosure decree has been made contrary to the terms of the mortgage, and an applica-

tion for the correction of error, made within a reasonable time, has been refused.—Mickle v. Maxfield, 42 Mich. 304.

¶ 942. A bill attacking a foreclosure decree and sale, and seeking leave to redeem, is in effect a bill in the nature of a bill of review.—Sanford v. Haines, 71 Mich. 116.

¶ 943. A bill seeking the partial annulment for fraud of a foreclosure decree, but praying that sale already made be ratified and time allowed for payment of balance due, is a bill in the nature of a bill of review.—Dodge v. Northrop, 85 Mich. 243.

¶ 944. Where, pending appeal, the whole basis of the suit had disappeared because of a decree rendered in another suit, the cause was remanded with instructions to allow appellant, the defendant below, to file a supplemental bill in the nature of a bill of review, or a bill to suspend or avoid the operation of the decree, upon the new matter arising from the reversal of the decree in the other cause.—Ballard v. Searls, 130 U. S. 50, 32 L. ed. 846, 9 Sup. Ct. Rep. 418.

¶ 945. Where a party has lost his right of appeal innocently and through mistake of his counsel, he cannot file a bill of review as a substitute for such appeal.—Roberge v. De Lisle, 158 Mich. 16; De Lisle v. Wayne Circuit Judge, Id.

¶ 946. A bill of complaint is not a bill for review where it does not assume the validity of the pleadings in the case sought to be reviewed.—Raniak v. Pokorney, 198 Mich 567. (Ostrander, J., dissenting.)

¶ 947. A petition to set aside a tax sale though based on jurisdictional grounds, cannot be treated as a petition for review, as in the latter the petitioner must present to the court his proposed bill, excuse the delay and show the merits of his case.—Cook v. Hall, 123 Mich. 378.

§ 241. ——Grounds and propriety of leave.

Change of law by decision as ground, see also post ¶ 964.
Laches or other objection to granting leave, see post § 242.
Discretion to allow or deny, see post § 243.
Denial on conditions or alternative imposed, see post § 246.
Newly discovered evidence as ground for rehearing, see ante § 229.
Ground for bill of review of divorce decree, see Divorce ¶ 380.

¶ 948. A petition for leave to file a bill in the nature of a bill of review will not be granted unless the court sees reason to believe that its allegations can be sustained by proof.—Day v. Cole, 65 Mich. 154.

¶ 949. The power of the court to grant or deny an application for leave to file a bill of review is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice.—Stockley v. Stockley, 93 Mich. 307.

¶ 950. A bill of review on the ground of newly discovered evidence cannot be granted if the evidence is not material, or if the party knew of it in season to have obtained it for use at an earlier stage in the cause.—Ryerson v. Eldred, 23 Mich. 537.

¶ 951. Leave to file a bill of review will not be granted on the ground of newly discovered evidence that is merely cumulative, and is directed to a point to which the attention of the moving party must have been called on the first hearing, when he ought to have known as much of the means of proving it as afterwards.—Taylor v. Boardman, 25 Mich. 527.

¶ 952. An original bill in the nature of a bill of review will lie to set aside a partition where the commissioners appointed to make it acted fraudulently in dividing the property and deceived the court, and defendants ratify their acts and insist on retaining the benefit of it.—Adair v. Cummin, 48 Mich. 375.

¶ 953. Where a complainant, whose bill has been dismissed on appeal, and whose motion for a rehearing and for leave to introduce further testimony has been denied, presents a petition for leave to file a bill of review, containing the affidavits upon which the motion for leave to introduce further testimony was based, as well as other affidavits, which are for the first time presented, which affidavits, if true, make a strong case in his favor on the point upon which the case turned on appeal, and it appears that he was not at fault in not producing the testimony upon the former hearing, equity requires that the case be opened to permit such testimony to be introduced.—Mosher v. Mosher, 108 Mich. 612.

¶ 954. The commencement of a suit by third parties, subsequent to the decree of the supreme court, under circumstances indicating fraud and collusion and an unauthorized use of the names of parties living and dead, for the purpose of affecting the controversy, was disregarded in disposing of an application for leave to file a bill of review.—Ryerson v. Eldred, 23 Mich. 537.

¶ 955. A supplemental bill in the nature of a bill of review was properly filed by a national bank receiver who, by reason of the refusal of the Comptroller of the Currency to permit him to join in the purchase of property at a mortgage foreclosure, according to an agreement made with other banks to protect a second mortgage under which the receiver's bank and the others were parties, neglected to assert his tax lien for moneys advanced; as, although the right to

the relief had not arisen since the decree, the necessity of asserting it had.—Noeker v. Howry, 119 Mich. 626.

§ 242. ——Laches and other objection or defense.

See also ante ¶¶ 160, 950, 951, 953.
Loss of right of appeal without fault, see also ante ¶ 945.
Recent necessity of asserting prior right as excuse for not asserting at hearing, see ante ¶ 955.
Unlikelihood of success, see also ante ¶ 948.
Discretion to deny leave, see post § 243.
Showing of objections and counterproofs, see post § 245.

¶ 956. A bill of review should be filed within the time allowed for appealing, unless grounded on newly discovered evidence, or where there is some satisfactory reason for the delay.—Sanford v. Haines, 71 Mich. 116.

¶ 957. Parties claiming through a general assignee are bound, in case of a controversy, to inquire of him for any facts in his knowledge bearing upon it, and failure to do so is gross negligence, depriving them of the right to have a bill of review on the ground of newly discovered evidence which the assignee is to furnish.—Ryerson v. Eldred, 23 Mich. 587.

¶ 958. As the allowance of permission to file a bill of review is discretionary (Chancery Rule 101), the objection that an application for leave to do so comes too late should not prevail where gross injustice will follow.—Vaughan v. Black, 63 Mich. 215.

¶ 959. Lapse of time will not prevent the correction of a decree of foreclosure where the record furnishes means of determining what land was really meant, as all the papers in the case must be read together.—Merrifield v. Ingersoll, 61 Mich. 4.

¶ 960. The diligence and prudence required of ordinarily prudent litigants involves something more than the mere employment of counsel, especially when they are given information that would put an ordinarily prudent person upon his guard.—Stockley v. Stockley, 93 Mich. 307.

¶ 961. Leave to file a bill of review will be denied for gross laches, consisting in many years' delay while rights were in litigation, and for 20 months afterwards, without appeal or other action though the parties knew or could have known their adjudicated rights.—Day v. Cole, 65 Mich. 154.

¶ 962. Laches such as should preclude leave to file a bill of review to vacate a decree which canceled a mortgage is not shown by failure to sue for enforcement of the mortgage, where the holder appeared and resisted a suit to annul the mortgage and sues to review that decree.—Cook v. French, 9(Mich. 525.

¶ 963. In proceedings by a vendor against a vendee and his wife to foreclose a land contract, both defendants were served with process, and both appeared by solicitor, who interposed a demurrer in the name of both. The demurrer was overruled, an answer filed, a decree for complainant duly entered, and a sale made. The day before the order of confirmation became absolute, the wife made a petition for leave to file a bill of review, claiming that she had not authorized the employment of the solicitor who appeared for her of record, and raising the same questions passed upon by the court upon the demurrer and answer. Held, that the petition was properly denied.—Converse v. Barnard, 114 Mich. 622.

¶ 964. A petition for leave to file a bill of review to reopen a chancery suit in which a decree had been settled by consent was properly denied where the ground of it was a decision in a similar case by the supreme court, rendered more than a year after such decree and twenty months prior to such petition, construing the law differently from what the parties supposed it to be when the decree was entered.—Ingles v. Bryant, 117 Mich. 113.

¶ 965. A petition for leave to file a bill of review, based chiefly on a claim of newly discovered evidence, may be filed and passed on over a year after a decree was rendered in the cause.—Tisman v. Tisman, 176 Mich. 94.

¶ 966. An infant complainant is guilty of fraud and comes into equity with unclean hands in a bill to review and reverse a decree setting aside a deed of a farm made to him by his parents some years before, where the deed was set aside on his petition alleging that it was made without his consent and unknown to him, and he now alleges that he signed the former petition without knowledge of its contents and on account of the fraud of his parents and his solicitor, and the testimony shows that the original deed was made without present consideration except his promises to assume a mortgage and to support his parents, that subsequently he decided to trade the property for hotel property and the suit to set aside was then brought and the trade made in his parents' name and at present he claims the original farm on the deed which was set aside at his own request.—Lowes v. Lowes, 127 Mich. 307.

¶ 967. Leave to file a bill of review is discretionary and this discretion must be exercised to effectuate essential justice, and inasmuch as a bill of review must show substantial equities, the application therefor will be denied where want of equity is clearly shown.—Smith v. Smith, 142 Mich. 413.

§ 243. ——Discretion to allow or deny.

Discretion of court, see also ante ¶¶ 948, 949, 958, 967.

Denial on conditions imposed, see post § 246.

¶ 968. A decision of the lower court denying leave to file a bill of review will only be overruled in the supreme court upon abuse of discretion.—Roberge v. De Lisle, 158 Mich. 16; De Lisle v. Wayne Circuit Judge, Id.

¶ 969. The granting of a petition for leave to file a bill of review on bill for separate maintenance, based chiefly on a claim of newly discovered evidence, is within the discretion of the trial court.—Tisman v. Tisman, 176 Mich. 94.

¶ 970. Denial of leave to file a bill of review on bill for separate maintenance and cross-bill for divorce when a decree granting a divorce was rendered after complainant agreed to a financial settlement, held not an abuse of the court's discretion.—Tisman v. Tisman, 176 Mich. 94.

¶ 971. When the defendants in a foreclosure case have failed to produce witnesses in their behalf, although repeatedly urged to do so, within the time set by the order of court, and have allowed a decree to be taken against them, they cannot complain of a refusal of leave to file a bill of review as being an abuse of discretion.—Stockley v. Stockley, 93 Mich. 307.

§ 244. ——Application and leave to file.

Time for applying, see ante § 242.

Grounds and showing, see ante § 241.

Counterproofs or showing, see post § 245.

Averment and showing of equities, see also ante ¶ 967.

Sufficiency of allegations as to amount of judgment in dispute to be reviewed, see ante ¶ 334.

Security to adversary, see also post ¶ 982.

Contents and sufficiency of the bill of review proper, see post § 247.

¶ 972. A petition for leave to file a bill of review is not governed by the same considerations as a bill of review itself, so that it can present and open all errors whether specified or not.—Johnson v. Shepard, 35 Mich. 115.

¶ 973. An order granting leave to file a bill of review cannot be made at chambers or without notice.—People ex rel. Clark v. Huron Circuit Judge, 40 Mich. 166.

¶ 974. The circuit court cannot allow a bill of review upon a decree made by the supreme court on appeal. If allowable at all, it must be on leave granted by the appellate court.—Ryerson v. Eldred, 18 Mich. 490.

¶ 975. The bills referred to in Chancery Rule 101 for which leave of court must be first obtained before filing are such only as may technically be styled bills of review or bills in the nature of bills of review.—Chapman v. Chapman, How. N. P. 18.

§ 245. ——Counterproof or showing.

¶ 976. Upon the hearing of a petition for leave to file a bill of review affidavits are admissible to contradict the averments of the petition by explaining the nature of the evidence.—Loth v. Loth, 116 Mich. 684.

§ 246. ——Denial on condition or alternative.

Remission of part of decree to avoid bill of review, see Appeal ¶ 2154.

¶ 977. A petition for a bill of review, filed after a long delay, will be governed by equitable considerations, and will not be allowed for technical irregularities where it appears that the petitioner has not been really damnified. Where the only tenable ground of relief is that the decree was excessive in amount, a remission of the excess will justify refusing the petition.—Johnson v. Shepard, 35 Mich. 115.

¶ 978. A petition for leave to file a bill of review in a suit to reform a deed and mortgage held to have been rightly denied, where leave to redeem within an extended time was granted.—Knapp v. Perry, 117 Mich. 97.

§ 247. ——Averments and sufficiency of bill and answers.

Distinction between bill of review and petition for leave, see ante ¶ 972.

¶ 979. A bill of review should recite the proceedings in the former case and show that complainant has equities.—People ex rel. Clark v. Huron Circuit Judge, 40 Mich. 166.

¶ 980. A bill cannot properly be sustained as a bill of review, or a supplemental bill in the nature of a bill of review, which, though filed more than five years after decree, does not show any performance of the decree by the party filing it, or any reason for the long delay, even if equities might at some time have existed; which, however, does not seem to have been the case here.—People ex rel. Clark v. Huron Circuit Judge, 40 Mich. 166.

¶ 981. Where a sworn plea to a bill of review is regular in form and positive in substance, and consists of a denial of the main issue presented, a demurrer to it, if permitted by practice, would be so frivolous as to entitle the pleader to final judgment. And setting the plea down for hearing would be equivalent to a demurrer. If it leaves any issue to be disputed, it should be replied to and the facts investigated.—Thomas v. Burt, 52 Mich. 489.

¶ 982. It seems that a bill of review filed after foreclosure sale and after the time for

appealing has expired, and allowed on the ground that the property has been sold at a great sacrifice to a purchaser who really represents the complainant, should be accompanied by adequate security and contain an offer to redeem or procure a higher bidder. —Thomas v. Burt, 52 Mich. 489.

¶ 983. A bill to correct a mistake in the description of land in a foreclosure decree and in the commissioner's deed did not contain averments sufficient to show that the mistake was rectified on the sale so as to identify the land sold as the true parcel, and it was defective in other respects, but as it showed sufficient cause for amending the decree it should not have been dismissed on general demurrer.—Merrifield v. Ingersoll, 61 Mich. 4.

§ 248. ——Parties to the review.

¶ 984. Where a defendant in foreclosure retains part of the property in suit, and is responsible on his covenants for other portions, he is interested in having the mortgage foreclosed according to its terms, and, if it is not, he is a proper complainant in a bill to review the decree.—Mickle v. Maxfield, 42 Mich. 304.

¶ 985. It is not error, though perhaps not necessary, to implead the commissioners in partition as defendants to a bill to set it aside for their fraud in dividing the property.—Adair v. Cummin, 48 Mich. 375.

¶ 986. The purchaser at an execution sale under a personal decree for a deficiency on foreclosure is not properly a party to a bill of review.—Gies v. Green, 42 Mich. 107.

¶ 987. Parties interested in both parcels are necessary defendants to a bill to rectify a mistake in the description of land in a foreclosure decree, the expression "southeast quarter" being written "northeast quarter," thereby rendering a resale necessary.—Merrifield v. Ingersoll, 61 Mich. 4.

§ 249. ——Scope of the review and relief thereon.

¶ 988. A bill of review concerns the original controversy only and does not cover subsequent proceedings.—Gies v. Green, 42 Mich. 107.

¶ 989. Where a bill of review is filed there is no practice which authorizes rights which accrued after the decree to be introduced into the controversy except by some affirmative pleading in the shape of an original or supplemental bill bringing the new parties into court.—Mickle v. Maxfield, 42 Mich. 304.

¶ 990. A mere subsequent encumbrancer cannot, on appeal from a decree on a bill of review, raise a question as to the security to be given on obtaining leave to file the bill, nor object that it was not given earlier.—Mickle v. Maxfield, 42 Mich. 304.

¶ 991. One who files a bill of review does not thereby lose any rights that he would have had on a rehearing; the only distinction is that a rehearing precedes and a bill of review follows enrollment. Neither remedy can be had without leave.—Mickle v. Maxfield, 42 Mich. 304.

§ 250. ——Dismissal of bill.

¶ 992. A bill of review to set aside a foreclosure sale was dismissed where complainant took no steps to facilitate inquiry into the facts or to obviate delays, and did not make any offers.—Thomas v. Burt, 52 Mich. 489.

¶ 993. A bill in the nature of a bill of review not sworn to and not accompanied by any sworn showing, filed without leave after long delay and without security, should be dismissed.—Sanford v. Haines, 71 Mich. 116.

¶ 994. A bill of review not filed under Chancery Rule 101 (first rules) is properly dismissed on motion, but the order of dismissal does not bar further proceedings by complainant under said rule.—Dodge v. Northrop, 85 Mich. 243.

XII. BILLS OF PEACE AND QUIA TIMET.

§ 251. In general.

[Note. Bills of this character are almost always brought to quiet title, and therefore the topic Quieting Title should be consulted. Injunctions against vexatious suits are treated in Injunctions, II, B. Interpleader, which see, treats of bills to interplead conflicting claimants against complainant.]

¶ 995. Bills of peace are only allowed where the complainant has established his right at law, or where the persons who controvert the right are so numerous as to render an issue under the direction of chancery indispensable to embrace all the parties concerned, and save a multiplicity of suits. —Lapeer County Com'rs v. Hart, H. 157.

¶ 996. A bill in equity, essentially a bill of peace is sufficient to warrant equitable relief in alleging that the complainant is a secret society, that it is entitled to a certain ritualistic book of procedure and the right to use the ritual in other states and territories, that its articles of association have been amended for that purpose, that the defendant has a mere license to use the ritual, that threats have been made and overt acts to prevent the complainant's use, and that the complainant will suffer irreparable injury.—Great Hive, Ladies of the Maccabees v. Supreme Hive, Ladies of the Maccabees, 129 Mich. 324.

EQUITY OF REDEMPTION to ESCAPING GAS.

Cross-References.

Equity of Redemption—
Under chattel mortgage, see Chattel Mortgages, II, VI.
Under land mortgages, see Foreclosures; Mortgages.
Under tax sales, see Taxes, XI, B.
Equivocal Pleading—
See Equity, VII; Pleading, I.
Erasures—
As alterations of instruments, see Alteration.
Effect to raise presumption against spoliator, see Evidence, II.
Effect on admissibility of document, see Evidence, VIII, A.
Validity of execution of instrument erased after partial execution, see Execution of Instruments, I.
Of indorsements by indorsee of paper, see Negotiable Instruments, VII, XIII.
In wills, see Wills, IV, C.
Erection of Buildings—
See Buildings; Building Contracts.
Incroachment on highways, see Highways, XI.
Invasion of right of adjoiner, see Adjoining Owners.
As nuisance, see Nuisances.
Erosion and Accretion—
See Waters, IV, A; Boundaries §§ 13, 20, 23, 38.
Error—
Writ of error, see Appeal and Error; Indictment, XVI.
Saving question for review, see Saving Questions.
Grounds for reversal or new trial, see Harmless Error; New Trial, II; Appeal, XII, XIII; Certiorari; Indictment, XV, XVI.
Judicial error as denial of due process, see Constitutional Law § 133.
Cure of error, see Harmless Error; Indictment, XV.
Amendments of pleadings, see Equity, VII, E; Pleading, VI.
Grounds for collateral attack, see Judgments, VII.
Amendment of Indictments, see Indictment, I, D.
In arbitration or award, see Arbitration.
On reference, see Reference, V.
Error in sense of mistake, see Mistake.
Actionable error, see Negligence; Highways, XII; Officers, VI; Municipal Corporations, XI.
Errors in records as affecting notice, see Notice and Record of Title, II, B, C.
Escape and Rescue—
As crimes, see Crimes, II; Indictment.
Civil liability of sheriff, see Sheriffs, IV.
Liability on bail bonds or recognizances, see Arrest, X-XII; Civil Arrest, IV, V.
Escaping Gas—
See Gas; Explosives.

ESCHEATS.

TREATS of the devolution to the state of the properties of persons dying intestate without legal heirs or successors in estate, and of rights of the state in properties of extinct corporations.

Analysis.

§ 1. In general.
§ 2. Inquest and evidence.
§ 3. Waiver, estoppel or release of escheat.
§ 4. Use and disposal of escheated estates.
§ 5. Title under the state.
§ 6. Property of extinct corporation or trust.

§ 1. In general.

Rights and disabilities of aliens to inherit, see Aliens § 2.

Descent and distribution, see Descent.

Construction of wills in favor of complete testacy, see Wills, VI, E.

Statutory provision for escheats, see Comp. L. 1915, § 11795, ¶ 6.

Statutory procedure for ascertainment and protection of interest of state in escheats, see Comp. L. 1915, §§ 317-339.

Uncalled for deposits of money and securities with banks and rights of state therein, see Comp. L. 1915, §§ 321-327.

Indemnification of bank for escheated deposits when subsequently bank is required to pay same to depositor, see Comp. L. 1915, § 339.

¶ 1. The term "escheat" defined, and the leading features of the English law of escheats considered.—Crane v. Reeder, 21 Mich. 24.

¶ 2. The right of reversion or escheat, to which, at common law, prior to the statute quia emptores, the grantor of an estate in fee simple was entitled on default of heirs of his grantee, never existed in Michigan; here the escheat could only accrue to the sovereignty, the state.—Mandlebaum v. McDonell, 29 Mich. 78.

¶ 3. Estates, on the failure of heirs, must go where the law directs. During the period while Michigan was governed as a territory the local legislature had power to provide for such cases. The act of the governor and judges regulating descents, adopted July 27, 1818, to take effect Oct. 1, 1818 (R. L. 1820, p. 29, § 1), which prescribed that for want of heirs estates should accrue to the territory, was a valid exercise of such power; and congress having made no other provision, the act of June 15, 1836, for the admission of Michigan into the Union, and ratifying the proposed constitution of the state, which provides (Schedule, § 3) that all escheats accruing to the territory shall accrue to the state, establishes the title to all lands escheated before that time in the state.—Crane v. Reeder, 21 Mich. 24.

¶ 4. Comp. L. 1857, § 2812, subd. 9; How. St., § 5772a, subd. 9, providing that certain estates shall escheat to the state for the use of the primary school fund, contains nothing repugnant to the special act of 1846, for it contains no provision applicable to estates which had escheated before, nor any provision for the sale of such as had escheated or might thereafter escheat. Nor did the constitution of 1835 or the R. S. 1846 make any appropriation of the proceeds of the sale of escheated lands, and until the adoption of the constitution of 1850 the only appropriation of such proceeds is found in the special act of 1846. There is, therefore, no repugnancy between the general revision of 1846 and the special act, which was passed on the same day, but took effect nine months earlier.—Crane v. Reeder, 22 Mich. 322.

§ 2. Inquest and evidence.

Evidence as to title, see also post ¶ 10.

Presumption of death entitling state to administration to determine escheat, see Comp. L. 1915, § 329.

Rights and duties of attorney general on administration of estate without known heirs, see Jud. Act. chap. LIII, §§ 20, 21; Comp. L. 1915, §§ 13838, 13839.

¶ 5. Inquest, or other proceeding in the nature of office found, is not necessary to vest in the sovereignty the title to lands escheating for want of heirs. To prove a failure of heirs in case of escheat, it is not necessary to exhaust the possibilities; and in cases where aliens are disqualified, proof of alienage, the American marriage, and death without issue, is enough.—Crane v. Reeder, 21 Mich. 24.

§ 3. Waiver, estoppel or release of escheat.

¶ 6. The state, by causing lands to be assessed to their occupant for taxation, and by selling them for delinquent taxes, does not waive its right to insist upon an escheat or estop itself from claiming them as escheated.—Crane v. Reeder, 25 Mich. 303.

§ 4. Use and disposal of escheated estates.

Trustees authorized by statute to take charge and dispose of escheated property, see Comp. L. 1915, § 316.

¶ 7. The act of May 18, 1846 (How. St., § 411), "concerning the estates of intestates escheated to the state," conferred upon the trustees therein named the power of selling and disposing of, in such manner as they shall deem for the best interests of the state, all lands which had then escheated or should thereafter escheat to the state.—Crane v. Reeder, 22 Mich. 322.

¶ 8. As the general powers of the commissioner of the land office (Comp. L. 1857, § 2428; How. St., § 5227) to lease, sell and dispose of the public lands can only be exercised in the "manner directed by law," and as there is no provision of law for the sale of the escheated lands except that contained in the special act of 1846, which commits this power to the trustees named in it, the act of 1846 must be construed as creating an exception to the general act, and therefore the sole power of selling the escheated lands is in the trustees named in the act of 1846.—Crane v. Reeder, 22 Mich. 322.

¶ 9. The lands mentioned in Const., art. XIII, § 2, do not include escheated lands, and section 3, which provides that the interest on the clear proceeds of the sales of escheated lands shall be appropriated exclusively to the support of primary schools, is not so repugnant to the act of 1846, which directs that these proceeds shall be deposited in the treasury to the credit of the general fund, as to deprive the trustees named in the act of 1846 of the power to sell the land as therein provided.—Crane v. Reeder, 22 Mich. 322.

§ 5. Title under the state.

¶ 10. Where a plaintiff in ejectment claims under a deed from the state board of escheats, evidence is not admissible on behalf of defendants, claiming adversely thereto, to show that in the sale and conveyance by such board to the plaintiff a fraud was committed upon the state.—Crane v. Reeder, 25 Mich. 303.

§ 6. Property of extinct corporation or trust.

Disposal of property of association on dissolution, see Associations § 12.

Duration of estates in land by corporations for limited term, see Corporations § 82.
Succession to property of dissolved private corporation, see Corporations §§ 261, 262.

¶ 11. The doctrine of escheat to the state of a previously dissolved charitable corporation is expressly disparaged.—Hopkins v. Crossley, 138 Mich. 561.

¶ 12. An escheat to the state of a charitable fund can be asserted by the state only.—Hopkins v. Crossley, 138 Mich. 561.

ESCORTS.

Cross-References.

Escort of Passenger—
Duty and liability of carrier, see Carrier § 153.

ESCROWS.

TREATS of agreements for the delivery of instruments through the hand of a third person upon a condition or event to occur whereupon the instrument shall be given to the other party or returned to the executing party and become ineffectual. It excludes delivery upon condition without any intermediary and also delivery through a third hand without any condition, as to both which, see Execution of Instruments, III. It also excludes trusts of property or muniments and evidences of right (see Trusts).

Analysis.

§ 1. In general; agreements of escrow.
§ 2. Existence and terms of escrow.
§ 3. Requisites and sufficiency of deposited writing.
§ 4. Character and certainty of the conditions.
§ 5. Parties to escrow.
§ 6. Delivery in escrow and revocation or recall.
§ 7. Operation and effect, relation back.
§ 8. ——Fulfillment or performance of conditions.
§ 9. Completion or enforcement of delivery by depositary.
§ 10. Effect of delivery contrary to conditions.
§ 11. Liability of depositary or principals.

§ 1. **In general; agreements of escrow.**

Existence and terms of escrow, see post § 2.
Requisites and sufficiency of deposited writing, see post § 3.
Character and certainty of the conditions, see post § 4.
Parties to escrow, see post § 5.
Delivery in escrow and revocation or recall, see post § 6.
Operation and effect, see post § 7.
Fulfillment or performance of conditions, see post § 8.
Completion or enforcement of delivery by depositary, see post § 9.
Effect of delivery contrary to conditions, see post § 10.
Liability of depositary or principals, see post § 11.

[Note. The term "escrow" is used in two senses, viz., the technical sense of a delivery through an intermediary on a condition or contingency, failing which redelivery is to follow so that the instrument shall have no effect, and the colloquial sense, viz., a delivery to an intermediary to be held for a time or until a certain event, like the grantor's death, and then turned over to the grantee but without any condition to frustrate the effect of the delivery. The latter is a sort of postponed or suspended delivery and the cases of it are treated in Execution of Instruments, III.]

Execution and delivery of instruments in general, see Execution of Instruments.
Rights and liabilities of bailees for deposit and keeping, see Bailments § 12.
Bank as depositary of shares of stock, see Bailments ¶ 50.
Necessity of writing to alter conditions for delivery of deeds, see Frauds, Statute of, I, G, II, B.

¶ 1. A memorandum made by the custodian of a deed delivered in escrow as to the conditions is not conclusive as to the terms.—Francis v. Francis, 143 Mich. 300.

¶ 2. The condition upon which an escrow deed is to be delivered need not be in writing, but may rest in parol, or partly in writing and partly in parol.—Fulton v. Priddy, 123 Mich. 298.

¶ 3. Upon a question whether a village council had deposited certain bonds with a bank in escrow for delivery, or simply for safe keeping, testimony that the banker

later made a report orally to the council that the bonds had been delivered and that the council made no protest, is admissible.—Schmid v. Village of Frankfort, 131 Mich. 197.

§ 2. Existence and terms of escrow.

Character and certainty of terms and conditions of escrow, see post § 4.

Admissibility of parol evidence of terms of escrow agreement, see Evidence § 157.

Delivery of writing to depositary to deliver to grantee on death of grantor or fulfillment of condition certain, see Execution of Instruments, III.

Admissibility of parol proof of conditions of escrow, see Evidence § 119, ¶ 598a.

¶ 4. A bill to quiet title averring that a deed was deposited by a wife to be delivered after her death to her husband and to no other person, that both husband and wife planned and intended that the property should belong absolutely to her if she survived her husband is sufficient to support evidence of a deposit in escrow only to be delivered to the husband only in the event that he survived her.—Skinner v. Kelley, 138 Mich. 134.

¶ 5. In a suit to quiet title, testimony by the depositary of a deed that both husband and wife desired to fix it so that the deed by the wife to the husband would be delivered to him on her death and the wife to retain title if she survived the husband, that he drew the deed with that end in view and to make doubly sure he also drew a will for the wife at the same time and that without direction of either party he made a note on the deed that it was to be delivered to the husband on the wife's death, is sufficient to support a decree upholding the surviving wife's right to the land when taken in connection with evidence of a previous long and bitter dispute and lawsuit with a son over the same land.—Skinner v. Kelley, 138 Mich. 134.

¶ 6. Where a contract for leasing of premises for the lifetime of the lessor was made with a provision for a deed thereafter, and a warranty deed was delivered in escrow to a third person, to take effect at the death of the lessor, held that it was the intention of the lessor that if the lessees performed the contract and survived the lessor, they should, upon her death, have the fee of the land, she, in the meanwhile, to own and control the property herself and retain all interest therein except a determinable leasehold.—Pollock v. McCarty, 198 Mich. 66.

§ 3. Requisites and sufficiency of deposited writing.

General requisites of deeds and mortgages and other contracts, see Deeds; Mortgages; Contracts; Frauds, Statute of; Execution of Instruments.

¶ 7. A deed conveying a homestead to [illegible] son, signed by husband and wife and pro[illegible] viding that title should not pass until th[illegible] death of both grantors, and delivered in e[illegible] crow to the wife, which was delivered to th[illegible] son upon the death of the father, did no[illegible] operate as a conveyance of the homestea[illegible] during the life of the wife, under Cons[illegible] art. XVI, § 2, prohibiting alienation of [illegible] homestead without the signature of the wif[illegible] to the paper creating the alienation.—Francis v. Francis, 122 Mich. 10.

¶ 8. A deed, which after the erasure, by the consent of the grantor, of a provision for its recall, was redelivered in escrow, became effectual without either re-execution, witnessing or acknowledging.—Fulton v. Priddy, 123 Mich. 298.

§ 4. Character and certainty of the conditions.

Invalidity of deed where condition for delivery not fulfilled till after death of grantor, see post ¶ 24.

Fulfillment or performance of conditions, see post § 8.

¶ 9. Delivery of an assignment of a land contract into the custody of one of the partners in a firm to which it is assigned cannot be considered a delivery in escrow, to operate until the assignee shall execute a mortgage back, where both the assignment and the contract have first to be delivered to another party to the contract in order to obtain from him a deed on which to base the mortgage. The condition is inconsistent with the delivery in escrow.—Ortmann v. Plummer, 52 Mich. 76.

¶ 10. Deeds executed by a father and his wife in favor of their sons and deposited with a third party with verbal instructions to such depositary to keep the deeds until the death of the father and then to deliver them to such sons on condition that they execute a certain note payable to a daughter, which note the father placed with such depositary, were invalid and did not rest upon the doctrine of escrow; since the conditions to be performed by the grantees were only to be performed after the death of the grantor and to allow the performance of unwritten conditions to be postponed till after death would practically remove the restraint against parol and nuncupative wills.—Taft v. Taft, 59 Mich. 185.

¶ 11. A deed has no present effect and is a nullity though delivered to the grantee by the depositary after grantor's death, where its terms impose a condition of supporting the grantor during his life, failing which no title is to pass from grantor, and where he delivers it to a third person to be delivered to the grantee after grantor's death. The intent, being testamentary cannot be consummated by a deed.—Culy v. Upham, 135 Mich. 131.

§ 5. Parties to escrow.

Delivery of assignment to assignee as escrow, see ante ¶ 9.

¶ 12. A deed cannot be delivered to the grantee in escrow. If delivered to him, whatever be the form of words accompanying the delivery, it is absolute, and the deed takes effect at once.—Dawson v. Hall, 2 Mich. 390; In re Hicks, 20 Mich. 280, 288.

¶ 13. In an action by infants by their next friend involving the sufficiency of a delivery of a deed in escrow, testimony of the scrivener, to whom the alleged delivery was made, given in another action in which the next friend was a party, is inadmissible to show directions given at the time of delivery to him since the fact that the next friend, who is only a nominal party, was a party to that action cannot affect the rights of such minors.—Walterhouse v. Walterhouse, 130 Mich. 89.

§ 6. Delivery in escrow and revocation or recall.

¶ 14. Under a bill brought by complainant to compel her father to convey certain property, there was evidence that the defendant had deeded the property to complainant and placed the deed with a third person to be delivered to her upon his death, and that the defendant had obtained the deed from said third person and destroyed it. Complainant testified that after making the deed defendant informed her he had given her the property, and told her she might take possession and collect the rents. Complainant's husband and brother testified to conversations with the defendant in which the latter stated that he had deeded the property to the complainant. The will of defendant's wife introduced in evidence showed that no provision was made therein for complainant because of the deed of the said property to her. Defendant testified that he never intended to place the deed beyond his recall and that his instructions to the third person were that the latter should deliver it if it was still in his possession and not called for before defendant's death, which testimony was corroborated by defendant's son. Said third person refused to testify. Held, the evidence was sufficient to sustain a decree holding that defendant relinquished all control over the deed, and ordering him to convey the property to complainant.—Wagner v. Kirchberg, 166 Mich. 411.

§ 7. Operation and effect, relation back.

Revocation or recall, see ante § 6.

Fulfillment or performance of conditions, see post § 8.

Effect of delivery contrary to conditions, see post § 10.

Time when deeds become effective, see Deeds § 26.

¶ 15. The doctrine that the deed is effectual by relation is not universal but is restricted to the purpose of giving effect to the deed, which otherwise would fail because of the intervening death of the grantor or his incapacity before delivery out of the escrow.—Taft v. Taft, 59 Mich. 185.

¶ 16. A deed was deposited in escrow with a written agreement by the grantor that the sale might be abandoned if the title to be conveyed should not be found by the depositary to be a full title in fee simple and free from all encumbrances. Held, that this paper referred to the title as it stood when the arrangement in escrow was made, and did not bind the grantee to accept any future rectification.—Fletcher v. Moore, 42 Mich. 577.

¶ 17. Where the grantor delivers a deed to a third party with instructions that it is to be recorded on her death in case a certain settlement should be made, the delivery does not devest her of any present title.—Miller v. Bearslee, 175 Mich. 414.

¶ 18. Where a note by defendant to plaintiff and a deed by plaintiff to defendant were placed in escrow with a third party, the note to be delivered to plaintiff and the deed to defendant at the maturity of the note, held that such deed passed by such delivery in escrow beyond plaintiff's control and at the stipulated time became defendant's absolutely and vested title in him unconditionally.—Bishop v. Dodge, 196 Mich. 231.

¶ 19. Where a note by defendant to plaintiff and a deed by plaintiff to defendant were placed in escrow with a third party, the note to be delivered to plaintiff and the deed to defendant at the maturity of the note, held that such escrow was to be construed as a deed by plaintiff to defendant from its first delivery to the depositary as soon as the time expired and the condition was fulfilled under which it remained in escrow, during which its effect as a deed to defendant remained suspended.—Bishop v. Dodge, 196 Mich. 231.

¶ 20. Specific performance will not be awarded to a son under a deed to a homestead executed by his father and mother, which provided that title should not pass until the death of both grantors, and which was delivered in escrow to the mother, and by her delivered to the son upon the death of the father; as under the terms of the deed the title had not yet passed to complainant, the mother still being alive, and her homestead not having been alienated by her signature to the paper creating the alienation.—Francis v. Francis, 122 Mich. 10.

¶ 21. A deed was executed and left in escrow, to be delivered when the grantee had paid all of the claims against the es-

tate of a deceased person. Neither the conveyance nor the agreement to pay was intended to be absolute. Held, that creditors acquired no lien upon the land by virtue of such arrangement to secure the payment of their claims.—Marshall v. Blass, 82 Mich. 518.

§ 8. ——Fulfillment or performance of conditions.

Delivery of note on condition that collateral contract be not performed, effect of extension and subsequent default, see also Contracts ¶ 1091.

¶ 22. A condition that signed contracts should not be delivered until a committee investigated the reasonableness of the price of the plant contemplated, was sufficiently met by an investigation followed by an adverse report, though it was understood that in making the investigation they might go at the promisee's expense to two certain states for that purpose, which they forbore to do, making the investigation without such travel.—Davis v. Kneale, 103 Mich. 323.

¶ 23. A deed delivered to a third person to be by him delivered to the grantee upon the happening of some event, which may or may not happen, does not pass the title to the land until the event occurs, and then from that time only.—McIntyre v. McIntyre, 147 Mich. 365.

¶ 24. Where a deed and bill of sale were made and delivered in escrow and not to take effect until a mortgage conditioned for the payment of an annuity to the grantor should be executed, such deed was void where the mortgage was not executed until after the death of the grantor.—McIntyre v. McIntyre, 147 Mich. 365.

¶ 25. Under an escrow agreement providing for the delivery of two deeds to the purchaser of certain lots and two notes and mortgages to the seller upon the payment of a stated sum, the purchaser was entitled to a delivery of the deeds upon payment of such amount, notwithstanding the fact that the purchaser had for a time insisted that the notes and mortgages should not be delivered until the title was perfected.—Alexander v. Bernard, 136 Mich. 642.

¶ 26. Where a deed was delivered in escrow and the conditions upon which it was delivered fully performed by the grantee, the title vests in him.—Francis v. Francis, 143 Mich. 300.

¶ 27. Until delivery of the deed by the depositary in escrow, in conformity with the conditions of holding, no title passes to the grantee.—Taft v. Taft, 59 Mich. 185.

¶ 28. A deed was executed by two only of three grantors named therein and delivered to an agent of both parties, who was to obtain the signature of the third grantor and then deliver it to the grantee, and the grantee deposited the consideration with the agent to be delivered to the grantors when the transaction was completed. The third grantor refused to sign the deed. Held that there was no delivery to the grantee.—Wisconsin & M. R. Co. v. McKenna, 139 Mich. 43.

§ 9. Completion or enforcement of delivery by depositary.

Impropriety of mandamus to compel delivery of deed held by official but in unofficial capacity, see Mandamus, III, B.

¶ 29. A grantee should establish his right to a deed held in escrow by a bill in equity or other proper proceeding against the grantor. Mandamus to compel it is not a proper remedy.—People ex rel. Austin v. Curtis, 41 Mich. 723.

¶ 30. The passage of a resolution by a township board accepting a deed of a site for a town hall which the grantors had deposited with an attorney for delivery when a warrant for the purchase price was drawn and the money paid over, which warrant was afterwards ordered to be drawn in favor of the grantors, is not equivalent to such delivery, and mandamus will not lie at the instance of the grantors to compel the supervisor of the township to sign said warrant, there being no valid executory contract for such purchase.—Wilhelm v. Fagan, 90 Mich. 6.

§ 10. Effect of delivery contrary to conditions.

¶ 31. A grantor may show by parol that a deed though executed and acknowledged was left with a depositary not to be delivered until the happening of certain contingencies, and a delivery contrary to such agreement is not binding upon him.—Dikeman v. Arnold, 71 Mich. 656.

¶ 32. A mortgage left with a third party to be delivered, when a prior mortgage had been discharged and other conditions performed, was assigned by the mortgagee to the depositary before the conditions had been fulfilled, and was afterwards assigned to another party before it fell due. Held, that there had been no delivery.—Cressinger v. Dessenburg, 42 Mich. 580.

¶ 33. A deed deposited in escrow, but delivered without authority by the depositary to the grantee, who inequitably refuses to perform the condition, will be declared void.—Abbott v. Alsdorf, 19 Mich. 157.

¶ 34. Where a purchase-price mortgage has been executed and deposited in escrow to await completion of title in the mortgagor in fulfillment of an oral bargain by

the mortgagee to sell the land to the mortgagor, and the title to the land in the meantime passes into other hands, the delivery of the mortgage in violation of the arrangement will not operate to make it a valid mortgage binding upon the mortgagor.—Powell v. Conant, 33 Mich. 396.

¶ 35. A purchase-price mortgage executed and deposited in escrow to await completion of title in the mortgagor, in fulfillment of an oral bargain by the mortgagee to sell the land to him, is, at the time of execution, without foundation or consideration, and is subject to recall at all times before the condition is performed; and a delivery thereof in violation of the arrangement does not operate to make it a valid mortgage, binding on the mortgagor.—Powell v. Conant, 33 Mich. 396.

¶ 11. Liability of depositary or principals.

¶ 36. A bill in equity will not lie to recover damages for the wrongful act of a depositary in suppressing a conveyance, there being an adequate remedy at law.—Pulezer v. Kucharzyk, 116 Mich. 92.

¶ 37. Where two parties have mutually arranged that one shall deliver certain notes and ship certain property, paying the freight, to a third person, who shall deliver the same to another and take his receipt in full of all demands against the first, and afterwards deliver such receipt to him on his giving a like receipt back to him for the other party, the party who has delivered the notes, shipped the property and paid the freight, in full compliance with the agreement on his part, cannot be held responsible because the third person, mutually agreed upon, afterwards of his own motion refuses to turn over the same except upon compliance with a further demand which the agreement did not authorize.—Crippen v. Hope, 34 Mich. 55.

ESTABLISHED BUSINESS to ESTATES IN LAND.

Cross-References.

Established Business—
- Disturbance as element of damages, see Damages, I.
- Taking and compensation in eminent domain, see Eminent Domain, III, IV.

Establishment—
- Of boundaries, see Boundaries.
- Public highways, see Highways, II.
- Private roads, see Highways, XV.
- Of lost papers, see. Restoration of Papers.
- Of wills, see Wills, V.
- Of claims against estates of decedents, see Estates of Decedents, VI.

Estates in Land—
- The plan of this digest is to treat of the various estates and the estates of persons in a given status or relation in specific topics, denoting the name and kind of the estate or the status or relation.
- See Real Property; Property; Curtesy; Dower; Life Estates, Remainders and Reversions; Mortgages; Tenants in Common; Husband and Wife, II; Infants, III; Insane Persons, III.
- Devolution and Administration, see Descent; Estates of Decedents; Wills.
- Transfers and conveyances, see Deeds; Wills; Mortgages; Gifts; Trusts; Vendors and Purchasers; Perpetuities; Frauds, Statute of; Fraudulent Conveyances.
- Taxable estates, see Taxes, II.
- Vesting and future estates, see Real Property; Deeds, III; Wills, VI; Perpetuities; Life Estates, Remainders and Reversions.
- Entails, see Real Property.
- Incorporeal estates, see Easements.

ESTATES OF DECEDENTS.

TREATS of the administration and distribution of the estates of decedents excluding the substantive rights of descent and distribution under the laws of intestacy (see Descent and Distribution), the general law of wills and the probate and construction of wills and the substantive rights given by will (see Wills). The administration of estates of wards or of trust estates is treated in Guardianship; Insane Persons; Trusts. Administration of affairs of a partnership by the surviving or remaining partner is treated in Partnership, VII. For other inclusions or exclusions see analytical index and cross-references in the body of this topic.

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II. JURISDICTION AND PROCEDURE IN GENERAL (§§ 7-17).
III. ADMINISTRATORS AND EXECUTORS AND THEIR LETTERS (§§ 18-45).
IV. STATUS AND AUTHORITY OF REPRESENTATIVES, AND TITLES IN THE ESTATE (§§ 46-66).
V. PROPERTY AND ASSETS (§§ 67-139).
VI. DEBTS AND LIABILITIES OF DECEDENT AND CLAIMS AGAINST ESTATE (§§ 140-221).
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Analysis and Index to Sections.

VIII. LIABILITY OF HEIRS, DEVISEES AND DISTRIBUTEES FOR DEBTS (§§ 262-263).
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X. RIGHTS AND LIABILITIES OF REPRESENTATIVES AND DISTRIBUTEES IN THE ESTATE OR TOWARDS EACH OTHER (§§ 269-304).
XI. ACTIONS AND SUITS; ARBITRATIONS; COSTS (§§ 305-331).
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XIII. SHARES IN THE ESTATE; DISTRIBUTION, PAYMENT AND DELIVERY (§§ 356-382).
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Right of widow to hold decedent's land as against creditors without administration, see Descent ¶ 54.
Right to relief in equity from execution of trust created to carry out unfair settlement among heirs, see also Equity ¶ 54.

¶ 1. It is the right of all parties interested in an estate to settle it up by voluntary proceedings if they agree to do so; and they may do this after an administrator is appointed as well as before.—Brown v. Forsche, 43 Mich. 492.

¶ 2. The amicable settlement of disputed matters and controversies, relating to estates of deceased persons, are favored by the courts and contracts looking thereto are valid.—Layer v. Layer, 184 Mich. 663.

¶ 3. Where the payee of a note dies intestate and no administrator is appointed, those who would be the distributees of the estate may assign the equitable title to the note, and if the maker thereof secures it by giving a chattel mortgage in good faith to the assignee, his creditors cannot complain.—Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

¶ 4. The provision in a settlement for an additional allowance in case her "actual necessities" should require it, has reference to the necessities for support and comfort provided for in the will, and does not invalidate the agreement as depriving the legatee and widow of the rights given her by the will.—Hull v. Hull, 149 Mich. 500.

¶ 5. On the discovery of additional assets after the closing of an estate and the satisfaction of the claims of creditors, it is not necessary to have the administrator reappointed, where the heirs are all of full age.—Powell v. Pennock, 181 Mich. 588.

¶ 6. A will provided that the testator's widow should receive the entire income of the estate, and such further sum from the principal as should be agreed upon by the executors or ordered by the court as her necessities might require, and appointed the widow and a nephew as executrix and executor. By a contract consented to in writing by all others interested in the estate, it was agreed that the executrix should have a stipulated sum annually and an additional allowance if her necessities required it in lieu of the provision for her support contained in the will, and that the executor should have the entire management of the estate. Held, that the contract was a fair one, and it was competent for the parties to enter into it, the object being to settle differences injurious to the estate.—Hull v. Hull, 149 Mich. 500.

¶ 7. B. died intestate, being possessed of personal property of great value. His wife survived him one year, and upon her death left her share of the estate to be divided among several legatees. A contest over the will was compromised, the will being set aside, and the manner of distribution of the estate agreed upon. B., twenty-one years before his death, had taken a lease of certain real estate for 100 years. The lessor's estate agreed to sell its rights under the lease and the fee of the land for a lump sum. The probate judge, upon application of the administrator of B.'s estate, authorized the purchase, claiming power to enter the order under How. St., § 5932, passed after the widow's death, and which provides that, in case any continuing claim shall be made against the estate of a deceased person for rent under a lease, the administrator may by and with the consent of the probate judge, compromise the claim, and may, in effecting the compromise, if necessary and if so ordered by the judge of probate, purchase the real estate covered by the lease, in which case the property so purchased shall be disposed of and distributed as personalty. Held, that the enactment and application of the statute were remedial and did not deprive the heirs of the wife of B. of rights vested under their agreement, even though the agreement contemplated a conversion into money of all personal property belonging to the estate.—In re Beecher's Estate, 113 Mich. 667.

§ 2. ——By heirs in absence of creditors.

¶ 8. Where no creditors appear, the heirs and legatees may divide the property as they see fit, regardless of decedent's will.—Letts v. Letts, 73 Mich. 138.

¶ 9. Where there are no creditors the law favors the collection and distribution of the personal estate of a decedent by the heirs or legatees without the intervention of an administrator, if the heirs or legatees can agree upon and carry such a distribution into effect.—Brobst v. Brobst, 190 Mich. 63.

¶ 10. Where there are no claims for adjustment an estate may be settled by the heirs without the intervention of the probate court.—Powell v. Pennock, 181 Mich. 588.

¶ 11. Where an estate is not in debt, and the heirs at law, being of full age, carry out a settlement upon which they have all agreed, and by which they receive all that they could by virtue of an administration, they are estopped from disturbing it.—Needham v. Gillett, 39 Mich. 574.

¶ 12. When there are no creditors, the heirs or legatees may collect the personal estate and make such distribution among themselves as they may agree to and carry into effect without the intervention of administrators and regardless of the provisions of decedent's will, if he made one.—Foote v. Foote, 61 Mich. 181.

§ 3. ——Effect on pending or later administration.

Propriety of reopening estate and requiring accounting after settlement by agreements, see post ¶ 1132.

¶ 13. An administrator duly appointed without appeal, cannot be denied the uncollected choses in action yet belonging to the estate, upon the ground that the heirs have agreed that there should be no administration upon the estate.—Ormsbee v. Piper, 123 Mich. 265.

¶ 14. The persons interested in property left under a will did not probate the same at the testator's death, but distributed the same by private agreement. The defendant, son of the testator, took possession of the personal property and used the same. Thirteen years after the testator's death, his daughter, who had no interest in the personal property and none under the will, had plaintiff administrator appointed for the sole purpose of bringing suit in trover for the conversion of the personalty. Held, plaintiff could not recover.—Diem v. Drogmiller, 158 Mich. 380.

§ 4. ——Conclusiveness, acquiescence or delay.

¶ 15. Where a voluntary division between the heirs of an intestate whose estate was not administered has been acquiesced in and its benefits received for more than twenty years, it cannot be disturbed or impeached by a party thereto.—Mitchell v. Mitchell, 68 Mich. 106.

¶ 16. Acquiescence by adult children for fourteen years in their father's ante-mortem disposition of his estate bars administration for the purpose of contesting such disposition.—Beardslee v. Reeves, 76 Mich. 661.

¶ 17. One entitled to claim by intestacy and to contest a will, but who is provided for in a family agreement made among legatees for the purpose of disposing of the residuum which has lapsed into intestacy, is bound by the entirety of it if he accepts its provisions, and cannot contest the will which it affirms.—Wilkins v. Hukill, 115 Mich. 594.

¶ 18. Heirs or legatees who have collected the personal estate of a decedent and have effected a distribution thereof by agreement will be bound thereby, in the absence of fraud or mistake, and, where there are no creditors, will be estopped from attempting to disturb such distribution by asking for the appointment of an administrator.—Brobst v. Brobst, 190 Mich. 63.

¶ 19. On a bill by an executrix and legatee against her coexecutor to set aside a contract between them by which the entire management of the estate was to be given to defendant and complainant was to accept a specified sum per year in lieu of the provisions for her support contained in the will, it was held that complainant had failed entirely to support her contention that she was deceived and misled or did not understand this contract which she signed, the agreement having been made to end disagreements as to management of the estate which were injurious to all concerned.—Hull v. Hull, 149 Mich. 500.

§ 5. Special administration.

Petition for special letters, see post § 26.

Authority and status of special administrators, see post § 49.

Authority and right of special administrator to collect or sue for assets, see post § 85.

Administration de bonis non, see post § 6.

Necessity of special administration for hearing of claims during pendency of appeal from appointment of representative, see post ¶ 539.

Appointment of special administrator, see Jud. Act, chap. LIII, § 4, Comp. L. 1915, § 13822.

¶ 20. Under How. St., § 5851, the probate court has almost absolute discretion as to whether a special administrator shall be appointed in any case.—Grece v. Helm, 91 Mich. 450.

¶ 21. When an appeal has been taken from the appointment of an administrator, the probate court should, on application, appoint a special administrator.—People ex rel. Palms v. Wayne Probate Judge, 39 Mich. 302.

¶ 22. A special administrator may be appointed though the only property of the estate is a litigated claim, where an immediate settlement can be made at once and where there must be delay before a general administrator can be appointed.—Grece v. Helm, 91 Mich. 450.

§ 6. Administration de bonis non.

See also post ¶ 244.

Petition for letters de bonis non, see post § 26.

Status and authority of administrator de bonis non, see post § 49.

Right and authority of administrator de bonis non to collect or sue for assets, see post § 85.

Right of legatee to appointment of administrator de bonis non, see post ¶ 1209.

¶ 23. On the resignation of an administrator the probate court may, under express provisions of § 9334, Comp. Laws 1897, How. St., 2nd Ed., § 11050, where the necessity of the case demands it, appoint an administrator de bonis non without the filing of a final account by the original administrator.—In re Thompson's Estate, 183 Mich. 618.

¶ 24. Section 9333, Comp. Laws 1897, How. St., 2nd Ed., § 11049, providing for an accounting does not prevent the appointment by the probate court on the resignation of an administrator of an administrator de bonis non under section 9334 without the filing of the final account of the original administrator, when the necessities of the case demand it.—In re Thompson's Estate, 183 Mich. 618.

¶ 25. Where an executor refused to bring suit against a municipality for causing his testator's death by reason of a defective bridge, but closed his administration and obtained his discharge, held that, under How. St., § 5843, letters of administration were properly granted to the widow to permit her to prosecute the action.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 26. Where an executor's final account showing what was left of the estate after paying the debts and certain legacies has been allowed, but no order made discharging the officer and on his death, there are legacies still unpaid and both real and personal estate to be administered, the residuary legatee is entitled to have an administrator de bonis non appointed.—Buss v. Buss' Estate, 75 Mich. 163.

¶ 27. Comp. L. 1897, § 9334, providing for the appointment of an administrator de bonis non covers the case of the discharge of an executrix before a legacy is paid and without notice to the legatee.—Cole v. Shaw, 134 Mich. 499.

¶ 28. The executor of an administrator is not entitled ex officio to succeed his intestate in his trust as administrator, but the trust is committed to an administrator de bonis non.—Perrin v. Calhoun Circuit Judge, 49 Mich. 342.

¶ 29. Under Comp. L. 1897, § 9320, providing that the executor of an executor shall not as such have any authority to administer the estate of the first testator, but that on the death of the only surviving executor letters de bonis non with the will annexed may be granted to such person as the probate court may judge proper, the executor of an executor has no duty or office representatively in the settlement of the first estate.—Robbins v. Burridge, 128 Mich. 25.

II. JURISDICTION AND PROCEDURE IN GENERAL.

§ 7. Nature and requisites of procedure in general.

Nature of procedure, see also post ¶ 38.

Procedure for appointment of representative, see post, III, B.

On qualifying as representative, see post, III, C.

On removal of representative, see post §§ 42-45.

Procedure to enforce collection of assets, see post, V, B.

Procedure for presentment, establishment and enforcement of claims, see post, VI, C.

Due process in administration proceedings, see Constitutional Law § 145.

¶ 30. The proceedings to administer an estate are essentially proceedings in rem.—Michigan Home Missionary Society v. Corning, 164 Mich. 395.

¶ 31. Proceedings in the probate court in the matter of estates of deceased persons are proceedings in rem, or proceedings to determine the status of the estate, and not proceedings inter partes between the various claimants.—In re Brown's Estate, 198 Mich. 544.

¶ 32. The probate of a will in another state is sufficient to entitle a devisee to be heard in Michigan in any administration proceedings which are essentially in rem and without parties.—In re Mower's Appeal, 48 Mich. 441.

§ 8. Jurisdictional facts of death, domicile and assets.

See also post ¶ 103.

Sufficiency of jurisdictional facts in petition, see post § 25.

Relative jurisdiction of probate and circuit courts, see post § 9.

Persons entitled to question proceedings for want of jurisdiction, see post § 33.

Facts and proof of domicile in general, see Domicile.

Presumptions and proof of death of person absent and not heard from, see Death and Survivorship.

Evidence as to domicile of testator dying abroad, see Domicile § 7.

¶ 33. Where foreclosure proceedings were taken by foreign executors to whom letters testamentary had been issued in Michigan, and the proceedings were taken under a stip-

ulation by the parties to the suit that the executors were duly appointed and acted as such, and the probate records showed nothing to the contrary, it was assumed that the appointment referred to in the stipulation meant the appointment in Michigan, and that such a showing was made to the court, by sworn petition or by oral proof, that the estate had such property interests in the county as would warrant the issue of the letters.—Alexander v. Rice, 52 Mich. 451.

§ 9. Relative jurisdiction of probate and circuit courts.

Equity jurisdiction to protect or conserve estate, see post § 10.

Equitable rights, trusts and remedies collateral or incident to administration, see post § 11.

Receivership, see post § 12.

Accounting and distribution, see post § 13.

Jurisdiction and discretion of probate court for appointment of special administrators, see ante § 5.

Jurisdiction for removal of representatives, see post § 39.

Original jurisdiction and appellate hearings on claims, see post § 197.

Jurisdiction and discretion of probate court to extend time for presentment of claims, see also post ¶ 521.

Jurisdiction of probate court for distribution of estate, see post §§ 371-373.

Jurisdiction and discretion of probate court to determine amount of widow's allowance, see also post ¶ 338.

Jurisdiction and discretion of probate court to determine time for and duration of widow's allowance, see post ¶¶ 355, 356.

Jurisdiction of probate court to determine fact of marriage where made issue on widow's allowance, see also post ¶ 364.

Jurisdiction and discretion of probate court to modify or rescind order for widow's allowance, see also post ¶¶ 368-370.

Jurisdiction and discretion of probate court over representative's bond, see post ¶ 139.

Jurisdiction of probate court in general, see Probate Courts, I.

Jurisdiction of probate courts, see Probate Courts, I.

Conflicting federal suit to reach assets, see also Courts ¶ 351.

¶ 34. The probate court has exclusive jurisdiction of all matters relative to the settlement of estates of deceased persons except in cases where its remedies are inadequate.—Brooks v. Hargrave, 179 Mich. 136.

¶ 35. Courts of probate have exclusive jurisdiction of the settlement of estates of decedents, except where their remedies are inadequate, or the interposition of equity is necessary for some auxiliary purpose.—Powell v. Pennock, 181 Mich. 588.

¶ 36. The probate court has original and exclusive jurisdiction in the administration of estates, and it alone can order sums to be paid out of the estate needed to carry on a will contest. The circuit court in such contest cannot.—Goff v. Cass Circuit Judge, 152 Mich. 121.

¶ 37. The probate court has exclusive jurisdiction over the settlement of the estates of deceased persons, except where its remedies are inadequate or the interposition of equity is necessary for some auxiliary purpose.—Davis v. McCamman, 165 Mich. 287.

¶ 38. The probate court is the only court that has any such jurisdiction in rem as will enable it to reach persons out of the state, or call in all creditors; the circuit court has no power in equity to act as a substitute for the probate court in this way, and, unless it has authority to deal with a case through the parties actually before it, cannot deal at all with it.—Dickinson v. Seaver, 44 Mich. 624.

¶ 39. Under our probate system a very large portion of the old equity jurisdiction is vested in the courts of probate; and it seems that the court of chancery has jurisdiction in those cases only in which an adequate remedy does not exist in the probate court.—People ex rel. Campau v. Wayne Circuit Court, 11 Mich. 393.

§ 10. ——Equity jurisdiction to protect or conserve estate.

Equity jurisdiction in distribution, see post § 381.

¶ 40. Estates of deceased persons are not settled in equity under our laws.—Holbrook v. Campau, 22 Mich. 288.

¶ 41. In the settlement of estates, equity will act only where the remedy at law is clearly inadequate.—Graham v. Graham, 171 Mich. 307.

¶ 42. It is within the jurisdiction of equity to enjoin an attempted sale by executors under order of probate court contrary to the requirements of law.—Ireland v. Miller, 71 Mich. 119.

¶ 43. Equity may assume jurisdiction when it is necessary to protect funds pending proceedings in a probate court.—Ewing v. Lamphere, 147 Mich. 659.

¶ 44. An order of a circuit court of chancery restraining executors from turning over to a legatee any money or property belonging to such legatee until a further order of the court and ordering such legatee to pay unpaid alimony to complainant does not constitute an incroachment upon the jurisdiction of the probate court.—Craig v. Wayne Circuit Judge, 192 Mich. 106.

¶ 45. Complainants cannot by a bill in equity retry issues, which were before tried in the probate court and determined against them, and which relate to matters within the jurisdiction of said court, since equity has no power of interference except where by fraud or mistake unusual conditions preclude an adequate remedy in the probate court in the first instance.—Davis v. McCamman, 168 Mich. 587.

§ 11. ——Equitable rights, trusts and remedies collateral or incident to administration.

¶ 46. Whether specific performance or other relief should be granted against a wife who, having agreed to accept, and having accepted, a conveyance, a mortgage, and a bequest from her husband in lieu of dower, etc., asserts claims against his estate, is within the jurisdiction of a court of chancery, not of the probate court.—Dakin v. Dakin, 97 Mich. 284.

¶ 47. The probate court cannot require an executor to advance money from a fund for accumulation, although the infant distributees are in need. Any relief in the premises must be sought in equity.—Knorr v. Millard, 52 Mich. 542.

¶ 48. The circuit court in chancery of the county in which land covered by a trust deed is located, and where reside the complainants to a bill against the trustee for an accounting, and against his grantee for a cancellation of a deed to such land, to establish the deficiency after determination of the value of such land, to determine the purpose of the giving of a note alleged to have been signed by a deceased person as additional security for the liabilities of the debtor, and to obtain a lien upon the property of such deceased person, in case of a deficiency, has exclusive jurisdiction, although a claim for the amount of such note was filed in the probate court of the county in which the estate of such deceased person was being administered.—Buck v. Lockwood, 193 Mich. 242.

¶ 49. A special administrator, who has filed a bill to revive and to complete the enforcement of a decree under which a fund was recovered by his predecessor, stands by the act of filing his bill in the relation of an intervening litigant in the original suit and subject to the jurisdiction of the chancery court; and hence such court has power on a petition to compel him to repay into court such fund improvidently paid out and in his keeping, although his bill of revivor has not yet progressed to the point where he stands as a party admitted to enforce the decree as revived against the other parties.—Dennis v. Kent Circuit Judge, 42 Mich. 249.

¶ 50. W., who was administrator of the estate of his deceased daughter, and her only heir at law, and also administrator de bonis non of the estate of a former husband of hers, upon which the said daughter had administered in her lifetime, filed a bill against her surviving husband, the defendant, setting forth that certain property, which had come into the hands of the defendant, in a piece of real estate the title to which had been taken in his name, really belonged to the wife. The defendant claimed most of the property as a gift from his wife. Held, that the court could only force the defendant, if he failed to prove the gift alleged in his answer, to account with complainant and place the property in his hands, without deciding the amount belonging to each estate or which must remain for distribution, etc., and that all such subsequent matters were within the proper jurisdiction of the probate court.—Wales v. Newbould, 9 Mich. 45.

§ 12. ——Receivership.

Suit against residuary legatee for appointment of receiver, see also post ¶ 1062.

¶ 51. A bill filed by the sister of an intestate, claiming as a distributee of personalty and not as heir, alleging fraud in the appointment of a guardian and administrator for the decedent, and asking the appointment of a receiver, is demurrable; proceedings must be had in the probate court.—Kellogg v. Aldrich, 39 Mich. 576.

¶ 52. A bill for the appointment of a receiver to take charge of the assets of an estate was denied, where it appeared that under the terms of the will executor was given full power to collect the rents and profits for the benefit of the widow who was given a life estate in the properties of the testator and was not a complainant.—Pitcher v. Douglas, 37 Mich. 339.

§ 13. ——Accounting and distribution.

Accounting and settlement of estates, see post, XII.

Jurisdiction and procedure in general for distribution, see post §§ 371-373.

Jurisdiction for statement of account, see also post § 337.

¶ 53. The probate court has jurisdiction of an action against an executor for an accounting.—Wessborg v. Merrill, 195 Mich. 556.

¶ 54. Proceedings to compel executor to account must be instituted in the probate court.—Pitcher v. Douglas, 37 Mich. 339.

¶ 55. Proceedings to compel an executor to file an account should be instituted in the probate court and not in chancery.—Pitcher v. Douglas, 37 Mich. 339.

¶ 56. The probate court has sole jurisdiction of a suit for an accounting between the estates of a husband and wife, who were

grantors of land under a conditional sale contract, to determine how much one estate is indebted to the other for moneys collected on such contract during the lives of the parties.—Flammer v. Cullen, 194 Mich. 585.

¶ 57. It is only when other interests than those of the estate or the executor are involved that chancery assumes jurisdiction of an accounting, and then rather because of the complexity of the parties than because of the complexity of the accounting.—Brooks v. Hargrave, 179 Mich. 136.

¶ 58. After the closing of an estate, the receipt of their distributed shares by the several heirs and the discharge of the administrator with their consent, chancery has jurisdiction to require a widow to account for money fraudulently obtained by her from her husband in his lifetime, and secretly withheld from his administrator.—Powell v. Pennock, 181 Mich. 588.

¶ 59. Jurisdiction to allow the final account of executors and to close an estate is not derived from Act No. 253, Pub. Acts 1899, relating to testamentary trustees.—Michigan Home Missionary Society v. Corning, 164 Mich. 395.

¶ 60. The rules which give chancery courts jurisdiction in matters of accounting as against courts of law are not applicable to the probate courts.—Brooks v. Hargrave, 179 Mich. 136.

¶ 61. The probate court having assumed jurisdiction by admitting a will to probate and appointing an executor, such jurisdiction is not lost until the estate is finally closed, and hence a bill will not lie in equity to compel the executor to account.—Brooks v. Hargrave, 179 Mich. 136.

§ 14. Place or county for administration or accounting.

Proper forum for accounting, see also post ¶ 76.
Venue in general, see Venue, I.
Court of what county to have jurisdiction over estate, see Jud. Act, chap. LIII, § 1, Comp. L. 1915, § 13819.

¶ 62. Under Comp. L. 1897, § 9323, How. 2nd Ed., § 11039, providing that when any person dies intestate and is a resident of the state letters of administration shall be granted to the probate court of the county of which he is resident and the administration first legally granted shall extend to all the estate of deceased in the state and shall exclude the jurisdiction of every other county, and Comp. L. 1897, § 9340, How. 2nd Ed., § 11056, relating to the giving of notice of application for appointment of an administrator for an intestate estate by the probate judge, and Comp. L. 1897, § 657, How. 2nd Ed., § 12105, providing that the "jurisdiction assumed in any case by a judge of probate, so far as it depends upon the place of residence of any person, or the location of his estate, shall not be contested in any suit or proceeding whatever, except in an appeal from the probate court in the original case, or when the want of jurisdiction appears on the same record," and Comp. L. 1897, § 658, How. 2nd Ed., § 12106, providing that the probate court of one of two counties first taking cognizance of a case of which they both have jurisdiction shall retain jurisdiction throughout the proceedings, and Comp. L. 1897, § 9336, How. 2nd Ed., § 11052, providing that if, after the granting of letters of administration by any probate court on the estate of an intestate a will is duly approved and allowed by such court, the administration shall be revoked, the probate court of a county first obtaining jurisdiction of the administration of an estate will retain such jurisdiction, even though a will is subsequently found and proceedings for probate are commenced in another county.—In re Carney's Estate, 199 Mich. 663.

¶ 63. The place for final accounting and settlement of an estate is in the forum of original administration.—In re Steven's Estate, 171 Mich. 486.

§ 15. Domiciliary, ancillary and foreign administration.

Wills probated abroad and foreign wills, see post § 16.
Property beyond state, see post § 17.
Authority and status of foreign representatives, see post § 51.
Recognition and title of foreign representatives, see post §§ 64, 65.
Remission of ancillary estate to domicile, see post § 374.
Compensation of foreign and domiciliary representatives, see post § 293.
Force and effect of foreign judgments in actions wherein personal representatives were parties, see Foreign Judgments, II.
Jurisdiction to annul or revise action of foreign court of probate, see also Courts ¶ 142.

¶ 64. Where certain tribunals have acquired jurisdiction over an estate and its representative within their territory, the representative is bound to account to them only for all assets, and the courts of other states cannot interfere. Otherwise intervening claimants within different foreign jurisdictions may claim through different courts the right of controlling the management of the estate.—Woodruff v. Young, 43 Mich. 548.

¶ 65. A suit in equity for a general accounting against the estate of a deceased person must be brought in the forum of the home administration rather than that of an ancillary one.—Spoon v. Baxter, 31 Mich. 279.

¶ 66. A foreign executor suing in Michigan in his own name on a note belonging to

the estate and payable to bearer is accountable in the court having jurisdiction of the estate for the judgment recovered.—Knapp v. Lee, 42 Mich. 41.

¶ 67. While personal property accompanies the person of the owner, and is to be disposed of on his death according to the law of his domicile, it may still be necessary to have distinct proceedings in administration if the property is in one jurisdiction and the domicile in another.—Reynolds v. McMullen, 55 Mich. 568.

¶ 68. A bill to compel the payment of the purchase moneys on contracts for the sale and conveyance of lands filed by persons claiming as assignees of foreign executors is not demurrable on the ground that the will was probated in another state, if it appears that letters of administration based on the foreign probate have also been issued in the state where suit is brought.—Day v. Cole, 56 Mich. 294.

¶ 69. Where assets within the state are justly subject to a claim which arises within the state, the claim may be litigated in ancillary proceedings within the state, and need not be presented in the courts in which principal proceedings for administration are had.—In re Colburn's Estate, 153 Mich. 208; More v. Luther, Id.

¶ 70. Where there are two administrations of a single estate, one in the place of the domicile of the testator or intestate, and the other in a foreign jurisdiction, the question whether the courts of the latter will decree distribution of the assets collected under the ancillary administration or remit them to the jurisdiction of the domicile, is not one of jurisdiction but of judicial discretion, dependent upon the circumstances of the particular case.—In re Steven's Estate, 171 Mich. 486.

¶ 71. In an ancillary administration in Michigan, the trial court found that the testatrix had her domicile in another state and died there, where her will was admitted to probate. Held, the contention that testatrix had her domicile in Michigan could not be litigated in the ancillary proceeding.—In re Steven's Estate, 171 Mich. 486.

¶ 72. Where ancillary administration is taken out in Michigan upon an estate left by a person dying and domiciled in Florida, the executors are not estopped from asking that the funds be transmitted to the Florida court by the fact that they asked for an order apportioning, assigning and distributing in Michigan the residue of the estate.—In re Steven's Estate, 171 Mich. 486.

¶ 73. Where there has been no application as respects the property of an intestate situated in the state for administration ancillary to administration proceedings in a foreign state and there has been no application to the probate court by the foreign administrator to direct the local administrator to turn over funds in his hands, a court of equity will not interfere with the local probate proceedings or order distribution of the funds in the hands of the local administrator according to the laws of the foreign state, especially when it is denied by complainants, the foreign administrators and an heir only under the laws of the foreign state, that the court of equity can determine, for itself, where the intestate was domiciled, and where the estate in the foreign state cannot be, by its order, brought into the state of Michigan for final distribution, if the facts require it.—Colvin v. Jones, 194 Mich. 670.

§ 16. ——Wills probated abroad and foreign wills.

See also post ¶ 1169.

Disposal of assets of foreign estates, see post § 370.

Necessity for bond on probate of foreign will, see post ¶ 135.

¶ 74. Under our probate system estates must be settled and claims proved in the probate court. Whatever may be done with the final balance where a will has been previously probated at a foreign domicile, the estate must be administered under the probate laws of the state to the time of distribution.—Dickinson v. Seaver, 44 Mich. 624.

§ 17. ——Property beyond state.

Dealings of representative with lands out of state, see also post § 274.

Effect of foreign judgment on property of estate within jurisdiction of court rendering it, see Foreign Judgments, II.

¶ 75. Letters of administration can have no such extraterritorial force as to give Michigan administrators control over Illinois lands.—Sheldon v. Rice, 30 Mich. 296.

¶ 76. A general accounting of matters extending over more than one state should be in the forum of the home administration rather than in that of an ancillary one. Heirs at law cannot be compelled to litigate here for land abroad.—Spoon v. Baxter, 31 Mich. 279.

¶ 77. A bill that makes an ancillary administrator alone a defendant will not lie to enforce an accounting as to lands in another state which are within the jurisdiction of the home administration; the interests involved would be such as affect heirs at law, who cannot be compelled to litigate here for lands abroad.—Spoon v. Baxter, 31 Mich. 279.

¶ 78. A court of equity will not pass upon the validity of trusts in a will or upon the distribution of a possible residue when the property involved consists of real estate lo-

cated in another state, and is not within the control of the executors asking for instructions.—Fuller v. McKim, 187 Mich. 667.

III. ADMINISTRATORS AND EXECUTORS AND THEIR LETTERS.

A. NOMINATION AND SELECTION.

§ 18. In general.

Persons entitled to administer, see post §§ 19, 20.

Nomination by testator, see post §§ 21-23.

Persons entitled to petition or be heard, see post § 24.

Petition and procedure thereon, see post §§ 25-30.

Appointing order and letters, see post §§ 31-33.

Validity of Federal Reserve Act empowering national bank to be executor, see Banking § 90, ¶ 284.

§ 19. Persons entitled and priorities in right.

Grantee of person primarily entitled, see post § 20.

Right of widow to appointment, see also post ¶ 146.

Who entitled to letters of administration, see Jud. Act, chap. LIII, § 2, Comp. L. 1915, § 13820.

¶ 79. The widow of one dying intestate, leaving an estate in the state of Michigan to be administered, may be appointed, or may nominate, the administrator of the estate.—In re Dettman's Estate, 195 Mich. 231.

¶ 80. Where an executor refused to bring suit against a municipality for causing his testator's death by reason of a defective bridge, but closed his administration and obtained his discharge, the right of action remains as a chose in action unadministered and under How. St., § 5843, letters of administration were properly granted to the widow to permit her to prosecute the action.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 81. Where the statute distributes equally between the father and the mother damages for a child's negligent killing, the mother has an equal interest in administration with the father, and may be appointed administratrix of the child's estate.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 20.

¶ 82. Where the mother of an incompetent would have under the statute been entitled to letters on the incompetent's estate if application had been made within thirty days, but she did not do so, and thereafter died and no one made application for eight years, a brother beneficially interested may apply and be appointed as against objection of his sisters contending that the administrator of the mother should be appointed, there being no creditors claiming the right.—In re Sprague's Estate, 125 Mich. 357.

¶ 83. A creditor of a decedent can take out letters of administration upon his estate if others do not do so.—Aldrich v. Annin, 54 Mich. 230.

¶ 84. Administration, when letters are issued on petition to the court, can only be granted to, or on application by, one or more of the persons specified in Comp. L., § 4379 (How. St., § 5849), viz., creditors and distributees; and as between these, only in this order, and under the contingency specified, of their being competent or willing to take the trust.—Breen v. Pangborn, 51 Mich. 29.

¶ 85. A widow failed for 50 days after the death of her husband to apply for administration of his estate, and plaintiff claiming to be a creditor applied to be appointed. The widow opposed his appointment claiming that he was not a creditor and there was much feeling between them, and the probate judge refused to appoint plaintiff but appointed another party. Upon appeal, held, that the probate judge was justified in his action and in finding that plaintiff was not a competent and suitable person to administer the estate. (Comp. L. 1897, § 9324).—Carpenter v. Wood, 131 Mich. 314.

¶ 86. Under a statute providing that administration of the estate of a person dying intestate shall be granted, on application, first, to the widow or next of kin, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust, and then, if the widow or next of kin, or the person selected by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect for thirty days after the death of intestate to apply for administration, or to request that administration be granted to some other person the same may be granted to creditors, if an application for the appointment of an administrator is made by the next of kin within the thirty-day period he must be appointed, where he is a suitable and competent person.—Estate of Campau, How. N. P. 149.

§ 20. ——Grantee of person primarily entitled.

¶ 87. Under Comp. L. 1897, § 9324 providing that administration of the estate of a deceased person shall be granted "First to the widow, husband, or next of kin, or a grantee of the interest of one or more of them," a trustee in bankruptcy of a daughter of the decedent may be appointed administrator against the objection of the husband of deceased, since such trustee comes within the meaning of "grantee" as used in the statute.—Osmun v. Galbraith, 131 Mich. 577.

§ 21. Nomination by testator.

Delegation of authority by testator, see post § 22.

Disqualification of nominee, see post § 23.

Directions, designations and nominations in will and construction of terms of will respecting persons to administer, see Wills, VI, F.

¶ 88. In the matter of selecting a person to administer there is wide distinction between administrators and executors, since the latter must ordinarily be appointed according to the nomination of the testator unless because of ineligibility or by reason of a discretion reposed in the court by statute letters may be refused.—Breen v. Kehoe, 142 Mich. 58.

§ 22. ——Delegation of authority by testator.

¶ 89. A common law testator may delegate to another the power to choose his executor.—Brown v. Just, 118 Mich. 678.

¶ 90. The common law right of a testator who delegates to another the power to choose his executor has not been abrogated in this state, as such right cannot be held to be abrogated except by express enactment or by necessary implication.—Brown v. Just, 118 Mich. 678.

¶ 91. How. St., § 5849, providing that the administration of the estates of a person dying intestate shall be granted to the widow or next of kin, or both, or such person as they may request to have appointed, applies only to cases where persons die intestate, or have left wills without any provision for the appointment of executors, and not to cases of delegated authority. Accordingly a direction in a will conferring power upon a probate judge to appoint an executor is not within the statute.—Brown v. Just, 118 Mich. 678.

§ 23. ——Disqualification of nominee.

¶ 92. A nominee of testator for executor is not disqualified because he is indebted to the estate.—Breen v. Kehoe, 142 Mich. 58.

¶ 93. At common law a nonresident, or even an alien, might be appointed as executor.—Breen v. Kehoe, 142 Mich. 58.

¶ 94. Under Comp. L. 1897, § 9310, providing that the probate court shall issue letters testamentary to the person named as executor in the will if he is legally competent, and section 9317, providing that if an executor shall reside out of the state the probate court "may" remove him, it being within the discretion of the probate court to appoint or to revoke letters on the ground of alienage, the word "may" is used in a permissive sense and does not imply a prohibition to appoint on the ground that one must not be appointed who may be removed.—Breen v. Kehoe, 142 Mich. 58.

B. PETITION FOR ADMINISTRATION, PROCEDURE THEREON, AND LETTERS.

§ 24. Persons entitled to petition or be heard.

Nature and requisites of procedure in general, see ante § 7.

Right of widow of intestate to nominate administrator, see also ante ¶ 79.

Procedure for appointment of representative where decedent left no known heirs, see Jud. Act, chap. LIII, §§ 20, 21, Comp. L. 1915, §§ 13838, 13839.

¶ 95. One having no interest in the estate of a deceased has no right to petition for the appointment of an administrator.—Diem v. Drogmiller, 158 Mich. 380.

¶ 96. How. St., § 5849, subd. 2, authorizing appointment of one or more of the principal creditors, does not require the petition to be made by the principal creditors of the deceased; any creditor may apply, and the court on such application may grant administration to one or more of the principal creditors. Whether the person whom the petitioner asks to be appointed is such a creditor, and whether he is competent, are questions to be judicially determined upon the hearing, and cannot be inquired into thereafter except on appeal.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 97. A widow being entitled presumptively to choose who shall administer her husband's estate may petition to have her former petition for the appointment of another person as general administrator dismissed, and to have herself appointed.—Grece v. Helm, 91 Mich. 450.

¶ 98. A husband has a right to be heard in regard to the appointment of an administrator for his wife's estate if she leaves any personalty, as he has an interest in the property.—Breen v. Pangborn, 51 Mich. 20.

¶ 99. Subdivision 2, § 9324, Comp. Laws, 1897, providing that if the parties so entitled neglect for thirty days after death of the intestate to apply for administration, or to request that it be granted to some other person, the same may be granted to one or more of the principal creditors, does not give to a petitioning creditor the right to dictate the appointment, and it is proper for the probate judge to give due consideration to the rights of other creditors in making the appointment.—McMeekin v. Saginaw Probate Judge, 150 Mich. 354.

§ 25. Necessity and sufficiency of petition.

For secondary, special or qualified letters, see post § 26.

Necessary jurisdictional facts, see ante § 8.

Sufficiency of petition to withdraw original petition and seek appointment of petitioner instead of third person named in first petition, see ante ¶ 97.

Petition for administrator of intestate estate, see Jud. Act, Chap. LIII, § 24, Comp. L. 1915, § 13842.
Petition for appointment of representative, see Prob. Ct. Rule 4.

¶ 100. A proper petition is a condition precedent to the appointment of an administrator under the statute providing for the administration of the estates of deceased persons.—Haug v. Primeau, 98 Mich. 91.

¶ 101. Jurisdiction to appoint an administrator must appear affirmatively on the face of the petition for administration.—Shipman v. Butterfield, 47 Mich. 487.

¶ 102. The petition for the appointment of an administrator must be by some one interested in the estate, and must set forth facts necessary to give the court jurisdiction.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 103. The jurisdictional facts to be set forth in a petition for letters are, that the person whose estate is to be administered died intestate, and was, at the time of his death, either an inhabitant or resident of the county in which the application is made, or, if he died without the state, that he left an estate in the county to be administered. The other usual allegations are made for procedural purposes to inform the court.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 104. A creditor's petition for administration, filed after thirty days from the date of the decease, need not state that no application has been made by the widow or next of kin; the court takes judicial notice of that fact.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 105. A creditor's petition for administration need not state the nature and amount of the debt, nor that petitioner was a "principal" creditor.—Johnson v. Johnson's Estate, 96 Mich. 525.

¶ 106. A petition for the appointment of an administrator, which shows upon its face that the petitioner is not one of the persons to whom administration is required in the first instance to be granted, and which fails to show that the petitioner is a creditor of the estate, or that he has been requested by any of said persons to make said petition, confers no jurisdiction upon the probate court to grant letters of administration to the petitioner or to any other person, and an order for the sale of real estate made in the course of such an unauthorized administration, as also the sale made thereunder, is void.—Haug v. Primeau, 98 Mich. 91.

¶ 107. A petition for administration does not confer jurisdiction to appoint an administrator if it does not show that the petitioner is interested in the estate as next of kin, creditor or in some other capacity enumerated in Comp. L. 1871, § 4379 (How. St., § 5849).—Shipman v. Butterfield, 47 Mich. 487.

¶ 108. A woman died intestate leaving a husband and four minor children. The husband was a creditor to her estate, and applied for letters of administration, but the probate court issued them to a person who was neither a creditor nor a distributee, and did so on a petition filed by the intestate's brother and setting forth on its face that there were lawful distributees residing in the county, and that the petitioner was not interested. Held, that the petition negatived the jurisdiction, and that, in the absence of reasons for disregarding the petition of the husband, the appointment was void as against him (Comp. L., § 4379, subd. 3).—Breen v. Pangborn, 51 Mich. 29.

§ 26. ——For secondary, special or qualified letters.

Authority of representative under special or limited letters, see post § 49.
Procedure for appointment of temporary administrator, see Jud. Act, chap. LIII, §§ 22, 23, Comp. L. 1915, §§ 13840, 13841.
Application for letters of administration with will annexed or administration de bonis non, see Jud. Act, chap. LIII, § 18, Comp. L. 1915, § 13836.

¶ 109. The mere filing of a petition alleging facts sufficient to justify the issuance of letters de bonis non does not entitle the petitioner to the letters as of course. It is only upon making a prima facie case by proof that the court can lawfully act.—Owen v. Ward's Estate, 127 Mich. 698.

§ 27. Objections, answer and subsequent pleadings.

¶ 110. It is no objection to the appointment of an administrator that the petitioner —a judgment creditor—proposes to file a bill in equity to set aside, as fraudulent and void against himself, a deed executed by intestate; How. St., § 5884, expressly confers this right in certain cases, and without an administrator the remedy might be lost.—In re Nugent's Estate, 77 Mich. 500.

¶ 111. Where an answer to a petition for the appointment of an administrator attempts improperly to traverse the allegation that the intestate died possessed of real and personal property, an untenable demurrer thereto, on the ground that such allegation is not traversable, does not admit the non-possession of property, so as to make out the defense despite the bad answer and justify the probate court in denying the petition upon that ground.—Brooke's Estate, 110 Mich. 8.

§ 28. Notice and publication.

Affidavits of publication of notice, see post § 29.

Legality of newspapers for publication of notice, see Newspapers.

Execution and return of process in general, see Process, II.

¶ 112. The power to determine in what particular newspaper probate notices shall be published is vested by the statute in the probate court.—Lynch v. Wayne Probate Judge, 101 Mich. 171.

¶ 113. One who appears and contests an application for the appointment of an administrator cannot complain that the publication of the time and place of hearing was insufficient to confer jurisdiction upon the court to make the appointment.—In re Brooke's Estate, 110 Mich. 8.

¶ 114. Under Comp. Laws 1897, § 9340, an appointment of an administrator de bonis non and subsequent sale of the real estate is void where the order and notice of hearing on the appointment fixed the time for hearing as Monday, August 9, 1878, when Monday fell on August 5th, and the appointment was then made.—Kammerer v. Morlock, 125 Mich. 320.

§ 29. ——Affidavits of publication.

¶ 115. When notice of application for a judicial order is required to be published, Comp. L. 1871, § 5924, How. St., § 7497, authorizes the filing of an affidavit of its publication. Held, that a probate order appointing an administrator, and based on an affidavit, was invalid where the affidavit did not conform to the statute, since it is only by the statute that the affidavit has any force as evidence.—Gillett v. Needham, 37 Mich. 143.

¶ 116. Where by the statute proof of publication is allowed to be made by the affidavit of "the printer of any such paper, or his foreman or principal clerk," an affidavit only made by "a printer in the office of"—not naming any paper—is fatally defective.—Gillett v. Needham, 37 Mich. 143.

¶ 117. An affidavit stating that notice of hearing of application for letters was published once in each week for four successive weeks, giving date of first publication, sufficiently specifies times of publication. It need not state each date of publication.—Wilkinson v. Conaty, 65 Mich. 614; Feustmann v. Gott's Estate, 65 Mich. 592.

§ 30. Matters litigable on hearing.

¶ 118. Property rights cannot be litigated in proceedings to appoint an administrator.—In re Nugent's Estate, 77 Mich. 500.

¶ 119. Property rights arising under a will cannot be litigated in a proceeding attacking the appointment of an executor, pursuant to delegated power, and it cannot be contended that the parties attempting to sustain the appointment have no interest in the estate.—Brown v. Just, 118 Mich. 678.

¶ 120. Though a petition for administration shows that decedent's only property is a bequest in her behalf, it should be granted; whether the claim to such bequest is well founded or not cannot be litigated in the proceedings for an administrator's appointment.—In re McCarty's Appeal, 81 Mich. 460.

§ 31. Appointing order and letters.

Collateral attack on letters, see post § 32.

Persons entitled to attack or question appointment, see post § 33.

Letters as evidence of representative's authority, see post § 54.

Operation and force of letters out of state, see ante ¶ 75.

Appeals from order of appointment to circuit court, see Probate Courts, III; and see note, post § 197, explaining digest plan.

Writ of error from circuit judgment on appeal to supreme court, see Appeal.

Operation and effect of probate court decrees in general, see Probate Courts, III.

Decrees as judicial estoppels, see Former Adjudication.

Reviewableness of proceedings in circuit on appeal from appointment or removal of representative, see Appeal § 28.

Best and secondary evidence of appointment and character, see Evidence § 126.

Effect of grant of letters as adjudication of fact of relationship of holder to decedent, see also Death by Wrongful Act ¶ 64.

Jurisdiction of the various "superior" courts and other municipal courts, see Municipal Courts, II.

Mandamus as remedy for refusal to grant letters, see Mandamus, II.

Procedure when executor is under age, see Jud. Act, chap. LII, § 40, Comp. L. 1915, § 13812.

Appointment of administrator where estate consists of personalty of less than five hundred dollars in value, see Jud. Act, chap. LIII, § 25, Comp. L. 1915, § 13843.

¶ 121. The order appointing an administrator need not specify the relation which the person appointed holds to the estate.—Wilkinson v. Conaty, 65 Mich. 614.

§ 32. ——Collateral attack on letters.

See also post ¶¶ 178, 763, 1036.

Estoppel to question capacity of representative, see post § 53.

Competency of person granted letters as question open only on appeal, see also ante ¶ 96.

Presumption of jurisdiction on collateral attack on letters, see ante ¶ 33.

Collateral attack and conclusiveness of judgments in general, see Judgments, VII.

¶ 122. The regularity of the appointment of a special administrator cannot be inquired into collaterally.—Cook v. Stevenson, 30 Mich. 242.

¶ 123. The regularity of an order appointing an administrator will not be considered in a collateral proceeding, where the probate court has by subsequent proceedings treated it as valid.—Woods v. Monroe, 17 Mich. 238.

¶ 124. The action of the probate court in appointing an administrator is not open to collateral attack, but should be appealed from if not satisfactory.—Johnson v. Johnson's Estate, 66 Mich. 525.

¶ 125. An administrator's right to sue for a fatal injury to his decedent is sufficiently established as against strangers by the letters of administration granted him by the proper court; and in the case of one who, as decedent's widow, has been appointed administratrix, the legality of her marriage cannot be questioned in an action by her for an injury to her decedent.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 126. The appointment by the probate court of an administrator cannot be assailed in a chancery suit to restrain an action at law by the administrator.—Crane v. Beedle, 95 Mich. 524.

¶ 127. Letters of administration which are valid cannot be collaterally attacked on the ground that there was no necessity for the appointment of the administrator.—Ormsbee v. Piper, 123 Mich. 265.

¶ 128. A decree of the probate court granting letters of administration cannot be collaterally attacked by testimony that the deceased was last seen alive during the month of the issuance of letters.—Benjamin v. Early, 123 Mich. 93.

¶ 129. The determination of the probate court that a judgment creditor of decedent was a party entitled to letters of administration, is not open to collateral attack by decedent's widow, in an action to restrain such proceedings, where the petition for administration was regular in form, and there was within the jurisdiction of the court an estate to be administered.—Ackerman v. Pfent, 145 Mich. 710.

¶ 130. Where an administrator sues in trover for the conversion of personal property, and his evidence reveals the fact that he has no right to sue as administrator, an order of a verdict for the defendant by the court does not constitute a collateral attack on the decision of the probate court appointing him administrator.—Diem v. Drogmiller, 158 Mich. 380.

§ 33. ——Persons entitled to attack or question appointment.

Right of one appearing and contesting appointment to question it, see also ante ¶ 113.

Estoppel of person administering to deny liability to account, see post ¶ 1061.

¶ 131. Although the appointment of an administrator cannot be inquired into collaterally by a stranger to the proceedings, parties whose interests are prejudiced may always take advantage of a want of jurisdiction.—Gillett v. Needham, 37 Mich. 143; Breen v. Pangborn, 51 Mich. 29.

¶ 132. Parties interested in the property left by an intestate can always object to the want of jurisdiction in the court which issues the letters of administration; but no one can intervene in the affairs of an estate unless he is authorized by law to do so, or is personally interested.—Breen v. Pangborn, 51 Mich. 29.

C. ASSUMING AND QUALIFYING FOR OFFICE, SECURITY AND BOND.

§ 34. In general.

¶ 133. Executors appointed by the probate court and who file a bond cannot bind the estate or the heirs of the testator, where letters testamentary were never issued nor an inventory or appraisal filed, or any of the steps taken that are usual and necessary in the settlement of estates, and it did not appear that they ever entered upon the discharge of the duties of executors.—Marsh v. Breen Iron Co., 181 Mich. 204.

§ 35. Necessity and sufficiency of bond.

Time for presentation and approval, see post § 36.

Justification on bond, see post § 37.

Liability on bonds, see post § 386.

Remedies and procedure on bonds, see post § 391.

Necessity and sufficiency of special bonds for sale of real estate, see post § 232.

Obligation, breach and liability on bonds of residuary legatees to dispense with further administration, see post § 388.

Sufficiency of probate bonds, see Jud. Act, chap. LXIII, §§ 1, 2, Comp. L. 1915, §§ 14119, 14120.

Bond of administrator, see Jud. Act, chap. LIII, § 3, Comp. L. 1915, § 13821.

When new or additional bond required, see Jud. Act, chap. LXIII, § 13, Comp. L. 1915, § 14131.

Bond of executor, see Jud. Act, chap. LII, §§ 36-39, Comp. L. 1915, §§ 13808-13811.

Bond of administrator with will annexed, see Jud. Act, chap. LII, § 41, Comp. L. 1915, § 13813.

Bond of special administrator, see Jud. Act, chap. LIII, § 7, Comp. L. 1915, § 13825.

Separate or joint bonds for executors, see Jud. Act, chap. LII, § 46, Comp. L. 1915, § 13818.

Joint or separate bond where two or more representatives appointed, see Jud. Act, chap. LIII, § 17, Comp. L. 1915, § 13835.
Bond to secure payment of funeral expenses on petition for appointment as administrator of intestate estate, see Jud. Act, chap. LIII, § 24, Comp. L. 1915, § 13842.

¶ 134. Comp. Laws 1897, § 311, How. 2nd Ed., § 11786, requiring an executor to give bond, is mandatory.—Chamberlain v. Husel, 178 Mich. 1.

¶ 135. Bond on executor's part is not required by statute on Michigan probate of foreign will.—Gray v. Franks, 86 Mich. 382.

¶ 136. Where the statute provides that an administrator shall give bond before letters are granted to him, and the letters granted are dated one day before the date of the bond, the presumption is that the probate court did not deliver the letters until after the date of the bond.—Brown v. Hannah, 152 Mich. 33.

¶ 137. An executor's bond covers all moneys received by him under color of his official authority.—Clark v. Fredenburg, 43 Mich. 263.

§ 36. ——Time for presentation and approval.
See also ante ¶ 136.

¶ 138. Where a statute provides that the administrator shall give bond before letters are issued to him, and the letters are issued by the court before such bond is given, but the bond is later supplied, the irregularity does not invalidate the appointment.—Brown v. Hannah, 152 Mich. 33.

§ 37. Justification on bond.
Liability of sureties and defenses open to sureties, see post §§ 389, 390.
Justification of sureties on bond of representative, see Prob. Ct. Rule 6.
Residence qualification of sureties on bond of representative, see Prob. Ct. Rule 6.

¶ 139. A probate judge cannot arbitrarily reject an administrator's bond, but he has the right to require the securities to justify if there is any reasonable doubt of their responsibility; and the supreme court will not interfere with such an exercise of discretion unless in a clear case of its abuse.—Carpenter v. Ottawa Probate Judge, 48 Mich. 318.

¶ 140. Executors' bonds are not such official bonds as will fall within the title of Laws 1885, Act No. 179, p. 244, "to provide that all sureties upon official bonds shall make justification, under oath, of their pecuniary responsibility." Nor are any probate bonds.—Bissell v. Durfee, 58 Mich. 237.

D. RESIGNATION OR DEATH, REMOVAL AND VACANCIES.

§ 38. Resignation, death, or vacancies in general.
Duty of representative to account after resignation, see post ¶ 1059.
Effect of removal of executor who has given bond as residuary legatee, see post ¶ 216
Administration de bonis non on resignation death or vacancy, see ante § 6.
Effect of death of representative to abate action, see Abatement §§ 2, 3.
Termination of agency for representative by latter's death, see Agency ¶ 73.
Removal or resignation of representative, see Jud. Act, chap. LIII, §§ 11, 12, Comp. L. 1915, §§ 13829, 13830.
Procedure on death of representative pending administration, see Jud. Act, chap. LIII, § 10, Comp. L. 1915, § 13828.

§ 39. Probate and equity jurisdiction.
Relative jurisdiction of probate and equity courts in general, see ante §§ 9-13.

¶ 141. The probate court has complete jurisdiction, and equity cannot interfere to remove administrators for breach of trust: Holbrook v. Campau, 22 Mich. 288; Kellogg v. Aldrich, 39 Mich. 576.

¶ 142. The court of chancery cannot remove an administrator for an abuse of his trust; its powers are limited to some purpose auxiliary to the relief sought in the court of probate, in which tribunal is vested complete jurisdiction over the subject.—Holbrook v. Campau, 22 Mich. 288.

§ 40. Grounds for removal.
Nonresidence or alienage, see post § 41.
Failure to file account as ground, see also post ¶ 147.
Representative's possession of property fraudulently conveyed by decedent as ground, see also post ¶ 157.
Necessity and sufficiency of alleging grounds for removal in petition, see post ¶¶ 154, 155.
Removal of representative for failure to render account, see Jud. Act, chap. LXII, § 10, Comp. L. 1915, § 14113.
Removal of executor, see Jud. Act, chap. LII, §§ 42, 43, Comp. L. 1915, §§ 13814, 13815.
Revocation of administration on proof of will, see Jud. Act, chap. LIII, § 14, Comp. L. 1915, § 13832.

¶ 143. The fact that one executor is a legatee while the other is a member of a partnership in which the testator was interested, is not grounds for their removal in order to permit the other legatees to file a bill for an accounting against the surviving partners because of the undervaluation of the testator's interest in the business.—In re Sloman's Estate, 186 Mich. 434, 440.

¶ 144. The probate court in Michigan is not bound to remove an ancillary administrator upon a showing that he has been removed as executor in the probate court of the deceased's domicile in a foreign state.—American Missionary Ass'n v. Hall, 138 Mich. 247.

¶ 145. The appointment as executor by the probate court of the attorney of the sole creditor of the estate, who has a claim equal to four-fifths the entire assets, is not so improper as to call for removal.—In re Rice's Estate, 158 Mich. 53.

¶ 146. The widow is entitled, under section 9324, Comp. Laws 1897, to the first right of appointment as administratrix, and cannot be removed upon petition of a creditor of the estate unless such creditor is without another and complete remedy.—McFarlan v. McFarlan, 155 Mich. 652.

§ 41. ——Nonresidence or alienage.

Sufficiency of notice of removal proceedings on nonresident representative, see post ¶ 155.

¶ 147. Where an executor changes his residence to another state, removes the funds of the estate out of the jurisdiction of the court, and fails for more than two years to file with the probate court any account of his dealings with the estate, ample ground is afforded for his removal.—In re Rice's Estate, 158 Mich. 53.

¶ 148. Nonresidence is not of itself a sufficient reason for the removal in a foreign jurisdiction of an administrator whose powers are merely ancillary there, but who is also the principal administrator at the domicile of the intestate; the petition for removal must show that the nonresidence prejudices the petitioner's interest.—White v. Spaulding, 50 Mich. 22.

§ 42. Persons entitled to petition removal.

Nature and requisites of procedure in general, see ante § 7.

¶ 149. A petition for the removal of an administrator must purport to have been made by persons interested; and if one signs the name of another to the petition he must show his authority for doing so.—White v. Spaulding, 50 Mich. 22.

¶ 150. The widow of an intestate whose administrator was given ancillary powers over property supposed to have been left in another jurisdiction from that in which he was domiciled when he died has no interest in petitioning a probate court in the foreign jurisdiction to remove the administrator, especially if her petition does not allege the existence of real property there.—White v. Spaulding, 50 Mich. 22.

¶ 151. Persons merely claiming to be principal creditors of an intestate who died in a foreign domicile do not make a sufficient showing of interest to sustain their petition to a probate court in Michigan for the removal, for neglect of duty, of an administrator who was given ancillary powers over property supposed to be left within its jurisdiction, especially if the letters of administration were taken out seven years before the petition was filed, and the records of the court do not show that any claims have ever been allowed in the petitioners' favor, and their petition is the first notification to the administrator that they claim to be creditors of the intestate.—White v. Spaulding, 50 Mich. 22.

§ 43. Petition and procedure on removal.

Notice of hearing, see post § 44.
Hearing, issues and order, see post § 45.

¶ 152. A petition for removal of an administrator is insufficient if it is not presented by persons interested.—White v. Spaulding, 50 Mich. 22.

¶ 153. The mere allegation, in a petition for removal, that the petitioner is a creditor, is not enough to establish the fact, even for the purposes of the petition, without showing by what instrument or contract he became so, or making some prima facie showing in support of the claim.—White v. Spaulding, 50 Mich. 22.

¶ 154. A petition for the removal of an administrator "for nonperformance of his duty" is fatally defective in that the allegation of cause is not specific enough to put the administrator on his defense. Nor is it sufficient to merely allege neglect and refusal to perform the orders of the court without being more specific; or to allege delay without showing that the petitioner had tried to expedite proceedings.—White v. Spaulding, 50 Mich. 22.

§ 44. ——Notice.

¶ 155. Notice of proceedings to remove an administrator who lives in a foreign jurisdiction, and whose residence is known, should be personally served on him and on the heir at law.—White v. Spaulding, 50 Mich. 22.

¶ 156. Where a proceeding to remove an administrator is fatally defective and an amended petition is filed, the proceedings on the amended petition must be taken precisely as if it were the first step, and the heir at law and the administrator must have full notice.—White v. Spaulding, 50 Mich. 22.

§ 45. ——Hearing, issues and order.

Note relating to appeals from orders of probate court, see post § 197.
Appeals to circuit court from order of removal, see Probate Courts, III.
Writ of error from circuit court judgment on appeal to supreme court, see Appeal.

¶ 157. Upon a petition by a creditor of an estate for the removal of the administratrix on the ground that she holds property conveyed to her by deceased in fraud of creditors, the court will not pass upon the validity to the deed, this being a proper question for the court in chancery upon a bill to set the deed aside.—McFarlan v. McFarlan, 155 Mich. 652.

IV. STATUS AND AUTHORITY OF REPRESENTATIVES, AND TITLES IN THE ESTATE.

A. IN GENERAL.

§ 46. Status, relationship, powers and duties.

Fiduciary character of functions, see post § 47.

Authority of representative to contract or deal for estate, see post §§ 55, 56.

Right and title of representative in property of estate, see post §§ 57-66.

Authority and right of representative to collect or sue for assets, see post, V, B.

Authority and right of representative respecting management, custody and disposal of estate, see post, V, E.

Authority of representative over real property, see post §§ 125-136.

Debts and liabilities resting on representative, see post, VI, B.

Duty and authority of representative to pay debts, see post, VI, D.

Duty and authority of representative to resort to sale or mortgage of lands to pay debts, see post, VII.

Personal liability of representative to creditors, see post, IX.

Rights and liabilities of representative in dealing with shares and properties of estate, see post, X, A.

Status of representative as creditor of estate, see post, X, B.

Acccountability for rents, profits and interest and losses or depreciation, see post, X, C.

Compensation, allowances and reimbursement of representatives, see post, X, D.

Status, duties and accountability of corepresentatives, see post, X, E.

Authority of executors de son tort and intermeddlers, see post, X, F.

Authority and duty to sue or defend in general, see post, XI.

Duty to render accounting and settlement, see post, XII.

Duty to make distribution and payment of shares, see post, XIII.

Right to and effect of discharge, see post §§ 383-385.

Duty of representative respecting inventory and appraisal, see post § 103.

Authority and duty of representative to annul decedent's fraudulent transfers, see post §§ 97-101.

Torts and frauds of representative as debt of estate, see post § 156.

Right of representative to purchase claims against estate, see post § 159.

Authority of representative to assign or transfer claim for compensation, see post § 294.

Authority of representative to clear title or remove clouds therefrom, see post § 310.

Effect of agreement for settlement on rights and authority of representative in later proceedings, see ante § 3.

Right of representative who was removed for failure to pay debts to object to delay in sale of realty, see post ¶ 739.

Power and status of representative appointed by court but never receiving letters, see ante ¶ 133.

Effect of acts of representative before appointment on rights of estate, see post ¶¶ 372, 373.

Power of representative to form partnership with surviving partner, see Partnership, I.

Right to vote stock in name of decedent, see Corporations § 65.

Privity between decedent or heirs and personal representative for purpose of applying bar or conclusiveness of judgment, see Former Adjudication, V.

Duty of executor to present will to probate court, liability for failure, and procedure thereon, see Jud. Act, chap. LII, § 5 et seq., Comp. L. 1915, § 13777 et seq.

Authority of executors where several designated in will but part only qualified to act, see Jud. Act, chap. LII, § 44, Comp. L. 1915, § 13816.

Authority of executor of executor, see Jud. Act, chap. LII, § 45, Comp. L. 1915, § 13817.

Validity of acts of representative before revocation of letters, see Jud. Act, chap. LIII, § 16, Comp. L. 1915, § 13834.

Powers of representative appointed as successor, see Jud. Act, chap. LIII, § 13, Comp. L. 1915, § 13831.

¶ 158. An executor or administrator is a mere officer of the law with no personal interest in the property intrusted to him; his powers are all statutory, and he is accountable for the due and proper execution of them.—Hatheway v. Weeks, 34 Mich. 237.

¶ 159. An administrator cannot in law be regarded as the agent of any single person interested in the estate, notwithstanding the evidence is strong that he favors that person's interest. In a suit between him and a third party, his intention faithfully to discharge his trust is to be assumed, even though an heir at law against whom such third party has equities was active in securing his appointment and advising the suit.—McKinney v. Miller, 19 Mich. 142.

¶ 160. An executor's duties as such are closed, except for the adjustment of his account, when he has paid the funeral expenses, debts and legacies, and nothing remains but the division of the residue. Any further acts in respect to the estate are done as donee of a power in trust.—Calkins v. Smith's Estate, 41 Mich. 409.

§ 47. Fiduciary character of functions.

See also post ¶¶ 501, 849.

Fiduciary title of representative in personalty, see post § 58.

Necessity of notice to all persons interested in estate of claim filed by representative against estate, see post § 169.

Nature of trusts in general, see Trusts, I.

Testamentary trustees, see Wills, VI, F.

¶ 161. While an administrator cannot be classed, in the technical sense, as a trustee holding legal title to real estate and the primary use of it in trust for another, yet his control involves fiduciary and confidential trust relations.—Parks v. Brooks, 188 Mich. 645.

¶ 162. The estate of the administrator in the personal property of his intestate is a trust created for the purpose of laying hold of the estate to make distribution to the persons entitled.—Brobst v. Brobst, 190 Mich. 63.

¶ 163. An administrator is a trustee of the assets that come into his hands for the benefit of all interested therein.—Pierce v. Holzer, 65 Mich. 263.

¶ 164. The care, prudence and judgment which the man of fair business capacity and ability brings to bear in the transaction of his own business furnish the standard that governs the administrator in performing his trust duties.—Loomis v. Armstrong, 63 Mich. 355.

§ 48. Individual or representative acts or capacity.

Suits brought in representative or individual name or capacity as party, see post § 321.

Acts and representations in representative capacity as estoppels, see Estoppel § 54.

Estoppel as individual, effect in representative capacity, see Estoppel § 54.

Construction of deed to determine whether party was such as individual or as representative, see Deeds § 19.

¶ 165. An administratrix, who is also the widow, who continues in possession of real estate for many years after the death of the husband under a statute which gives no right of possession to the administratrix as such is presumed to have been in possession under her rights of dower and homestead and is not chargeable with rents and profits.—Russell v. Wheeler, 129 Mich. 41.

§ 49. Special or other limited letters.

Necessity and occasion for special administration, see ante § 5.

Necessity and occasion for administration de bonis non, see ante § 6.

Status and rights of special administrator in equity, see also ante ¶ 49.

Authority and right of special administrator to collect or sue for assets, see post § 85.

Right and authority of administrator de bonis non to collect or sue for assets, see post § 85.

Petition for special or other limited letters, see ante § 26.

Collateral attack on appointment of special administrator, see ante ¶ 122.

Authority of administrator de bonis non to bring probate proceedings to discover assets, see also post ¶ 276.

Authority of special administrator to rescind transfers fraudulently obtained from decedent, see also post ¶ 284.

Authority of administrator de bonis non to set aside mortgage, see also post ¶ 308.

Defenses open to administrator de bonis non on suit for nonpayment of claims, see post ¶ 474.

Right and authority of special administrator to represent estate on hearing of claims, see also post ¶¶ 541, 542.

Authority of administrator de bonis non in staying execution against insolvent estate, see post ¶¶ 665, 666.

Sufficiency of petition of administrator de bonis non for license to sell realty to pay debts, see post ¶ 709.

Authority of administrator de bonis non against intermeddler, see also post ¶ 974.

Authority of special representative or administrator de bonis non to sue or defend in ejectment, see also post ¶¶ 990, 991.

Authority of special representative to make a compromise, see also post ¶ 1012.

Accountability of special representative for variance in account from property receipted for, see post ¶ 1092.

Powers and duties of special administrators, see Jud. Act, chap. LIII, §§ 5-8, Comp. L. 1915, §§ 13823-13826.

¶ 166. A special administrator has no power to pay either himself or another, as attorney for some of the heirs in a contest over the will, his duty being simply to conserve the estate ready to be turned over to the regularly appointed administrator when appointed (section 9326, Comp. Laws 1897).—Zimmer v. Saier, 155 Mich. 388.

§ 50. Joint representatives' authority and mode of action.

Accountability for corepresentatives and predecessors, see post, X, E.

Compensation of corepresentatives, joint representatives and successors, see post § 292.

Authority of one of several representatives on sale of real estate, see also post ¶ 770.

¶ 167. Under Comp. L. 1897, § 9386, one of two administrators may appeal from an order allowing claims, although his coadministrator withholds his consent to such appeal.—Hammond v. Wayne Circuit Judge, 140 Mich. 371.

¶ 168. A foreclosure by advertisement by executors is not invalidated by the fact that

only two out of three executors acted, if these two acted under proper authority and there is no showing that the third ever gave an official bond or qualified.—Alexander v. Rice, 52 Mich. 451.

§ 51. Authority of foreign representative.

Jurisdictional rights under foreign administration, see ante §§ 15-17.

Recognition and title of foreign representatives, see post §§ 64, 65.

Compensation of foreign representatives, see post § 293.

Rights of representatives under foreign probate, see Conflict of Laws § 32.

Effect and conclusiveness of judgments by or against foreign representatives, see Foreign Judgments, II.

Writ of error in name of Michigan representatives of foreign testator on foreign probate, see Appeal ¶ 363.

Right of foreign representative to file authenticated copy of his appointment, see Jud. Act, chap. LIX, § 34, Comp. L. 1915, § 14020.

Right of foreign representative to sell real estate, see Jud. Act. chap. LIX, § 35, Comp. L. 1915, § 14021.

¶ 169. An executor or administrator appointed in another state has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed.—Colvin v. Jones, 194 Mich. 670.

¶ 170. Comity in the recognition of a foreign administrator is determinable by statute, or by usage as evidenced by judicial decisions.—Reynolds v. McMullen, 55 Mich. 568.

¶ 171. Proceedings by a foreign administrator under proper letters of administration cannot be attacked collaterally; but nothing can be presumed in favor of an administration that has not been judicially ordered.—Reynolds v. McMullen, 55 Mich. 568.

¶ 172. The force of a grant of administration is confined to the jurisdiction granting it; a person appointed administrator in another state cannot, as such administrator, bring suit in this state.—Vickery v. Beir, 16 Mich. 50.

§ 52. Representative's right to defend his authority.

Proceedings for removal of representative, see ante §§ 42-45.

¶ 173. An executor, whether named in the will or by delegated power has a right to defend his authority to act in the courts.—Brown v. Just, 118 Mich. 678.

§ 53. Estoppel to question capacity.

Estoppel of person administering to deny liability to account, see post ¶ 1061.

Estoppel of representative to bring trover for stock certificate because of indorsement before appointment, see also post ¶ 267.

Estoppel as individual, effect on representative capacity and vice versa, see Estoppel, II, III, C.

¶ 174. One who without authority assumes to administer is estopped from denying representative character when called to account.—Damouth v. Klock, 29 Mich. 289.

¶ 175. Where persons who are appointed as executors and also as trustees under a will take possession of corporate stock as executors, charge themselves with it as executors, inventory and appraise it as an asset of the estate, continue to hold it in the name of the estate, untransferred, collect dividends paid to them as executors by checks drawn in favor of the estate, indorse checks as executors, and deposit them in a bank to the estate's account and as executors draw checks on such account in distributing dividends to the beneficiaries and never qualify as trustees, are estopped to claim that they hold such stock in any other capacity than that of executors.—Wessborg v. Merrill, 195 Mich. 556.

¶ 176. A defendant who has appealed in an administrator's name from a decision of commissioners on claims, and has defended the appeal in such name, cannot, when sued by the administrator seeking to collect the estate to pay claims, question the administrator's title to the office.—Farrand v. Caton, 69 Mich. 235.

§ 54. Letters or other evidence of authority.

Proof of representative capacity by general reputation, see also post ¶ 1034.

Letters as evidence of authority in action by representative, see also post ¶ 1035.

Admissibility of letters notwithstanding admission of representative capacity of plaintiff, see also Evidence ¶ 394.

Necessity of proof of executorship of grantee to make his deed as such admissible, see also Evidence ¶ 2583.

Certificate of foreign appointment as proof, see Evidence ¶ 2791.

Necessity of letters to sustain proxy by executors to vote stock, see Corporations ¶ 233.

¶ 177. In a suit by an administrator under How. St., § 5884, to recover real estate conveyed by decedent in fraud of creditors, his letters of administration are admissible in evidence to show his representative character, and he need not go back of such letters to show his official title.—Ferrand v. Caton, 69 Mich. 235.

¶ 178. Letters of administration and the presentation of administratrix's claim to the common council were properly admitted in evidence, in an action against a city for the

death of her intestate, where the declaration, brought in the name of such administratrix, alleged her due appointment as such administratrix and her presentation to the city of her claim as such administratrix as provided by the city charter, and where the proofs showed that while her bond bore the date February 27th, it was approved and left in the clerk's office not later than February 26th, that her claim was filed with the clerk of the common council on February 26th and was acted upon by such council in March following; although objected to by opposing counsel on the ground that such letters were issued before her bond was filed and that when the claim was presented she was not administratrix.—Warn v. City of Flint, 140 Mich. 573.

B. CONTRACTING AND DEALINGS FOR ESTATE.

§ 55. In general.

Management use and application of properties, see post § 117.
Right to borrow money, see post § 56.
Right and authority of representative to petition for street improvement, see post ¶ 204.
Authority of representative to pay interest on unallowed claim to defer foreclosure sale, see also post ¶ 220.
Authority of representative to assign right of suit for decedent's fraudulent transfers, see post ¶ 294.
Authority of representative to warrant personalty on making sale of it, see also post ¶ 388.
Purchase by representative of claims against creditors for use as set-offs, see post ¶ 472.
Authority of representative to secure agreement to bid from prospective purchaser at sale of realty, see also post ¶ 726.
Dealings for estate by person other than representative, see post, V, F.
Surrender of assets to heir as consideration for heir's promise to executor, see Contracts § 114, ¶ 484.
Continuation of liquor business by personal representative of deceased licensed dealer, see Intoxicating Liquors, II, C.

¶ 179. An executor has no power in or of himself to bind the estate by contract, even for the necessities of infant devisees, since the probate court has an ear always open to these necessities and must be consulted as to whether they exist.—Roscoe v. McDonald, 91 Mich. 270.

¶ 180. Acceptance of goods by the administrator of a deceased purchaser cannot ratify an oral contract of sale that is already void under the statute of frauds; nor can the administrator make contracts for his intestate.—Smith v. Brennan, 62 Mich. 349.

§ 56. Right to borrow money.

¶ 181. Under How. St., § 6105, which provides that an administrator may borrow money to pay debts against the estate, money may be borrowed to pay a mortgage on decedent's property, even though such mortgage was not given by the decedent, it being, nevertheless, a "debt against the estate."—In re Lambie's Estate, 94 Mich. 489.

C. TITLE AND RIGHTS IN PROPERTY OF ESTATE.

§ 57. In general.

Authority and title of representative of decedent representative, see ante ¶¶ 28, 29.
Title of residuary legatee as executor, see post § 66.
Estoppel sufficient to cut off title as representative, see also Estoppel § 54.
Validity against heirs or next of kin of stock voting by representative, see also Corporations ¶ 233.

¶ 182. An administrator is, under our probate system, a mere officer of the law, and though his title to the assets of the estate relates back to the death of the intestate, yet it is an official title which cannot be affected to the prejudice of the estate by any acts of his prior to his appointment; nor will it be affected by any estoppel that does not rest on equities against the estate.—Gilkey v. Hamilton, 22 Mich. 283.

§ 58. Title and interest in personalty.

Possession of personalty, see post § 59.
Right and title in mortgages, see post § 60.
Fiduciary character of representative, see ante § 47.
Right of legatees to possession of specific bequests, see post § 362, ¶¶ 1148-1150.

¶ 183. The legal estate only in personal property vests in the administrator; the equitable estate is in the heirs or other persons entitled to distributive shares thereof.—Foote v. Foote, 61 Mich. 181.

¶ 184. On the death of an intestate the title to his personalty does not vest in the next of kin, but remains in abeyance until the appointment of an administrator, and then vests in him in trust, in his official capacity, as of the time of such death; and he is entitled to the possession of such assets, and to the management of the property for the purposes of the trust.—In re Palmer's Appeal, 1 D. 422; Cullen v. O'Hara, 4 Mich. 132; Wales v. Newbould, 9 Mich. 45; Morton v. Preston, 18 Mich. 60; Gilkey v. Hamilton, 22 Mich. 283; Albright v. Cobb, 30 Mich. 355; Miller v. Clark, 56 Mich. 337.

¶ 185. The legal title to personalty is held in abeyance on the death of its owner, until the appointment of an administrator, in whom the title then vests for the purposes of administration.—Powell v. Pennock, 181 Mich. 588.

¶ 186. The equitable title to personalty on the death of its owner, vests in his heirs, subject to the rights of creditors and the

expenses of administration.—Powell v. Pennock, 181 Mich. 588.

¶ 187. The legal estate in the personal property of an intestate vests in the administrator, the equitable estate being in the heirs or distributees.—Brobst v. Brobst, 190 Mich. 63.

¶ 188. The title to the personal effects of an intestate remains in abeyance till the appointment of an administrator, when such title vests in the administrator as of the date of the death of intestate, and such administrator is thereupon entitled to the possession of such effects, to be managed for the purposes of the trust.—Brobst v. Brobst, 190 Mich. 63.

¶ 189. The general rule is that title to personal property of a decedent, testate or intestate, vests in the personal representative until administration is completed and the estate is fully settled and distributed, or until he chooses or is forced to part with it earlier.—In re Reidy's Estate, 164 Mich. 167; Shattuck v. Watson, Id.

§ 59. Possession of personalty.

Authority of representative to take possession of personalty, see post § 83.

Right of possession of person other than representative, see post, V, F.

Right to possession of chattels held under life tenancy on death of life tenant, see Life Estates, II.

Representative's right to possession of personalty, see Jud. Act, chap. LIV, § 5, Comp. L. 1915, § 13849.

¶ 190. The statute does not make it imperative upon the administrator to take possession of the intestate's personalty; it only empowers him to do so. It is not expected that he will disturb the possession of decedent's family except so far as the proper discharge of his duties may require.—Brown v. Forsche, 43 Mich. 492; and see Howard v. Patrick, 38 Mich. 795.

¶ 191. A general administrator is entitled to the possession and control of all the personalty, including money and securities, of which his intestate died in possession; and this includes property covered by a bill of sale from him, but never delivered.—Palmer v. Palmer, 55 Mich. 293.

¶ 192. Comp. L. 1871, § 4407, providing that the executor or administrator shall be entitled to the possession of the personal estate of the deceased, until assignment or distribution of the same to the persons entitled thereto, by order of the probate court, or until the estate is finally settled, simply empowers the personal representative to take possession of the estate and does not require him to do so.—McDermott v. Copeland, 9 Fed. 536.

§ 60. Right and title in mortgages.

¶ 193. Mortgages, being part of the personal estate, belong to the personal representatives of the mortgagee after his death, and not to his heirs.—Abbott v. Godfroy's Heirs, 1 Mich. 178.

¶ 194. Under R. S. 1838, p. 285, pt. 2, tit. 4, chap. 3, § 10, unforeclosed mortgages belonging to the estates of deceased persons were made personal assets, and the right there recognized as belonging to the mortgagee, his executor or administrator, to take possession of the mortgaged premises, is one that did not descend to the heirs of the mortgagee; deeds of such heirs could not transfer the mortgage interest of the deceased, at least without a showing that the estate had been administered and settled and the debts paid, and that such mortgage had, upon a final distribution, been conveyed to them.—Albright v. Cobb, 30 Mich. 355.

¶ 195. A mortgage executed subject to the provisions of R. S. 1838, p. 285, pt. 2, tit. 4, chap. 3 § 10, did not, even after forfeiture for nonpayment, convey the legal estate to the mortgagee to the extent of making the mortgagee's interest descendible to heirs instead of executors and administrators.—Albright v. Cobb, 30 Mich. 355.

¶ 196. Under the amendments (Laws 1843, p. 139, R. S. 1846, chap. 71, § 12), to the provisions in R. S. 1838, p. 285, pt. 2, tit. 4, chap. 3, § 10, while the right of possession is taken away, executors and administrators have always had the right to enforce payment or release a foreclosure or convey mortgages of the deceased, and the heirs, as such, have no power over them or right to dispose of them or to maintain an action in respect to them.—Albright v. Cobb, 30 Mich. 355.

§ 61. Rights and interest in realty.

See also post ¶ 405.

Rents, issues and profits, see post § 62.

Title to lands bought by representative, see post § 63.

Right to possession to realty before recourse for payment of debts, see post § 226.

Occasion and propriety of recourse to lands for payment of debts, see post §§ 222-226.

Right to ejectment and possessory actions for lands, see post § 308.

Right to possession of realty by person other than representative, see post, V, F.

Rights of executors in land as dependent on law of place, see Conflict of Laws § 32.

Disability of administrator to make dedication for lack of title in him, see Dedication § 3.

Representative's right to possession of realty, see Jud. Act, chap. LIV, § 6, Comp. L. 1915, § 13850.

Title of administrator or executor as trustee for heirs where deed is made to him as successor of purchaser at execution sale pursuant to statute, see Jud. Act, chap. XXIII, § 118; Comp. L. 1915, § 12933.

¶ 197. Comp. L. 1857, § 2904, conferring right to possession, did not create an intervening estate between that of the ancestor and the heir converting the heir's estate into one of expectancy.—Campau v. Campau, 19 Mich. 116.

¶ 198. An administrator, either general or special, has no interest in the real estate, and no right to the possession thereof, except where there is insufficient personal property to pay the debts and expenses of administration.—Pratt v. Millard, 154 Mich. 112.

¶ 199. An heir at law may recover in ejectment his undivided interest in the lands of which his ancestor died seized, as against the administrator of the ancestor's estate, where the administrator shows no authority from the probate court to take possession of the realty.—Warren v. Tobey, 32 Mich. 45.

¶ 200. The administrator's right of possession was not one of which the probate court had exclusive jurisdiction, or since the amendment of 1871, Laws 1871, p. 80, taking away the right, any jurisdiction at all, and was held to be no defense to an application for a writ of possession under a decree in a partition suit.—Campau v. Campau, 25 Mich. 127.

¶ 201. An executor in possession of land, who for several years has had entire control of the property without objection, and who is acting under the direction of the probate court, is presumably rightly in possession.—City of Detroit v. Schilling, 93 Mich. 429.

¶ 202. The real estate referred to by R. S. 1846, chap. 71, § 7, and successive later statutes giving the administrator right of possession of lands, includes only such lands as belonged to and were left by the decedent, and not to lands bid in by the administrator or executor on mortgages and executions, which are covered by Comp. L. 1871, §§ 4112-4115. Of the latter the administrator has the same right of possession as of personalty.—Kunzie v. Wixom, 39 Mich. 384.

¶ 203. Laws of 1881, Act No. 236 (How. St. § 5875), authorizing administrators to take possession of the real estate of their decedents, is not retroactive in its terms, and does not operate to give the right as against the heirs of a person whose estate was in administration before the passage of the statute, and whose heirs and devisees had already become vested with the interests to which they were entitled.—Van Fleet v. Van Fleet, 49 Mich. 610.

¶ 204. An administrator cannot bind the estate by signing a petition for the improvement of a street upon which his decedent's land abuts, and his signature to a petition for the improvement of a street which is the boundary line between the city and township cannot be counted upon as making a majority of the resident property holders.—Aplin, Auditor-General v. Fisher, 84 Mich. 128.

§ 62. ——Rents, issues and profits.

Right to rents and profits in course of management, see post § 131.

Right to crops of purchaser at representative's sale, see post § 247.

Accountability of representative for rents, profits and issues, see post § 278.

Collection of rents and profits and proceeds of land, see post § 92.

Evidence as to title to growing crop, see post ¶ 328.

Rents and current income as assets of estate, see post § 70.

Vested character of right of representative to have possession of lands and to take rents, etc., see Constitutional Law § 246, ¶ 1051.

Right to rents and profits where estate exceeds homestead exemption but is incapable of partition, see Homesteads, VII.

¶ 205. In proceedings to condemn a testator's land for railroad purposes, notice and payment of damages to the life tenant and executrix only, held sufficient under Rev. St. 1846, p. 288, § 7, providing that the executor or administrator during administration shall have a right to the possession of real estate, and may receive the rents, issues and profits thereof.—Barlage v. Detroit, G. H. & M. R. Co., 54 Mich. 564.

¶ 206. As between the heirs and the administrator, the latter is entitled to crops growing on lands of the deceased.—McGee v. Walker, 106 Mich. 521.

¶ 207. Trover lies against executors who unnecessarily enter land held by devisee and take crops that were growing thereon when testator died.—Rough v. Womer, 76 Mich. 375.

§ 63. Title to lands bought by representative.

¶ 208. An administrator who bids in land at a foreclosure sale to protect the lien of a second mortgage held by the estate acquires the same title against third parties as any other purchaser, and the fact that the land may be or is treated as personal estate in the distribution of the estate does not affect his holding; he acquires the fee, and can dispose of it by deed, which will convey the same title as that of any other purchaser.—Watson v. Grand Rapids & I. R. Co., 91 Mich. 198.

§ 64. Recognition and title of foreign representatives.

Mortgages and mortgage debts of other states, see post § 65.

Authority and status of foreign representative, see ante § 51.

Jurisdictional rights under foreign administration, see ante §§ 15-17.

Right of foreign representative to sell real estate, see Jud. Act, chap. LIX, § 35, Comp. L. 1915, § 14021.

¶ 209. A foreign administrator has no interest in the real or personal property of his intestate in this state.—Thayer v. Lane, W. 200.

¶ 210. Where a foreign executor is by terms of the will entitled to a claim against another estate, he may present such claim for payment even though ancillary letters in Michigan have not yet issued on a petition for them: since the ancillary probate could only furnish evidence of his title and did not confer it.—Feustmann v. Gott's Estate, 65 Mich. 592.

¶ 211. Michigan letters of administration cannot give administrators control over Illinois lands.—Sheldon v. Rice, 30 Mich. 296.

§ 65. ——Mortgages and mortgage debts of other state.

¶ 212. An assignment by a foreign executor of a mortgage upon Michigan land and of its accompanying note is ineffectual.—McIntire v. Conrad, 93 Mich. 526.

[Note. In the foregoing case the foreign executor was bequeathed the mortgagee's estate as residuary legatee and was also appointed executor in the domicile. He took out ancillary letters in Michigan and assigned the note and mortgage to himself as residuary legatee. Before that the foreign will was allowed in Michigan. The case is therefore authority that even a residuary legatee, who is also executor abroad cannot pass title to a mortgage debt.]

¶ 213. Where a mortgage upon Michigan lands belongs to one who dies in another state, title thereto belongs to the administrator appointed here, and no foreign administrator can sell the claim to strangers.—Reynolds v. McMullen, 55 Mich. 568.

¶ 214. Where a mortgage upon real property in Michigan belongs to a person who dies in another state, and whose estate is in course of regular and valid administration under a local administrator in Michigan, no foreign administrator can sell the mortgage claim to strangers; since by virtue of the statutes the title thereto is in the local administrator for purposes of administration, and only he can sue on it or assign or discharge it of record.—Reynolds v. McMullen, 55 Mich. 568.

¶ 215. The public administrator at St. Louis, Missouri, acting without the authority of the court, took possession of the personal assets of a resident bachelor who died there, leaving heirs in Michigan. Among the assets was a mortgage on Michigan land, which the administrator sold at considerable loss and which a subsequent holder released. An administrator previously appointed in Michigan proceeded, however, to foreclose the mortgage. Held, that even if the public administrator had had authority under the laws of Missouri to take possession of the assets, he had none to sell the mortgage.—Reynolds v. McMullen, 55 Mich. 568.

¶ 215a. A foreign administrator cannot assign a mortgage on Michigan land for the purpose of foreclosing it, nor can he discharge it; new letters must be taken out within the state before the mortgage can be foreclosed and the land sold; since a mortgage in Michigan is a conveyance (How. St., § 5689), and cannot be foreclosed under the power of sale until it is recorded (How. St., § 8948); and any assignment of it for the purpose of foreclosure must also be of record and so must the assignor's authority.—Reynolds v. McMullen, 55 Mich. 568.

§ 66. Title of residuary legatee as executor.

Effect of bond by residuary legatee as executor, see post § 220.

Obligation, breach and liability on bonds of residuary legatees to dispense with further administration, see post § 388.

Authority of residuary legatee as executor to mortgage property of estate, see post ¶ 800.

Necessity for inventory or account by residuary legatee as executor, see post ¶ 330.

Requisites and sufficiency of deed conveying title of executor as residuary legatee, see post ¶ 425.

Extension of time for payment of legacies by executor as residuary legatee where payment required under will, see post ¶ 1147.

Bond when executor is residuary legatee, see Jud. Act. chap. LII, § 37, Comp. L. 1915, § 13809.

¶ 216. The title of a residuary legatee and executor, who has given the statutory bond to pay debts and has taken possession of the estate, is not absolute but subject to the payment of debts; and he may as executor sell real estate for that purpose without license from the probate court; and if such residuary legatee is removed as executor the title revests in the estate as unadministered assets, while the administrator may cause the land on application to be sold for debts.—Lafferty v. People's Savings Bank, 76 Mich. 35.

V. PROPERTY AND ASSETS.

A. IN GENERAL; WHAT INCLUDED.

§ 67. Personal or real property in general.

Debts, claims and contracts owing decedent, see post § 68.
Money orders, bills, notes and deposits, see post § 69.
Rents, royalties and current income, see post § 70.
Contracts payable "to heirs" or "assigns," see post § 71.
Debt of representative as asset, see post § 72.
Share of decedent in another estate, see post § 73.
Life insurance and action for wrongful death, see post §§ 74, 75.
Right of action for tort to property, see post § 76.
Property right in occupational or business license, see post § 77.
Property in possession of others, see post § 78.
Property held by other spouse or jointly owned, see post § 79.
Equitable assets, see post § 80.
Goods held as agent, bailee or trustee, see post § 81.
Unadministered assets, see post § 82.
Rents, issues and profits of realty as assets, see also ante § 62.
Growing crops as assets of estate, see also ante ¶¶ 206, 207.
Authority and right to collect and sue for assets in general, see post, V, B.
Inventory and appraisal of assets, see post, V, C.
Management, custody and disposal of assets and property of estates see post, V, E.
Title and rights of representative in assets of estate, see ante §§ 57-66.
Possession and dealings with assets and property by person other than representative, see post, V, F.
Rule that real estate descends direct to heirs, see Descent § 20.
Right of survivorship in property owned jointly with decedent, see Tenants in Common, II.
Partnership property, see Partnership, III.
Nature of representative's interest in partnership assets pending payment of partnership debts, see Partnership, III.
Dissolution, settlement and accounting of partnership and effect of dissolution as to surviving and deceased partners, see Partnership, VII, D.
Rights of deceased partner in general, see Partnership, IV.
Whether dower interest is asset of estate of deceased husband or can be sold by or released to administrator for benefit of estate, see Dower ¶ 9.
Interest in mortgaged premises as personalty in hands of representative, see Jud. Act, chap. LIV, § 11, Comp. L. 1915, § 13855.

¶ 217. At common law lands were not assets in the hands of an administrator except as they were subjected to his authority by the order of a competent court.—Sheldon v. Rice's Estate, 30 Mich. 296; and see Manning v. Drake, 1 Mich. 34.

§ 68. Debts, claims and contracts owing decedent.

Contracts payable to "heirs or assigns," see post § 71.
Share in assets of old corporation as chose recoverable from new one which took them, see Corporations ¶¶ 1146, 1147.
Nature of interest of decedent in land contract, see also Descent § 7.

¶ 218. Additional salary to which a circuit judge was entitled under an amendment to the constitution and paid to his administrator under a statute passed after his death appropriating money for the payment of the increase, is assets of the estate.—Joslyn v. Joslyn, 117 Mich. 442.

¶ 219. Where a father executes a will devising a farm to his son as security for the making of permanent improvements, consisting of a barn and addition to the house, and, after the death of the son, revokes the will, the estate of the son is entitled, upon the death of the father, to an allowance for such improvements.—Montgomery v. Montgomery's Estate, 191 Mich. 398.

¶ 220. The holder of a promissory note given by an intestate in his lifetime, and secured by a mortgage on realty, but not presented and allowed as a claim, is liable to the estate for the repayment of interest moneys paid to him by the administrator out of the personal estate to induce him to defer sale under a decree of foreclosure, although the agreement was made in good faith, since an administrator has no authority to part with any part of the estate in payment of a claim not regularly proved before the commissioners.—Miner v. Raymond, 113 Mich. 28.

§ 69. Money orders, bills, notes and deposits.

Title to bank deposit of decedent against which unaccepted check is outstanding, see Banking § 12.

¶ 221. Where, in response to a letter requesting a loan, the person to whom it is written purchases and forwards to the writer, after indorsing it to him, an express money order for the sum asked for, and the order is received by the writer's wife whom he has constituted his agent to receive and disburse it, the title to the order passes, on its receipt and acceptance by the wife, and upon the husband's death it becomes the property of his estate; and the question whether the widow rightfully or wrongfully disposes of the order is a matter between her and the administrator, in which the party sending it has no concern.—Mills v. American Express Co., 98 Mich. 154.

§ 70. Rents, royalties and current income.

¶ 222. Royalties from mines which were earned previously to the death of a testatrix, but which were payable after her death, do not constitute part of the general assets of a trust estate, but, being unapportionable, pass to the life tenant of a portion of the estate.—Poole v. Union Trust Co., 191 Mich. 162.

§ 71. Contracts payable "to heirs" or "assigns."

¶ 223. The proceeds of a note payable to the "legal heirs" of a grantor four years after his death, which note as taken amounts to a gift of such proceeds by him to the said heirs, will belong to them and not to his administrator.—Love v. Francis, 63 Mich. 181.

¶ 224. The administrator of the obligee's estate can sue on a bond drawn to a named person, his heirs or assigns.—Rynearson v. Fredenburg, 42 Mich. 412.

§ 72. Debt of representative as asset.

Liability of representative on bond for his debts to estate when insolvent, see post ¶ 1213.

¶ 225. When a debtor is appointed executor of his creditor's will, and accepts the trust, the debt is presumed to have been paid, and is treated as an asset in the executor's hands.—Crow v. Conant, 90 Mich. 247.

§ 73. Share of decedent in another estate.

¶ 226. An order by residuary legatees authorizing persons appointed trustees of the testator's estate to pay to their mother the amount of an insurance policy belonging to the estate after all the debts of such estate had been paid, "provided she survived the payment of such debts," entitled the mother's executor to the payment of such proceeds, where she lived fifteen months after the order was given, and the trustees during such time had sufficient funds to pay all debts, and the will provided that they should be paid at once.—Sheley v. Brooks, 114 Mich. 11.

¶ 227. A will made testator's widow tenant for life, with power to encroach on the principal if necessary for her support, and with power to dispose of the personalty by her will to the extent of reimbursing herself for all necessary payments made by her on account of the estate. She was also nominated and was appointed executrix; and when her final account as such was settled, it showed a balance in her favor. She did not collect it and eight years later the real estate was intact. She had then recently obtained her discharge. Held, that the balance found due her as executrix belonged to the legatees of the residuary personalty, and not to her personal representatives, it not being shown that she had any separate estate of her own, or that, if she had, she had used any of it for the benefit of her husband's estate.—Smith v. Blindbury, 66 Mich. 319.

§ 74. Insurance on decedent's life.

¶ 228. A beneficiary fund payable on the death of a member of an association to persons named by him is not an asset of the estate subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries or their guardian.—Catholic Mut. Ben. Ass'n v. Priest, 46 Mich. 429; Catholic Mut. Ben. Ass'n v. Firnane, 50 Mich. 82.

¶ 229. A widow named as payee in an insurance certificate issued to her husband, having suit thereon as administratrix, may waive her claim to the fund in favor of the estate.—Enright v. Standard Life & Accident Ins. Co., 91 Mich. 238.

§ 75. Right of action for wrongful death.

Establishing right of representative to sue for wrongful death, see ante ¶ 125.

Death by wrongful act in general, see Death by Wrongful Act.

Cause of action for death of parent by wrongful act as property sustaining guardianship in state, see Conflict of Laws ¶ 99.

Survival to representative of action for injuries resulting in lingering death, see Death by Wrongful Act § 4.

¶ 230. The right of action given to an administrator by How. St., §§ 8313, 8314, for negligently causing the death of his intestate, constitutes assets of the estate of the deceased, within the meaning of section 5848 authorizing administration in case of the death of a nonresident "leaving estate to be administered in this state."—Findlay v. Chicago & G. T. R. Co., 106 Mich. 700.

¶ 231. A right of action is as much property as is a corporeal possession, and under the Survival Act (Comp. Laws 1897, § 10117) this at once vests in the injured person upon the inflicting of the negligent injury, and upon his subsequent death becomes an asset of his estate to be collected and distributed in accordance with the administration statutes.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 232. The defendant, an attorney, made an agreement with a widow to prosecute a suit for causing the death of her husband. The next of kin and the administrator, the complainant, consented that the suit should be brought in the name of the administrator. No one was dependent on the deceased but his widow. Defendant settled the suit, and paid over the money to the widow. Complainant, as administrator, brings a bill to demand an accounting. Held, that no case was shown for the intervention of equity.—Hackett v. McIlwain, 158 Mich. 265.

§ 76. Rights of action for tort to property.

Procedure for enforcing rights of action for tort to property, see post § 90.

Essential facts to make prima facie case of conversion for administrator against decedent's son for crops, see Conversion ¶ 135.

¶ 233. An executor may bring trover for a conversion of his testator's goods that occurred but was not sued on in testator's lifetime under Comp. L. 1871, § 5828.—Rogers v. Windoes, 48 Mich. 628.

¶ 234. An executor can maintain trover without previous demand against a legatee who collects a note belonging to the estate and appropriates the money collected.—Harris v. Cable, 104 Mich. 365.

§ 77. Occupational or business licenses.

¶ 235. One's right to carry on the business of selling spirituous liquors at retail after paying the tax does not pass on his death to the administrator of his estate; at least not without paying the tax and giving a new bond.—People v. Sykes, 96 Mich. 452.

§ 78. Property in possession of others.

Property in possession of other spouse, see post § 79.

Delivery and acceptance or other transfer requisite for gift, see Gifts, III.

¶ 236. The title to unindorsed notes payable to a decedent and after his death found in his house among his housekeeper's effects, is presumed to have remained in him, and a contrary presumption does not arise from their being in the possession of the housekeeper who was their proper custodian until an administrator was appointed.—Bellis v. Lyons, 97 Mich. 398.

§ 79. Property held by other spouse or jointly owned.

See also ante ¶ 221.

Right of property as between decedent and surviving spouse, see Husband and Wife, II.

Title to joint deposit with right of survivorship created by decedent, see Banking § 6.

¶ 237. Where a certificate of deposit standing in the name of a wife at the time of her death, is shown to be the property of her husband, it is not necessary that it go through the hands of the administrator of her estate.—Mains v. Webber's Estate, 131 Mich. 213.

¶ 238. The title to a wife's interest in a mortgage executed to herself and husband jointly passes, at her death, to her executor, for the benefit of her creditors and heirs at law.—Luttermoser v. Zeuner, 110 Mich. 186.

§ 80. Equitable assets.

See also post ¶ 286.

Property held by decedent as trustee, see post § 81.

¶ 239. If the owner of the equity of redemption dies before foreclosure sale, the surplus moneys are assets of the estate.—Smith v. Smith, 13 Mich. 258.

¶ 240. The equity of redemption owned by a mortgagor does not become an asset of the mortgagee's estate by the mortgagor's appointment as executor, and acceptance.—Crow v. Conant, 90 Mich. 247.

¶ 241. The amount received by a wife as consideration for a separation agreement is not an equitable asset of the estate of the husband where the agreement was avoided by a reconciliation with the wife before the husband's death.—Knapp v. Knapp, 95 Mich. 474.

§ 81. Goods held as agent or bailee or trustee.

Surrender of trusts, pledges and property of others, see post § 124.

¶ 242. The administrator may recover as goods of the estate such as were held by the decedent on commission and which passed without authority of the administrator or payment to him to defendant, where the decedent's consignors have proved claims for such goods against the estate.—Brennan v. Pardridge, 67 Mich. 449.

¶ 243. Where a receiver dies without having rendered a final account, his executor may recover from a bank trust funds deposited by such receiver, though the bank, as creditor, may have an interest in the fund, the executor's purpose presumably being to turn the money over to the new receiver.—Avery v. Preston Nat. Bank, 132 Mich. 445.

§ 82. Unadministered assets.

¶ 244. After the inventory of an estate was filed, one of the distributees guaranteed the payment of a debt due the estate by a written instrument, reciting that such obligation was owned by the estate. It was orally agreed that the debt should be paid to the administrator, who should make an appropriate division of the proceeds among the other distributees. The debt was not collected, nor its proceeds distributed by the administrator as such, and subsequently, the guarantor having died, the administrator, who had in the meantime been discharged, procured an appointment as administrator de bonis non, and filed a claim for the amount of the debt against the estate of the guarantor. Held, that such debt had never ceased to be a part of the original estate, and was subject to collection and administration de bonis non.—Spring v. Perkins, 156 Mich. 327.

B. COLLECTION AND REDUCTION TO POSSESSION.

§ 83. Authority and primary right to collect or sue for assets.

Refusal or neglect by representative, see post § 84.
Administrators de bonis non and special administrators, see post § 85.
Suits by agents of representative, see post § 86.
Suing in individual or representative name, when permissible, see post § 87.
Suit before letters, see post § 88.
Collection of debts due from heirs or distributees, see post § 89.
Actions for conversion, implied contract, and contracts running to heirs, see post §§ 90, 91.
Claims for rents, profits and proceeds of land, see post § 92.
Claims for insurance, see post § 93.
Right to recover real property, see post §§ 96-101, 126 et seq.
Right and authority to sue in general, see post, XI, A.
Right of representative to possession of personalty and duty to obtain, see also ante § 59.
Possessory actions for lands, see post § 308.
Actions for trespass or waste, see post § 309.
Suits to remove clouds or perfect title, see post § 310.
Representative's right to management, custody and disposal of personalty, see post §§ 116-124.
Right of representative to compromise with debtor, see post § 317.
What are assets and property of estate, see ante, V, A.
Right of defendants in action by representative to set-off claims against estate, see also post § 316.
Right to sue for possession of chattels on death of life tenant thereof, see Life Estates, II.
Right to recover as representative despite estoppel as widow of decedent, see also Estoppel ¶ 240.
Nonestoppel as representative to sue for fund by reason of dealing with it as individual, see also Estoppel ¶ 239.
Demand for savings deposit of decedent without production of pass book, see Banking § 28, ¶ 89.
Right of representative to compound with debtor, see Jud. Act, chap. LIV, § 10, Comp. L. 1915, § 13854.

¶ 245. The administrator, not the next of kin or heir at law, represents decedent's personal estate, and he is the only proper person to prosecute a claim on its behalf.—Hollowell v. Cole, 25 Mich. 345.

¶ 246. An administrator has no power as such to invade at pleasure the premises of a person in peaceable possession of the personal property of the estate and take it therefrom without process.—Waldo v. Waldo, 52 Mich. 94.

¶ 247. Until the probate court has adjudged in whom is the title or possession the general administrator only can bring suit for personal property in the intestate's possession and control.—Palmer v. Palmer, 55 Mich. 293.

¶ 248. Except under exceptional circumstances the personal representative of a decedent, as the holder of the legal title to the personal property of such decedent, is alone authorized to bring an action for the recovery of a debt due the estate.—Brobst v. Brobst, 190 Mich. 63.

¶ 249. The bare fact that there are probably no creditors of a decedent to whom a chose in action belongs does not create an exception to the rule that the personal representative of the decedent is alone authorized to enforce the chose in action.—Brobst v. Brobst, 190 Mich. 63.

¶ 250. Heirs and legatees of a decedent have no authority to enforce the payment of debts owing to the estate.—Brobst v. Brobst, 190 Mich. 63.

§ 84. ——Refusal or neglect by representative.

Authority in general to sue on refusal or neglect of representative, see post §§ 311, 312.
Liability of representative for loss from failure to collect assets, rents or profits, see post §§ 282, 283.

¶ 251. If the executor neglects his duty in collecting or obtaining possession of the assets of the estate the law gives the devisees and legatees a remedy, but does not permit a devisee or legatee to represent the estate in the prosecution or defense of suits.—Hillman v. Schwenk, 68 Mich. 297.

¶ 252. Act No. 326, Pub. Acts 1905, conferring upon a creditor of an estate the right, upon the refusal of the executor or administrator to bring suit, to bring it himself in the name of such executor or administrator, is broad enough to include a case where the executor or administrator claims title to the property.—McFarlan v. McFarlan, 155 Mich. 652.

¶ 253. Where the creditors of an estate have notice that the decedent held a mortgage which has only partly matured, they should inquire into the matter in the probate court if they wish to have it applied to their benefit.—Dickinson v. Seaver, 44 Mich. 624.

¶ 254. Fifteen years' unexplained delay by creditors of an estate in bringing suit to have applied in aid of administration and subjected to satisfaction of debts a mortgage to the intestate, of the ownership whereof by him they had notice, held too great.—Dickinson v. Seaver, 44 Mich. 624.

§ 85. ——Administrators de bonis non and special administrators.

See also ante ¶ 244.

Necessity and occasion for special administration, see ante § 5.

Necessity and occasion for appointment of administrator de bonis non, see ante § 6.

Status and authority of special administrator in general, see ante § 49.

Authority and status in general of administrator de bonis non, see ante § 49.

Petition for special or other limited letters, see ante § 26.

Equity jurisdiction over special administrator on bill for recovery of assets, see also ante ¶ 49.

Authority of special administrator to rescind transfers fraudulently obtained from decedent, see also post ¶ 284.

Authority of administrator de bonis non to set aside mortgage, see also post ¶ 308.

Authority of special representative to sue to set aside fraudulent conveyances of decedent, see also post ¶ 311.

Ejectment by administrator de bonis non, see also post ¶ 991.

¶ 255. The powers of a special administrator under Comp. Laws 1897, sections 9326-9330 do not give him the authority to sue in equity to cancel a conveyance of real estate alleged to have been obtained from deceased by fraud.—Union Trust Co. v. Kirchberg, 174 Mich. 161.

§ 86. ——Suits by agents of representative.

¶ 256. A party who loaned money to an administratrix and received from her a note indorsed to him as security, and who agreed to collect the note and bring suit thereon if necessary and after deducting the amount coming to him, account to her for the balance, is the agent of the administratrix to collect, and may sue on the note in his own name.—Benjamin v. Early, 123 Mich. 93.

§ 87. Suing in individual or representative name, when permissible.

Suing in representative or individual capacity in general, see post § 321.

¶ 257. An administrator may sue in either his individual or his representative character for money had and received after the death of his intestate for the use of the estate, but to recover for money received in the lifetime of the intestate he must sue in his representative character, and allege that it was received to the use of the intestate.—Barnum v. Stone, 27 Mich. 332.

¶ 258. A foreign executor can sue in his own name on a note belonging to the estate and payable to bearer; and any claim held by the defendant against the estate can be presented as set-off. But if the note were non-negotiable, or payable to order and not indorsed, the executor should sue in his official character.—Knapp v. Lee, 42 Mich. 41.

¶ 259. Where an administrator sues a mutual benefit association as such upon a certificate of insurance, recovery should be permitted if he is shown to be the only person entitled to participate in the fund, even though the action ought to have been brought by him in his individual capacity.—Peet v. Great Camp of Knights of Maccabees, 83 Mich. 92; Enright v. Standard Life & Accident Ins. Co., 91 Mich. 238.

¶ 260. Where the heirs of a deceased member of a mutual benefit association are the persons, if any, entitled to recover on his beneficiary certificate, action thereon cannot be objected to because brought in the name of his administrator who is also his sole heir.—Peet v. Great Camp of Knights of Maccabees, 83 Mich. 92.

¶ 261. An executrix who is also the sole legatee and devisee may, after the payment of all debts, turn over to herself a claim due the testator, and seek to enforce it in her individual capacity.—Ewers v. White's Estate, 114 Mich. 266.

§ 88. Maturity of right, suit before letters.

Acts or disposals before letters, see post § 116.

¶ 262. A foreclosure suit begun by foreign executors before the will is probated in Michigan is made good by subsequent probate before the hearing.—Gray v. Franks, 86 Mich. 382.

§ 89. Collection of debts due from heirs or distributees.

Collection of guaranty due from distributee, see also ante ¶ 244.

¶ 263. The distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness either as against the land or the proceeds of the sale thereof in the hands of the administrator; such indebtedness is to be collected by proceedings brought the same as for collecting any other indebtedness due the estate.—Marvin v. Bowlby, 142 Mich. 245.

§ 90. Action for conversion or on implied promise for value.

Rights of action for tort to property as assets, see ante § 76.

Denial of right to sue in trover as collateral attack on letters, see ante ¶ 130.

Taking and withholding goods claimed by decedent as a conversion against true owner, see Conversion § 3, ¶ 8.

¶ 264. The possessor of personal property of an intestate may maintain trover for its conversion against a wrongdoer, or one having no better right than himself; and if the possessor die, his administrator may also bring trover for a conversion of the property taking place after his intestate's death, and

prior to his own appointment as administrator.—Cullen v. O'Hara, 4 Mich. 132.

¶ 265. An executor may bring trover for a conversion of the estate's goods that occurred but was not sued on in testator's lifetime, under Comp. L. 1871, § 5828.—Rogers v. Windoes, 48 Mich. 628.

¶ 266. The collection by a legatee of a note which belongs to the estate, and the appropriation by her of the moneys collected, amount to a conversion, and the executor can maintain trover against her without demand.—Harris v. Cable, 104 Mich. 365.

¶ 267. An administratrix is not estopped from bringing trover for conversion of stock belonging to the estate by her action before appointment in indorsing the certificate of such stock.—Morton v. Preston, 18 Mich. 60.

¶ 268. Proof that plaintiff's intestate transferred funds to defendant when she was mentally incompetent and was subjected to undue influence by defendant, will sustain an action by the administratrix for money had and received; a bill in chancery to set aside the transfer being unnecessary where no real estate is involved.—Harty v. Teagan, 150 Mich. 75.

¶ 269. In trover by an administrator against a son of the deceased, who had carried on the latter's farm, for certain grain, stock and tools on the farm claimed to belong to the estate and to have been converted by defendant, evidence that intestate, years before, owned a horse and wagon, which he sold and with the proceeds bought a farm, and afterwards (but nearly twenty years before suit) sold that farm and purchased the farm on which this personalty belonged, in his wife's name, and to avoid the payment of his debts, is impertinent and immaterial, at least in the absence of any showing that suit was in the interest of creditors or that there were creditors.—Hill v. Chambers, 30 Mich. 422.

§ 91. Suits on contracts running to "heirs and assigns."

¶ 270. Where a bond is drawn to the obligee, "his heirs and assigns," his administrator can bring suit upon it, and the bond need not contain formal words giving him the right to sue.—Rynearson v. Fredenburg, 42 Mich. 412.

§ 92. Claims for proceeds of land or rents and profits.

Collection of condemnation award as "issues and profits of land," see also ante ¶ 205.
Collection of awards in condemnation proceedings, see Eminent Domain § 119.

¶ 271. An award in condemnation proceedings against a testator's estate should be paid to the executor for distribution in the probate court according to the rights of the legatees.—City of Detroit v. Schilling, 42 Mich. 429.

§ 93. Claims for insurance.

Name of capacity in which suit for insurance to be brought, see also ante ¶¶ 259, 260

¶ 272. An administrator of the mortgagor can sue on an insurance policy for the use and benefit of a mortgagee to whom it was payable.—Westchester Fire Ins. Co. v. Dodge 44 Mich. 420.

¶ 273. The administrator may sue for death benefit in a firemen's mutual benefit and relief society organized under How. St. chap. 165, where person designated to receive it for wife and children declines to act. —Neville v. Detroit Firemen's Fund Ass'n, 104 Mich. 149.

¶ 274. An executor is entitled to incur all reasonable expense necessary to prosecute suits to recover funds due from the insurance companies on the testator's policies, despite the fact that a large portion of the money when collected will go to the heirs and legatees.—In re Bender's Estate, 154 Mich. 44.

§ 94. Statutory probate proceedings to discover assets.

Failure to seek discovery in probate court as laches, see also Equity ¶ 179.
Pendency of probate proceedings for discovery as affecting right to sue in equity for winding up partnership, see also Equity ¶ 101.
Order on demurrer to application as nonappealable interlocutory decree, see Probate Courts, III.
Appeals to circuit court from orders in statutory probate proceedings to discover assets, see Probate Courts, III.
Writ of error from circuit judgment on appeal to supreme court, see Appeal.
Proceedings to discover assets concealed or embezzled, see Jud. Act, chap. LIV, §§ 7-9, Comp. L. 1915, §§ 13851-13853.

¶ 275. A probate order under Comp. L. 1871, § 4408, How. St., § 5876, requiring the respondent to furnish such information as will enable an administrator to know the condition and resources of his decedent's estate, is merely ancillary to such action as may be had in any court where such information is needed; it is not a final accounting and may be issued against strangers to the record.—Perrin v. Calhoun Circuit Judge, 49 Mich. 342.

¶ 276. Comp. L. 1871, § 4408, How. St., § 5876, in providing that any person interested in a decedent's estate may bring before the judge of probate for examination any one whom he suspects of possessing writings which tend to disclose the interest of the deceased in any property, entitles an administrator de bonis non to cite the executor of a

previous administrator to produce the books of a partnership composed of the deceased and the previous administrator. And the proceeding is not barred by the pendency of a suit in equity for final relief.—Perrin v. Calhoun Circuit Judge, 49 Mich. 342.

¶ 277. The representative of a deceased executor can be compelled by the probate court to give information to parties in interest, but such inquiries should be so carried on as not to interfere needlessly with the place of custody of books in daily use, and the right of access to them.—Perrin v. Calhoun Circuit Judge, 49 Mich. 342.

¶ 278. A person cited to appear before the probate court for examination touching his possession of effects belonging to the estate of a deceased person, under How. St., § 5876, cannot be forced to submit to an oral examination, but the same must be made upon written interrogatories and answers, as provided by How. St., § 5877.—Palmer v. Jackson Circuit Judge, 90 Mich. 1.

¶ 279. The sole purpose of the statute (How. St., § 5876), which provides for the citation before the probate court and for the examination on oath of a person suspected of having in his possession or knowledge any deed, etc., containing any evidence of a decedent's right or title to any real or personal estate, etc., is to procure the production and examination of the documents specified in the statute; and when executors cited to appear for examination answer fairly, and tender full access to all documents called for, the labor and expense of preparing and furnishing a schedule of such property will not be imposed upon them.—Manly v. Washtenaw Probate Judge, 99 Mich. 441.

§ 95. Equitable remedies, procedure and relief.

Retention of bill to recover assets for complete relief by compensation to representative for chattels, see Equity § 222.

Retention of creditors' bill against administrator as bill by him for same purpose, see Creditors' Suits ¶ 139.

Proper form of bill to reach resulting trust for benefit of creditors, see Creditors' Suits § 5.

Averments of willingness to do equity in bill to cancel foreclosure under invalid mortgage and to reinstate prior valid mortgages made by decedent, see also Equity ¶ 339.

Remedy of accounting against surviving partner, see Partnership, VII, E.

Equitable remedy where employees operating farm for decedent at fixed wage appropriate income and refuse to account, see Master and Servant, II.

¶ 280. The complainant, who was administrator on his daughter's estate, filed a bill claiming the possession of a note signed by him and belonging to her estate, and which was in the hands of the defendant, her husband. Held, that though complainant, by proving that the wife owned the note against him at her decease, and that he was her administrator, could thereby establish a full defense in a suit at law thereon against him, yet this did not constitute a full and adequate remedy, and that he was also entitled to have it delivered up to him, and that a court of chancery had jurisdiction.—Wales v. Newbould, 9 Mich. 45.

¶ 281. Complainant's intestate had leased premises for the purpose of erecting a steam sawmill thereon, had placed upon them a frame for the building, ready for erection, and had contracted and partly paid for an engine for the same. After his death the land was sold by the lessor, and the purchaser, together with the contractor for the engine, put up the frame, and completed and commenced operating the mill. Complainant, as administrator, filed his bill against them to compel payment of the value of the mill frame, and of the moneys paid towards the engine, and to have the amount declared a lien on the premises. Held, that his claims were not of equitable jurisdiction, and his remedy was at law.—Bennett v. Nichols, 12 Mich. 22.

¶ 282. Where a bill is brought by an administrator to impress a trust on certain property held by defendant, and claimed by her under an alleged gift inter vivos by the deceased, equity has jurisdiction, and the bill should not be dismissed on the ground that there is an adequate remedy at law.—Chamberlain v. Eddy, 154 Mich. 593.

¶ 283. Whether the heirs are necessary parties in a suit by a mortgagor's administrator to redeem or to compel the release of a satisfied mortgage, quære; but an objection to their nonjoinder should be taken before hearing.—Enos v. Sutherland, 11 Mich. 538.

§ 96. Suits to rescind transfers and recover property.

[Note. Since ordinarily the real estate does not come into administration except when the administrator assumes possession (see post, V, E, 2), or sues under the statute to annul fraudulent conveyances (see post § 97 et seq.), or petitions to sell for debts (see post, VII, A), the rights of the heirs to sue for recovery of the realty are determined by the fact and consequences of their being heirs (see post, XV; also Descent) and by the law applicable generally to real actions, e. g., Ejectment; Quieting Title; Trespass. The right to sue for relief from fraud practiced on a deceased grantor depends further on the law of Fraud, which see, and that of Rescission and Cancellation, which see.]

Suits to annul decedent's fraudulent conveyances, see post § 97.

Laches of heirs or distributees to sue to annul conveyances obtained in fraud of decedent, see also Equity, IV.

Procedure in general for rescission, see Rescission and Cancellation, VI.
Appeals to circuit court from decrees rescinding fraudulent transfers, see Probate Courts, III.
Writ of error from circuit judgment on appeal to supreme court, see Appeal.
Delay in suing to rescind grant by incompetent decedent until after right matures by his death, as excusable delay, see also Equity ¶ 183.
Validity of voluntary deed as against personal representative, see Deeds § 3.

¶ 284. Where a third party has obtained title to real estate from deceased by fraud, the heirs, and not the special administrator, have the right to sue in equity to cancel the conveyance.—Union Trust Co. v. Kirchberg, 174 Mich. 161.

¶ 285. To recover money fraudulently obtained from a person in his lifetime and secretly withheld from his administrator, an accounting may be required in equity and the fund pursued, or an action maintained at law.—Powell v. Pennock, 181 Mich. 588.

¶ 285a. A bill filed by an administrator on behalf of the estate for the cancellation of a deed given by his intestate and for an accounting, must be considered as attacking the conveyance for the benefit of all persons interested in the estate though not parties to the suit.—Travis v. Parks, 130 Mich. 15.

§ 97. Suits to annul decedent's fraudulent conveyances.

Suits by creditors, see post § 98.
Existence of debts and of fraud on claimants, see post § 99.
Bill and procedure thereunder, decree and relief, see post § 100.
Parties affected by setting aside, see post § 101.
Suits to rescind or recover property fraudulently obtained from decedent, see ante § 96.
Bill in aid of execution against lands of decedent designed to annul decedent's fraudulent conveyance, see also post ¶ 594.
Purchase of farm in wife's name with proceeds of sale of land to avoid debts, see also ante ¶ 269.
Proof of authority to sue to annul decedent's fraudulent conveyances, see ante ¶ 177.
Petitioner's intention on appointment to sue to annul decedent's fraudulent conveyance as ground for denial of letters, see ante ¶ 110.
What constitutes fraud, see Fraudulent Conveyances, I.
Procedure in general on setting aside fraudulent conveyances, see Fraudulent Conveyances, V.
Assignability of administrator's right to institute proceedings to set aside intestate's fraudulent transfers, see also Fraud and Deceit, III, A.
Venue in general, see Venue, I.
Suit for recovery of lands fraudulently conveyed by decedent, see Jud. Act, chap. LIV, §§ 15-17, Comp. L. 1915, §§ 13859-13861.

¶ 286. Equitable assets, including land fraudulently conveyed, or held in trust for creditors, may be recovered by the administrator of the debtor, and are assets in his hands.—Beith v. Porter, 119 Mich. 365.

¶ 287. How. St., § 5884, authorizing and making it the duty of administrators, when there is a deficiency in assets, to take steps to secure so much as shall be necessary to pay the debts of the estate from any property which the deceased shall have conveyed in fraud of creditors, is not in derogation of the common law and should be liberally construed; and therefore an administrator may file a bill to set aside a conveyance of land bought and paid for by the deceased and deeded by him to his wife.—Beith v. Porter, 119 Mich. 365.

¶ 288. Where there is a deficiency of assets to pay claims allowed, lands conveyed by the decedent for a nominal consideration and subject to the payment of his debts may be recovered from the grantee for the benefit of the estate's creditors under How. St., § 5884.—Farrand v. Caton, 69 Mich. 235.

¶ 289. Under Comp. Laws 1897, § 9363, where there is a deficiency of assets in the hands of an executor or administrator and deceased has in his lifetime conveyed any real estate with intent to defraud his creditors, the executor or administrator may sue to recover such real estate for the benefit of the creditors.—Union Trust Co. v. Kirchberg, 174 Mich. 161.

¶ 290. An administrator is entitled to seek relief in equity for an accounting and to set aside a deed given by the decedent to his son, reserving a life interest in himself, the son having controlled the property under a parol agreement for a period of several years.—Griffin v. Hovey, 179 Mich. 104.

¶ 291. Where an administrator brings suit to set aside a deed delivered as ordered after the grantor's death, and to sell the premises to pay debts the attitude of the widow, who is one of the grantees, is not important and the fact that she happens to be the principal creditor has no bearing on the rights and duties of such administrator.—Barris v. Emmons, 173 Mich. 590.

¶ 292. An administrator cannot maintain a bill in equity under How. St., § 5884, to set aside a deed of his intestate as in fraud of creditors, for the sole purpose of reaching the proceeds of crops growing upon the land

at the time of the conveyance. The remedy in such case is in an action at law.—Bresnahan v. Nugent, 106 Mich. 459.

¶ 293. Quære, whether an administrator of a deceased partner may file a bill to reach property of the partnership transferred to the wife of the deceased, to evade the payment of partnership debts.—Murdoch v. Walls, 121 Mich. 164.

¶ 294. The right which the statute confers upon an administrator, in case of a deficiency of assets, to institute proceedings to avoid fraudulent dispositions of property by the intestate, cannot be assigned by him.—Morris v. Morris, 5 Mich. 171.

§ 98. ——Suits by creditors.

¶ 295. Where the administrator of an insolvent estate of a decedent refused to institute proceedings to set aside a conveyance by the decedent as in fraud of a certain creditor whose obligation was contracted prior to such conveyance and who obtained judgment against the estate upon the obligation, held that the judgment creditor might institute such suit.—Allen v. Powers, 106 Mich. 622.

¶ 296. A bill filed by a creditor against the administrators of his deceased debtor and others, to set aside a conveyance made by the deceased as fraudulent, and subject the land to the payment of debts, is not within R. S. 1838, p. 288, § 10, prohibiting the commencement of suits against administrators within one year after their appointment, etc.—Manning v. Drake, 1 Mich. 34.

¶ 297. Where a bill is brought by a creditor in the name of the administrator of an estate, to set aside the conveyance of certain real estate by the deceased, in fraud of creditors, and no evidence is introduced by the defendant to show that the administrator intended to bring the suit, and all the subsequent proceedings show clearly he did not intend so to do, the bill will not be dismissed for being prematurely brought.—Mette v. Mette, 154 Mich. 662.

§ 99. ——Existence of debts and of fraud on the claimants.

Necessity of deficiency of assets to pay debts, see also ante ¶¶ 288-294.

Necessity of showing of creditors' interest in conversion, see ante ¶ 269.

What constitutes fraud, see Fraudulent Conveyances, I.

¶ 298. General claims against an estate must be adjudicated by the commissioners thereon or by the probate court, or on an appeal, before they become a charge against the estate which will warrant the executor in filing a bill to set aside a conveyance made by his decedent in order to obtain assets for their payment.—O'Connor v. Boylan, 49 Mich. 209.

¶ 299. How. St., § 5884, authorizing an administrator to recover any lands conveyed in fraud of creditors by decedent in his lifetime, does not, it seems, authorize the subjecting to the payment of debts incurred by decedent to purchase land deeded to defendant, his wife, by a stranger at a time when decedent had no creditors who could complain of such deed.—White v. Newhall, 68 Mich. 641.

¶ 300. A father's settlement with his son for services rendered after the latter had reached his majority, and the transfer of property made in satisfaction, will not be disturbed in favor of the father's administrator, when there is no proof of fraud or undue advantage. Such settlements are not to be discouraged.—Bowen v. Lockwood, 26 Mich. 441.

¶ 301. Relief cannot be granted under §§ 9363, 9364, C. L. 1897, How. St., 2nd ed., §§ 11074, 11075, in an action by an administrator for the benefit of creditors, to set aside an alleged fraudulent conveyance, where a portion of them did not extend credit on reliance on the debtor's apparent ownership.—Cowan v. Anderson, 184 Mich. 649.

¶ 302. Lands conveyed by a husband to his wife under stress of debts and without adequate consideration, they constituting a large part of his life long savings, and his debts exceeding the value of his remaining property, will be subjected to claims allowed against his estate.—Blue v. Schurtz, 115 Mich. 690.

¶ 303. The granting of time within which to move for a new trial on a claim and judgment against the estate of a deceased person does not suspend the right of the administrator to file a bill under How. St., § 5884, to set aside a conveyance made by the decedent on the ground that it was void as to the claim of the judgment creditor.—Walker v. Cady, 106 Mich. 21.

¶ 304. Testimony of the administrator and a son of the deceased that they know of no property belonging to the estate except the land in controversy, alleged to have been conveyed in hindrance of creditors, and another parcel claimed to have been conveyed under like circumstances, establishes a prima facie case of deficiency of assets.—Walker v. Cady, 106 Mich. 21.

¶ 305. The fact that a person died in another state, where he had lived for about two years previous to his death, creates no presumption that he left property there, so as to rebut an otherwise sufficient showing of a deficiency of assets in a suit by his administrator to set aside a conveyance by the decedent as in fraud of creditors.—Walker v. Cady, 106 Mich. 21.

¶ 306. On a bill by an executor to set aside a deed and to reach assets disposed of

in fraud of creditors the allowance of claims by the commissioners not shown on their face to have accrued after the testator's death is prima facie evidence of their existence before that period.—Chapoton v. Prentis, 144 Mich. 283.

§ 100. ——Bill and procedure thereon, decree, and relief.

Duty of representative to attack fraudulent conveyance for benefit of all persons interested in estate, see ante ¶ 285a.

¶ 307. A bill filed by an administrator to subject property once owned by his intestate to the payment of demands against the estate will not lie where the bill itself tends to show that the property was disposed of without fraud as against creditors; as where deeds were given in escrow for the purpose of distributing the property among the grantor's heirs without will or administration, and with the reservation of a power to destroy the papers at any time.—Crittenden v. Basom, 46 Mich. 33.

¶ 308. An administrator de bonis non cannot bring suit to set aside a mortgage made by his decedent without averring a deficiency of assets in his hands and in those of his predecessors in the trust to satisfy the obligations existing against the estate (How. St., §§ 5884, 5885).—Kellogg v. Beeson, 58 Mich. 340.

¶ 309. Where a bill to set aside a conveyance as in fraud of the creditors of a deceased person sets forth the probate proceedings, the appointment of complainant as administrator, the allowance of a claim against the estate, and a deficiency of assets, it sufficiently appears that the bill is filed by the complainant in his capacity of administrator, under How. St., § 5884, although there is no specific allegation to that effect.—Walker v. Cady, 106 Mich. 21.

¶ 310. Where the bill alleges that there is a deficiency of assets in the hands of an executor through the allowance of claims which became a charge upon the estate an executor or administrator may institute proceedings under Comp. L. 1897, § 9363 et seq., without either an order of the probate court or an application by creditors.—Chapoton v. Prentis, 144 Mich. 283.

¶ 311. Where there is no allegation of creditors' claims, a special administrator cannot maintain a bill to set aside conveyances of realty by the deceased, on the ground of undue influence and fraud exercised by the grantee, and the mental incapacity of the grantor.—Pratt v. Millard, 154 Mich. 112.

¶ 312. Where an administrator seeks to have deeds made by his intestate declared void as to creditors, decedent's immediate grantee should be made a party to the bill, although he does not now own or have possession of the premises sought to b subjected to the payment of the debts of th estate—he being interested because of hi warranty to his own grantees.—Fraser v Passage, 63 Mich. 551.

¶ 313. In a suit by an executor to set asid a deed and to reach assets disposed of i fraud of creditors because of a deficienc in assets due to the allowance of claims i person who has been paid in full and ha parted with his interest is neither a neces sary nor a proper party.—Chapoton v. Pren tis, 144 Mich. 283.

¶ 314. An answer to a bill to set aside decedent's conveyance in order to pay de frauded creditors, which answer assails the foundation of the bill by denying the regular and legal allowance of the claims, must state wherein they were illegally allowed, as that a sufficient number of commissioners did not allow them.—Reed v. Jourdan, 109 Mich. 128.

¶ 315. An old man gave a warranty deed of his land in consideration of a life lease back to him and of his support during life. His executor filed a bill, under Comp. L. 1871, § 4416, How. St., § 5884, to set this aside as fraudulent in respect to his creditors. Held, that the objection could not be made, especially if not set up in the answer, that the transfer was of a homestead and not the subject of such a bill. It was in effect the conveyance of the expectant remainder after the extinguishment of the homestead.—O'Connor v. Boylan, 49 Mich. 209.

¶ 316. Since defendant, the fraudulent transferee, is not harmed by it, an administrator's bill to set aside intestate's conveyances as in fraud of creditors cannot be defended on ground that creditors' claims were assigned to complainant.—Howd v. Breckenridge, 97 Mich. 65.

¶¶ 317-318. In an action by a special administrator to recover real estate alleged to belong to deceased where it appears that complainant has no interest in the subject-matter and no authority to institute or conduct the suit, the bill is properly dismissed on motion of defendant.—Union Trust Co. v. Kirchberg, 174 Mich. 161.

¶ 319. An executor's bill under Comp. L. 1871, § 4416, How. St., § 5884, to set aside a conveyance made by his decedent as fraudulent in respect to creditors, will lie though the title has been passed to innocent purchasers, and it will reach the proceeds of such transfer. But the amount recoverable is so much only as will satisfy the deficiency in decedent's assets below the amount required to pay his debts.—O'Connor v. Boylan, 49 Mich. 209.

¶ 320. In a suit by an executor to set aside a deed and to reach assets disposed of

in fraud of creditors begun under a statute permitting such proceedings where there is a deficiency of assets due to the allowance of claims a decree, annulling the deed and ordering a reconveyance to the executor and ordering the executor to reduce the land into money by sale thereof as if the deceased had died possessed thereof, is too broad, and may be modified so as to provide for the payment by the grantee of the claims allowed and the costs of the proceedings in the probate and circuit courts, and for the sale of the land only in case of his failure to comply therewith.—Chapoton v. Prentis, 144 Mich. 283.

¶ 321. An administrator who sues to recover the value of goods conveyed by his decedent in fraud of creditors, cannot recover interest thereon from the time of transfer.—Bresnahan v. Nugent, 97 Mich. 359.

¶ 322. In a suit by an administrator under How. St., § 5884, to set aside a deed executed by decedent as in fraud of creditors, the court entered a decree vacating and setting aside the deed. Held, that defendant should have been permitted, upon the payment of the claims against the estate and of the costs of the proceedings in the probate and circuit courts, to retain the land, subject to the widow's dower interest therein.—Reed v. Jourdan, 109 Mich. 128.

¶ 323. On setting aside a deed by a debtor to his wife because it was in constructive fraud of creditors, he being since deceased and the relief being sought by his administrator on behalf of creditors, decree was entered with leave to the grantee to discharge the lien of the decree by paying to the administrator a sum sufficient to satisfy creditors.—Blue v. Schurtz, 115 Mich. 690.

§ 101. ——Parties affected by setting aside.

¶ 324. In a suit by the administrator to set aside a deed delivered as ordered after the grantor's death, and to sell the premises to pay debts, the widow who is a grantee thereunder and is the principal creditor is neither asserting nor denying the validity of the deed.—Barris v. Emmons, 173 Mich. 590.

¶ 325. Where a decedent granted his estate to his wife and to others by a deed delivered after his death, the wife who is a creditor of the estate, has a legal right as against her cograntees to repudiate the deed and to stand on her rights as a creditor and as a widow entitled to her statutory rights, on the deeds being set aside at suit of the administrator under the statute as in fraud of creditors.—Barris v. Emmons, 173 Mich. 590.

§ 102. Evidence and presumptions as to assets and title of decedent.

Presumption of assets in foreign state from fact that decedent died a resident thereof, see also ante ¶ 305.

Evidence and burden of proof in general in actions by or against representative, see post § 324.

Evidence in actions on claims against estate, see post §§ 205-207.

Presumption as to ownership of tax sale certificate in one's possession originally issued to decedent, see Evidence ¶ 285.

Petition by claimant for surrender of property by executor as admission against claimant's interest, see Evidence ¶ 2053.

Evidence as to ownership of property in trover by personal representative, see also Conversion §§ 31, 36, 37.

Rebuttal on question of ownership in trover by representative, see also Evidence ¶ 444.

Conclusion of witness as to ownership by gift, see Evidence ¶ 1272.

¶ 326. On an issue as to ownership by decedent of personalty on a farm cultivated by a son, the claimant, evidence having any tendency to show what the understanding was between the father in his lifetime and the son, regarding the ownership, should be liberally received.—Chambers v. Hill, 34 Mich. 523.

¶ 327. On an issue as to ownership of grain, live stock and tools on a farm occupied by decedent, evidence showing the understanding between husband and wife as to the ownership of the stock, etc., and the general sense and expression on the subject in the family, is pertinent.—Hill v. Chambers, 30 Mich. 422.

¶ 328. Where, in a suit by an administrator to recover from his intestate's widow the value of certain crops growing upon a farm owned by her and her husband in the entirety at the time of his death, and which she afterwards converted to her own use, plaintiff claims to recover upon the theory that there was an arrangement between the husband and wife by which the husband was to own the crops, an objection that title to the crops can only be shown by showing the record title to the farm is untenable, as, if plaintiff's theory is substantiated by the evidence, it suffices and he can recover for the whole crop.—Parks v. Norris, 101 Mich. 71.

¶ 329. In an action by the administrator of the estate of a grantor in a certain deed, which reserved to the grantor a life estate in the premises conveyed, to recover rent claimed to be due from the tenant of the grantor, where the rent had been paid to a date subsequent to the grantor's death, such deed held admissible, as relevant and material to show that the grantor's title had been extinguished.—Harrington v. Sheldon, 196 Mich. 388.

C. INVENTORY AND APPRAISAL.

§ 103. In general.

Partnership or trust properties, see post § 104.

Variance in account from inventory, see post § 343.
Filing of inventory as condition precedent to presentation or hearing of claims, see post ¶ 508.
Effect and conclusiveness of inventory on representative, see post ¶ 830.
Effect of failure to inventory mortgage note with mortgage, see post ¶ 1200.
Effect of joint inventory, see also post ¶ 965.
Making and return of inventory, see Jud. Act, chap. LIV, § 1, Comp. L. 1915, § 13845.
Necessity and procedure for appraisal, see Jud. Act, chap. LIV, §§ 2-4, Comp. L. 1915, §§ 13846-13848.

¶ 330. An executor who has given the bond provided for in Comp. L. 1871, § 4366 (How. St., § 5836), need return into court no inventory nor account whatever.—Durfee v. Abbott, 50 Mich. 278.

¶ 331. A fund appraised as the individual property of the executrix and referred to as her property in the affidavits of her daughter and her son-in-law may properly be held to belong to her personally and not as executrix, on an issue arising out of a claim against the estate for services relating to such fund.—Bullock v. Tompkins' Estate, 125 Mich. 17.

§ 104. Partnership or trust properties.

Accountability for surviving partner's acts and omissions, see post § 302.
Purchase by representative of interest of decedent's partner, see post ¶ 382.
Variance in account from inventory of partnership properties, see post ¶ 1091.

¶ 332. An inventory by the administrator of a deceased partner should only refer to the interest as a partnership one, giving its location; it should not undertake to give the items of the partnership property.—Loomis v. Armstrong, 63 Mich. 355.

¶ 333. Where an inventory was filed by an executor showing a large quantity of unmanufactured timber as being embraced in a contract held by a partnership of which the executor was the surviving member and such surviving partner thereafter had a scale made resulting in a large shortage for which the partnership failed to account; held, if the scale was a short one and was purposely so made by the surviving partner, it should not control, and that if a mistake was made in the inventory, the executor should not be bound thereby.—Porter v. Long, 124 Mich. 584.

D. ALLOWANCE TO WIDOW AND CHILDREN.

§ 105. In general; nature of right.

Amount allowable or proper, see post § 106.
Amount allowable in estates under $150, see post § 107.
Household furniture and property allowances, see post § 108.
Allowance from insolvent estates, see post § 109.
Bar or release or right, see post § 110.
Effect of will or other provision, see post § 111.
Commencement and duration of allowance or payment, see post § 112.
Statutory allowances to widow and children out of personalty and for support, see Jud. Act, chap. LVII, § 1; Comp. L. 1915, § 13913.
Allowance for widow and family, see also Jud. Act, chap. LII, § 22; Comp. L. 1915, § 13794.

¶ 334. How. St., § 5755, which provides that a widow may remain in the dwelling house of her husband one year after his death, without being chargeable with rent therefor, and shall have her reasonable sustenance out of his estate for one year, gives her the absolute right to such sustenance for one year from her husband's death.—Bacon v. Kent Probate Judge, 100 Mich. 183.

¶ 335. Widow held entitled to remain in possession of premises belonging to her husband without accounting for rents and profits.—Kitchell v. Mudgett, 37 Mich. 81.

¶ 336. The right of a widow to an allowance for her support during the pendency of a suit over her husband's will is a personal right, and not assignable, therefore an assignment to her attorney of all her right, title, and interest in the estate, to secure advances made by him to her, does not assign her right to the allowance; and if under such circumstances the allowance is paid in fact, but not in form, to him, and is credited by him to her account, it constitutes a payment to her.—In re Service's Estate, 155 Mich. 179.

¶ 337. A widow's right to an allowance for support is not assignable.—Hackley v. Muskegon Circuit Judge, 58 Mich. 454.

§ 106. Amount allowable or proper.

Allowance in estates below $150, see post § 107.
Power of executors under will to fix amount of allowance, see also post ¶ 360.

¶ 338. It is for the probate court to determine, upon proper showing, the allowance to be made for the proper support of the widow and minor children during the progress of the settlement of an estate which is specifically devised and bequeathed, and the proportion each part of the estate shall contribute to the payment of such allowance.—North v. Tuscola Probate Judge, 84 Mich. 69.

¶ 339. A widow's allowance of $800 by the probate court pending settlement of an estate, it including $300 additional made on ascertaining that she must account for rents

of the homestead, was not disturbed on appeal in the absence of proof that such allowance was an abuse of discretion.—In re Estate of Power, 92 Mich. 106.

¶ 340. An allowance to a widow, out of an estate consisting of $9,000 in cash, of $15 per week during the twenty-two months of her widowhood, is held not to have been excessive.—Bacon v. Kent Probate Judge, 100 Mich. 183.

¶ 341. The amount allowed from the estate of intestate for the care, maintenance and support of one of the minor wards, was not excessive, where in settlement between such ward and her guardian, it appeared that such amount was proportionate to the amounts spent for the support and maintenance of intestate's other minor children.—Alexander v. Hillebrand, 140 Mich. 490.

§ 107. ——Estates below $150.

¶ 342. Under Comp. L. 1897, § 9322, subd. 4, providing that if the entire estate of a decedent does not exceed $150 over and above the allowance of wearing apparel and household furniture to the widow provided by section 9322, subd. 1, the probate court may assign the entire estate to the widow and children, the widow acquires no property under said subdivision, except by order of the probate court.—Stanton v. Foster, 122 Mich. 219.

§ 108. Household furniture and property allowances.

Right of widow to household furniture and specific property, see Jud. Act, chap. LVII, § 1, ¶ 1; Comp. L. 1915, § 13913, ¶ 1.

¶ 343. Whether the intestate's widow is entitled to the possession of any particular part of his household furniture and property without an order of the probate court setting apart the same to her, quære.—Howard v. Patrick, 38 Mich. 795.

§ 109. From insolvent estates.

See also post ¶ 370.

¶ 344. The allowance to a widow and children out of the personal estate of a deceased person which may be allowed by the probate court under Comp. L. 1897, § 9322, subd. 2, providing for such allowance "which, in the case of an insolvent estate, shall not be longer than one year after granting administration, nor for any time after the dower and personal estate shall be assigned to the widow," continues until the estate is distributed, as the words, "nor for any time after the dower and personal estate shall be assigned to the widow," are not a limitation affecting all cases, but refer only to estates which are insolvent.—Marskey v. Lawrence, 121 Mich. 577.

¶ 345. A probate judge has no authority to grant a widow an allowance beyond the period of one year where the estate is insolvent.—McDonald v. Hollywood's Estate, 130 Mich. 691.

¶ 346. Decedent's widow and children will not be compelled in a court of equity, as a condition to their being allowed an injunction restraining the application of the general assets to the payment of the trade debts for which trade assets were deficient, to refund amounts which had been allowed to them for their support out of the funds of the estate when the same was solvent.—Frey v. Eisenhardt, 116 Mich. 160.

§ 110. Bar or release of right.

Effect of will or other provision, see post § 111.

Effect of provision for widow in agreements of settlement, see ante ¶¶ 4, 6.

¶ 347. A widow who has wrongfully converted the entire estate of her husband is not entitled to an additional widow's allowance after the sum of $1,000 has been set aside for that purpose under Comp. L. 1897, § 9322, subdivision 2.—Maney v. Casserly, 134 Mich. 252.

¶ 348. An antenuptial agreement, releasing dower and all right to share in husband's estate, does not exclude statutory allowances for support pending administration.—Pulling v. Durfee, 85 Mich. 34.

¶ 349. A contract between husband and wife wherein they mutually agree to separate and live apart, and a property settlement between them wherein he agrees to give her cash and notes "which shall be in full claim to and right for dower, support and of all claims of every name, nature and description," and the wife agrees to transfer her interest in the furniture and to execute a deed releasing her right of dower, will prevent the wife from enforcing any claims against the husband's estate as his widow when the contract has been fully executed.—Bechtel v. Barton, 147 Mich. 318.

¶ 350. A wife is not barred of her statutory allowance under Comp. L. 1897, § 8940, providing for her support out of the estate during administration, by a postnuptial agreement by which she was to receive certain property "in full satisfaction of all my dower rights or interests in the lands and property of the said H. B. * * * intending to bar myself of all rights and interest in any and all of the property of said H. B. to which I might become entitled by reason of being the wife of the said H. B. except the right of support and maintenance out of said property during the lifetime of said H. B."—Bliss v. Livingston Probate Judge, 149 Mich. 271.

§ 111. ——Effect of will or other provision.

Validity, operation and effect of will in general, see Will, VII.

¶ 351. A will disposing of all the testator's estate, and making no provision for the widow, cannot affect her right to allowances under Comp. L. 1871, § 4377, How St., § 5847, subd. 1.—Miller v. Stepper, 32 Mich. 194.

¶ 352. Comp. L. 1871, § 4350, How. St., § 5813, authorizes the probate court to make a reasonable allowance for the support of a testator's widow and minor children while the estate is being settled. Held, that such allowance may be proper where there are no children and the widow has a legacy.—Moore v. Moore, 48 Mich. 271.

¶ 353. Under Comp. L. 1897, § 9289, authorizing the probate court to make allowances for the widow and minor children during the settlement of an estate, it is within the discretion of the probate court to allow the widow a weekly sum for one year, notwithstanding her written election to take under the will which provides that a devise shall be in lieu of all other rights, claims and demands.—Hill v. Kalamazoo Probate Judge, 128 Mich. 77.

¶ 354. A widow who accepts a year's allowance for her support from her deceased husband's estate, is not entitled to receive also the income for that period from his real estate although devised to her for life.—In re Stetson's Appeal, 184 Mich. 402.

§ 112. Commencement and duration of allowance or payments.

See also post ¶ 365.

¶ 355. Under How. St., § 5755, a widow is entitled as a matter of right to her reasonable sustenance out of the estate of her deceased husband for one year after his death; and where he died testate the probate judge may use discretion as to continuing the allowance during the progress of the settlement of the estate, but never for a longer period than until the widow's share is assigned to her.—Pulling v. Wayne Probate Judge, 88 Mich. 387.

¶ 356. Where no assets come into the hands of the administrator until after the remarriage of the widow, which occurs about twenty-two months after the husband's death, the probate court has power, upon her application made after her remarriage, to grant her an allowance covering the entire period of her widowhood.—Bacon v. Kent Probate Judge, 100 Mich. 183.

¶ 357. An order of distribution, does not operate as a settlement of an estate, so as to terminate an allowance to a widow and children under Comp. L. 1897, § 9322, subd. 2, providing for such allowance during the progress of the settlement of the estate, as the allowance continues until the estate is in fact distributed, there being an appeal allowed from the order of distribution to the circuit court.—Marskey v. Lawrence, 121 Mich. 577.

¶ 358. The rule that an allowance for support to a widow and children, under Comp. L. 1897, § 9322, subd. 2, is not terminated by the making of an order of distribution, but continues until the actual distribution, is not unreasonable as allowing an appeal from the order of distribution whereby a widow through collusion might continue her allowance for an unreasonable length of time, as the order for allowance is subject to rescission or modification at any time.—Marskey v. Lawrence, 121 Mich. 577.

§ 113. Petition, notice and procedure to secure allowance.

Hearing, issues and orders or decrees, see post § 114.
Right to further allowance, see post § 115.
Actions for the assignment of dower, see Dower § 40.
Waiver of notice by representative on hearing for widow's allowance, see Prob. Ct. Rule 9.
Service of notice of hearing on petition for widow's allowance on representative, see Prob. Ct. Rule 9.

¶ 359. No formal or sworn petition is required to be presented by a widow to the probate court to obtain an order for an allowance for her support, under How. St., § 5847.—Freeman v. Washtenaw Probate Judge, 79 Mich. 390.

¶ 360. Although a will gives the executors discretion in fixing the amount of the allowance for the widow and children of a deceased son of the testator, a petition alleging the refusal and neglect on the part of the executors to pay any allowances shows facts sufficient to give the Probate Court jurisdiction under Pub. Acts of 1899, No. 253, to determine the amount of the allowance and decree its payment.—Cole v. Cole's Estate, 125 Mich. 655.

¶ 361. An administrator is entitled to notice of the application of the widow for an allowance for her support pending the settlement of the estate, under How. St., § 5847, and to be heard on such allowance, and an order made without such notice is void.—Freeman v. Washtenaw Probate Judge, 79 Mich. 390.

¶ 362. There is no statute requiring written notice to be given to an administrator of the application of the widow for an allowance for her support pending the settlement of the estate.—Bacon v. Kent Probate Judge, 100 Mich. 183.

¶ 363. Where, in response to an oral notice of an application for a widow's allowance the administrator appears, and is consulted by the court, and furnishes the information upon which the order for an allowance is based, the probate court acquires jurisdiction to act.—Bacon v. Kent Probate Judge, 100 Mich. 183.

§ 114. ——Hearing, issues and orders or decrees.

Note relating to appeals from orders of probate court, see post § 197.

Appeals from order for allowance to circuit court, see Probate Courts, III.

Writ of error from circuit judgment on appeal to supreme court, see Appeal.

¶ 364. In a proceeding to administer an estate where a widow makes a claim against the estate and the representative of the estate denies the validity of her marriage to the intestate the probate court may determine the issue of whether there was a marriage.—Bechtel v. Barton, 147 Mich. 318.

¶ 365. The statute (see How. St., § 5813) contemplates that there shall be no unnecessary delay in setting off to the widow the statutory allowances to which she is entitled as matter of right from the property of her deceased husband; and where on appeal the action of the probate judge in denying allowances has been reversed in the circuit court, the fact that a motion has been made and is pending in the circuit court to set aside its order is no valid reason for any further delay by the probate judge in setting off these allowances.—People ex rel. Curtis v. Cass County Probate Judge, 35 Mich. 220.

¶ 366. An entry in the probate judge's docket under the word "Remarks," to the effect that "widow allowed net income for support" made pursuant to a petition of the widow for support pending settlement of the estate, did not assume the form of an order and was not considered on appeal from a decree approving payments to the widow by the executor and trustee.—Dickinson v. Henderson, 122 Mich. 583.

¶ 367. A probate decree allowing a sum certain to the widow for family expenses for the first year will not be construed by the circuit court as having been a consent decree, designed to become a substitute for a provision in the will making an allowance annually of an equal sum as a bequest to the widow, where the probate decree was based on a petition which reserved the widow's right to elect for or against the will, and where there is not strong proof that the parties so intended to substitute the allowance for the testamentary provision, the presumption being in favor of an allowance in addition to the one made by the will.—Houghteling v. Stockbridge, 136 Mich. 544.

¶ 368. Orders for allowances to widows, under How. St., § 5847, are in the discretion of the probate judge, and he may modify or rescind them at any time, and appellate courts will not interfere, except where there has been an abuse of discretion.—Freeman v. Washtenaw Probate Judge, 79 Mich. 390.

¶ 369. The entry of an inoperative order closing an estate will not prevent the probate judge from entertaining a petition for the maintenance of the widow and minor children under How. St., § 5813 during the progress of the settlement of the estate, the year for the settlement of the estate not having elapsed when the order was made.—North v. Van Tassel, Judge, 84 Mich. 69.

¶ 370. An order of a probate judge granting a widow an allowance for more than a year may be rescinded where it appears that the estate is insolvent and allowance for more than one year forbidden under Comp. L. 1897, § 9322, subd. 2, and upon such rescission the court may make such modification as may seem proper with reference to instalments due but not yet paid.—McDonald v. Hollywood's Estate, 130 Mich. 691.

§ 115. Further allowances.

¶ 371. Where an allowance for one year has been made to a widow out of her husband's estate the probate court may require her to show her circumstances before a further allowance is made.—Pulling v. Wayne Probate Judge, 88 Mich. 387.

E. MANAGEMENT, CUSTODY AND DISPOSAL.

1. In General.

§ 116. Acts or disposals before letters.

See also ante ¶ 267.

Acts without letters, see also ante ¶ 174.

Effect of acts before appointment, see also ante ¶ 182.

Suit before letters, see ante § 88.

Liability of representative for acts or disposals before letters, see Jud. Act, chap. LIII, § 9, Comp. L. 1915, § 13827.

¶ 372. Where one interferes with the property of a deceased person, and sells a portion of it without right, and is afterwards appointed administrator on such person's estate, he is not estopped by his prior acts from recovering the property for the estate.—Gilkey v. Hamilton, 22 Mich. 283.

¶ 373. The widow and heirs of a shareholder in a corporation, thinking to avoid the expense of administration, took his certificate of shares and indorsed their names upon it, and then left it with one of their number to be sold for the benefit of all. He, instead of selling it, pledged it for his own debt, and the pledgee was recognized by the corporation as the owner of the stock, and disposed of it as owner. The widow was subsequently appointed administratrix of the shareholder's estate, and brought trover against the pledgee for converting the stock. Held, that she could recover.—Morton v. Preston, 18 Mich. 60.

§ 117. Management, use or application of properties.

Separate fund and management of same, see post § 118.
Continuing business or completing contracts, see post § 119.
Speculating or engaging in new enterprises, see post § 120.
Discharge of incumbrances on land, redemption, see post § 121.
Sales or disposal of personalty, see post § 122.
Release, waiver or compromise of rights, see post § 123.
Surrender of trusts, pledges and property of others, see post § 124.
Representative's rights and title in property of estate, see ante, IV, C.
Representative's authority to contract and deal for estate in general, see ante §§ 55, 56.
Representative's dealings with shares and properties, see post, X, A.
Accountability of representative for rents, profits and interest, and losses or depreciation, see post, X, C.
Power of representative to compromise continuing claim for rent under lease by purchase of leased property, see ante ¶ 7.
Directions in will as to management, construction of such directions and implications therefrom, see Wills, VI, F.

¶ 374. An administrator has no authority to convert the assets to his private use, or to speculate with the moneys of the estate, or to invest them in trade or manufacturing business, either upon his own account or that of the estate.—Ward v. Tinkham, 65 Mich. 695.

¶ 375. An administrator cannot, by misapplying trust funds belonging to the estate in the purchase of a homestead, obtain a right superior to that of the creditors who have been injured by such application.—Pierce v. Holzer, 65 Mich. 263.

§ 118. Separate funds and management of same.

Liability for interest on money or property held in management of funds and assets, see post § 286.

¶ 376. Where the testator provides for the creation of separate funds, the executor is not entitled to use one fund to augment the other.—Draper v. Brown, 153 Mich. 120.

¶ 377. Where the testator provides for the creation of a trust with respect to certain realty, and also for the creation of a residuary fund, the executor is entitled to use the income from the residuary estate without the consent of the beneficiary thereof for the purpose of keeping down interest charges upon the real estate and preventing foreclosure.—Draper v. Brown, 153 Mich. 120.

§ 119. Continuing business or completing contracts.

Representative's authority to contract for estate, see ante §§ 55, 56.
Liability of representative for losses in conduct of business, see post § 279.

¶ 378. The duty of administrators is to settle estates, and divide them among the heirs. They cannot carry on the business in which the deceased was engaged, except at their peril.—Brush v. Beecher, 110 Mich. 597.

¶ 379. Where an executor or administrator, instead of closing out decedent's business with reasonable promptness, assumes, with the consent of the parties interested, to conduct the same as a going concern for a series of years, contracting extensive debts and sustaining heavy losses, only the trade assets—i. e., the property employed in the business or resulting from it—can be subjected to the payment of such debts.—Frey v. Eisenhardt, 116 Mich. 160.

¶ 380. A surviving partner cannot, by will, confer upon his executor a right to continue the business for any longer period than he himself might lawfully have continued the same, which is limited to such time as is necessary to close out the business without sacrificing it.—Frey v. Eisenhardt, 116 Mich. 160.

§ 120. Speculating or engaging in new enterprises.

Liability of representative for losses incurred in speculation or conduct of business, see post § 279.

¶ 381. An administrator has no authority to convert the assets to his private use, nor to speculate with the moneys of the estate, nor to invest them in trade or manufacturing business, either upon his own account or that of the estate.—Ward v. Tinkham, 65 Mich. 695.

¶ 382. A purchase by an administrator of an undivided interest in pine lands from his decedent's partner and an arrangement for the working up and selling of timber will be upheld where the arrangement was in good faith and for the best interests of the estate.—Loomis v. Armstrong, 63 Mich. 355.

§ 121. Discharge of incumbrances on land, redemption.

Authority of representative to borrow money to discharge incumbrance, see also ante ¶ 181.
Mortgage of lands under statutes for payment of debts, see post §§ 222-257.
Realty purchased by representative on execution sale for debt due estate or on foreclosure of mortgage held by estate, see Jud. Act, chap. LIV, § 13, Comp. L. 1915, § 13857.

Right of representative to receive and receipt for money from redemption of mortgage or mortgage sale, see Jud. Act, chap. LIV, § 12, Comp. L. 1915, § 13856.

¶ 383. An administrator entitled under the statute to the possession of his intestate's lands has such an interest as entitles him to redeem, or to compel a release of a satisfied mortgage.—Enos v. Sutherland, 11 Mich. 538.

¶ 384. Where the payment of mortgages is not a duty devolved upon the executor by will, he has no authority to pay them.—Draper v. Brown, 153 Mich. 120.

¶ 385. In the absence of any proof that the condition of an estate did not warrant an administrator in redeeming from a mortgage, it will be presumed that in redeeming he acted in the discharge of his duty.—Goodrich v. Leland, 18 Mich. 110.

§ 122. Sales or disposal of personalty.

Power to sell or dispose of realty, see post § 128.

Appealability of order of probate court for sale of perishable personalty, see Probate Courts, III.

Verified report of sale of personal property to be filed by representative, see Prob. Ct. Rule 7.

¶ 386. An administrator, as the holder of the legal title to the personal property of his intestate, has the right to take possession of and sell such parts of the personal estate as may be necessary, regardless of any division or disposition made by the heirs or distributees.—Brobst v. Brobst, 190 Mich. 63.

¶ 387. An administrator may lawfully sell at private sale, and assign to the purchaser, his interest in a mortgage and the accompanying notes held by the decedent as pledgee at the time of his death, without first demanding payment of the pledgor, whose rights are not affected by such transfer.—Drake v. Cloonan, 99 Mich. 121.

¶ 388. It is within the power of an administrator to warrant the soundness of personal property belonging to the estate upon disposing of the same at private sale.—Boltwood v. Miller, 112 Mich. 657.

§ 123. Release, waiver or compromise of rights.

Waiver or release of rights or equities in management or disposal of realty, see post § 135.

Compromises in actions and suits, see post § 317.

¶ 389. An executor has no power, on receiving from one of two residuary legatees a note which in fact belongs to the estate, but which the legatee claims to own as a gift from the testator, to authorize the legatee to collect the note and convert the proceeds to her own use.—Harris v. Cable, 104 Mich. 365.

§ 124. Surrender of trusts, pledges and property of others.

Goods held by decedent as agent, bailee or trustee, see ante § 81.

Power of representative to sell pledges, see ante ¶ 387.

¶ 390. Equity will require an executor to deliver up a certificate of stock to its true owner, where the debt for which it came into the decedent's control as collateral security was paid him in his lifetime, notwithstanding the certificate was issued in the name of and was in the possession of the deceased at his death.—Strong v. Chaney, 182 Mich. 37.

¶ 391. One who has been appointed receiver as successor to a receiver who has died, may demand and recover from his executors trust funds belonging to the receivership, and where the fund is capable of identification, may follow it and claim it.—Avery v. Preston Nat. Bank, 132 Mich. 445.

2. Real Property.

§ 125. In general.

Acts before letters, see ante § 116.

Discharge of incumbrances on land and redemption, see ante § 121.

Right and authority of representative to petition for street improvement, see ante ¶ 204.

¶ 392. An executor has no power to dispose of lands by virtue of his office, and whenever he undertakes to meddle with lands without authority, he cannot bind them any more than a stranger. The owner, whether devisee or otherwise, is in no way affected by his action, which is void for all purposes.—Frost v. Atwood, 73 Mich. 67.

§ 126. Possessory rights and control over lands.

Surrender or loss of possession, see post § 127.

Power to sell or dispose, see post § 128.

Completion of contracts for conveyance of land, see post § 129.

Power to lease lands in possession, see post § 130.

Rights to rents and profits, see post § 131.

Payment of taxes and current charges, see post § 132.

Chattel interests in land and mortgages, see post §§ 133, 134.

Waiver or release of rights or equities, see post § 135.

Requisites and sufficiency of deeds, see post § 136.

Title and rights of representative in realty, see ante §§ 61-63.

Right to ejectment and possessory actions for land, see post § 308.
Right to possession of lands before recourse for debts, see post § 226.
Right to possession of land by person other than representative, see post, V, F.
Right of devisees to possession of devised lands, see also post ¶¶ 1151, 1152.

¶ 393. The law, as it stood in R. S. 1846 (Comp. L. 1857, § 2904), did not require the administrator to take possession of the real estate, but gave him the right to do so when necessary for the payment of debts, etc. It left the right of possession in the heirs until the executor or administrator took possession or otherwise claimed that right under the statute. Until such possession was so taken or claimed the heirs could enter upon the land without awaiting the final settlement of the estate; or in their own names could bring ejectment, or maintain summary proceedings for its recovery against all persons except the administrator or those holding under him.—Streeter v. Paton, 7 Mich. 341; Marvin v. Schilling, 12 Mich. 356; Campau v. Campau, 19 Mich. 116; Howard v. Patrick, 38 Mich. 795; and see also Brown v. Forsche, 43 Mich. 492, as to the effect of the amendment in Comp. L. 1871.

¶ 394. Comp. L. 1857, § 2904, did not contemplate that the administrator would exercise his right of possession unless necessary; if, without any necessity, he should take possession, or should exercise his powers arbitrarily or oppressively, equity would restrain him.—Holbrook v. Campau, 22 Mich. 288.

¶ 395. An executor's right under How. St., § 5875, to possession of decedent's real estate is only to be exercised for the purposes of the administration and settlement of the estate; and where an executor holding sufficient personalty to pay all claims against the estate enters upon land peaceably held by a devisee, and carries away wheat growing thereon at the time of testator's death, he is liable to the devisee in trover.—Rough v. Womer, 76 Mich. 375.

¶ 396. An administrator's forcible ouster of a guardian from the possession of the real estate of heirs who are his wards cannot be legalized by facts occurring after the proceedings were begun.—Carpenter v. Harris, 51 Mich. 223.

¶ 397. On the death or removal of the administrator, his possessory right, and the rents and profits connected with it, pass to his successor, who may maintain ejectment to recover possession from one claiming under the first administrator. And this notwithstanding the first administrator was one of several heirs, and had made a contract in his own name to sell the lands to the person in possession.—Kline v. Moulton, 11 Mich. 370.

§ 127. ——Surrender or loss of possession.

Loss of possession by representative, see also ante ¶ 199.

¶ 398. The power conferred upon executors and administrators to take possession of the decedent's realty is purely statutory, and may be taken away as well after as before the administrator has taken possession.—Campau v. Campau, 25 Mich. 127.

¶ 399. A proceeding by the administrator to have the lands partitioned is a recognition of the fact that his further possession is unnecessary, and should be treated as a surrender of the discretionary right to such possession.—Holbrook v. Campau, 22 Mich. 288.

¶ 400. An heir at law may recover in ejectment his undivided interest in lands whereof his ancestor died seized, as against the administrator of such ancestor's estate, in the absence of any showing of authority in the administrator from the probate court to take possession of such lands.—Warren v. Tobey, 32 Mich. 45.

§ 128. Power to sell or dispose.

Sale or disposal of personalty, see ante § 122.
Sales to pay debts and charges on estate, see post, VII.
Effect of representative's unauthorized disposal of lands, see also ante ¶ 392.
Statutory power of chancery to direct and authorize sale or disposal of lands held by executors on trust, see Jud. Act, chap. XIX, §§ 55-57; Comp. L. 1915, §§ 12709-12711.
Sale of real estate by representative to preserve the estate, see Jud. Act, chap. LIX, § 1, ¶ 2; Comp. L. 1915, § 13987, ¶ 2.
Petition for sale of real estate, see Jud. Act, chap. LIX, § 3; Comp. L. 1915, § 13989.
Notice and hearing on petition for sale of realty, see Jud. Act, chap. LIX, §§ 3-7; Comp. L. 1915, §§ 13989-13993.
Order for sale of realty, see Jud. Act, chap. LIX, §§ 12, 13; Comp. L. 1915, §§ 13998, 13999.

¶ 401. Property conveyed to an administrator for the estate's benefit and not taken on execution or mortgage sale can be sold without license.—Little v. Lesia, 5 Mich. 119; Williams v. Towl, 65 Mich. 204.

¶ 402. A testator by his will directed his executors or administrators to sell his real estate to the best advantage and invest the proceeds. Held, that this was a general power in trust, and that the executors or administrators were authorized to sell and convey such real estate without a license from the probate court.—Battelle v. Parks, 2 Mich. 531; King v. Merritt, 67 Mich. 194.

¶ 403. On a bill filed by tenants in common, an administrator, who was proceeding to sell under a probate license a larger in-

terest in the lands than the estate had, was enjoined from making the sale until the interest of the intestate was ascertained and settled.—Thayer v. Lane, H. 247.

¶ 404. An administrator cannot make a public plat of his intestate's lands under a probate license to sell them.—People ex rel. Lothrop v. Board of Public Works, 41 Mich. 724.

¶ 405. An administrator is in no sense the owner of his intestate's land. The only authority he has is such as his license gives him, and it is in the nature of a power, and not a proprietary interest. He cannot make a statutory plat.—People ex rel. Lothrop v. Board of Public Works, 41 Mich. 724.

¶ 406. Chapter 244, Comp. Laws 1897, limited the authority of the probate judge to authorize sales of real estate to a value of five hundred dollars where necessary to preserve said estate. Act No. 261, Pub. Acts 1905, amended the former statute, and gave him power to authorize unlimited sales. Held, that Act No. 209, Pub. Acts 1909, referred to the Act of 1897 as amended by the Act of 1905, and under it the probate judge was not limited to authorize sales of only the value of five hundred dollars.—Klatt v. Wayne Probate Judge, 159 Mich. 203.

¶ 407. Under Pub. Acts 1909, No. 209, § 1, as amended by Act No. 162, Pub. Acts 1911, How. 2nd Ed., § 11287, authorizing the probate court to order the sale of a decedent's real estate, or any interest therein, upon petition of the executor, when such a sale is necessary to preserve the estate or prevent a sacrifice, or is for the best interests of the persons interested as devisees, the majority in interest approving the application, held that the probate court had jurisdiction to order the sale of the interest of the estate of a deceased person in certain real estate for the purpose of preserving the same on petition by the executrix of the estate, who was also the life tenant of such interest, one of three legatees of the proceeds of the interest after the expiration of the life estate having assented to such sale.—In re Rodgers' Estate, 192 Mich. 156.

¶ 408. The power given the probate court by Pub. Acts 1909, No. 209, How. 2nd Ed., § 11287, as amended by Pub. Acts 1911, No. 162, to sell land belonging to an estate of a deceased person on petition of the executor, is in no wise or in any degree impaired by Comp. Laws 1897, § 9234 et seq., How. 2nd Ed., § 10977, which gives the owner of a life estate the privilege of procuring a sale and distribution in the chancery court, even where the executor petitioning for such sale in the probate court is also life tenant in the land sought to be sold.—In re Rodgers' Estate, 192 Mich. 156.

¶ 409. Laws 1840, Act No. 88, § 4, giving the probate court power to license executors and administrators to make conveyances for the purpose of carrying out contracts of their decedent, did not require that such deeds should be confirmed by the court, and if it did such confirmation would be presumed after a lapse of forty years.—King v. Merritt, 67 Mich. 194.

§ 129. Completion of contracts for conveyance of land.

Authority of representative to contract for estate in general, see ante §§ 55, 56.

Suits for completion of contracts by assignees of foreign representative, see also ante ¶ 68.

Pleading, proof and procedure in specific performance suit, see Specific Performance, IV.

Right to specific performance of decedent's contract for conveyance of land, see Jud. Act, chap. LX, § 1; Comp. L. 1915, § 14038.

Procedure for enforcement of specific performance of decedent's contract to convey land, see Jud. Act, chap. LX, §§ 2-10; Comp. L. 1915, §§ 14039-14047.

§ 130. Power to lease lands in possession.

¶ 410. A two-year lease from executors whose authority to lease is derived from How. St., § 5875, creates a tenancy from year to year only, since the executor taking possession under that statute may only lease from "year to year", and is terminable, under How. St., § 5774, at the expiration of one year from the time of service of notice to quit.—Grady v. Warrell, 105 Mich. 310.

¶ 411. It cannot be presumed that either executors or trustees have power to bind their estate by a lease for five years, or by oral representations concerning its condition which result in large unliquidated damages.—Weise v. Rich, 77 Mich. 325.

§ 131. Right to rents and profits.

Title and interest of representative in rents and profits, see ante § 62.

Representative's accountability for rents and profits, see post § 278.

Right of widow to share of rents and profits of land in which she is dowable, see Dower § 57.

¶ 412. The right of an administrator, under said Comp. L. 1857, § 2904, to the possession of the real estate of his intestate, and the rents and profits thereof, pending the settlement of the estate, was a mere statute power for the benefit of creditors, and not an estate or right of property, nor a chattel interest which the administrator could dispose of as such.—Kline v. Moulton, 11 Mich. 370; Campau v. Campau, 25 Mich. 127; Campau v. Campau, 19 Mich. 116.

¶ 413. Having a right to the possession the heirs and devisees would not be liable to the executor or administrator for the rents and profits during their occupancy, prior to his

claiming possession, unless they were needed for the payment of debts, etc.—Howard v. Patrick, 38 Mich. 795.

§ 132. Payment of taxes and current charges.

¶ 414. An executor of an estate is bound to pay taxes upon the real estate of the decedent and to prevent the property from being sold for taxes.—Long v. Landman, 118 Mich. 174.

§ 133. Chattel interests and equities in lands.

¶ 415. An administrator has power to assign, without order from probate court, a chattel interest—such as a mere right of decedent to acquire an interest in land.—Gustin v. Union School District of Bay City, 94 Mich. 502.

¶ 416. An administrator cannot sell the interest of the estate in an executory contract for the purchase of lands except as real estate and after license.—Baxter v. Robinson, 11 Mich. 520.

¶ 417. A lease of land for years, signed by both parties, contained a provision whereby the lessor agreed to execute to the lessee or his assigns a deed of the premises at the expiration of the lease upon payment of a certain sum, provided the lessor or his assigns should in writing ask for such deed at any time during the three months before the expiration of the lease. The lessee's assignee dying before the term expired, his administrator assigned the lease to complainant, who paid the required sum during the three months. Held, that as decedent had merely a right to acquire an interest in the land, his rights passed to his administrator, not to his heir, and that complainant by making the payment became entitled to a deed.—Gustin v. Union School District of Bay City, 94 Mich. 502.

¶ 418. Comp. Laws 1897, § 9361 (How. Ann. St., 2nd Ed., § 11072), relating to the approval by the judge of probate of a sale of land by an executor or administrator, applies only where the representative has taken title to real estate, and has no application to a transfer by the representative, before the expiration of the period of redemption, of equitable interests as purchaser at a foreclosure sale.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

¶ 419. An administrator cannot be held liable for not receiving and accounting for funds arising from the sale of his intestate's partnership interest in real estate, when the whole property was needed to satisfy the debts of the firm, and the sale was made to the surviving partner in order to transfer to him the legal title to be used in settling the business.—Merritt v. Dickey, 38 Mich. 41.

§ 134. Mortgages and securities belonging to estate.

Mortgages to pay debts or charges on estate, see post, VII.

Mortgages as incidents of the debt for purpose of descent, see also Descent § 8.

¶ 420. An administrator may properly sell a mortgage security of an estate at a discount in order to obtain necessary funds for the use of the estate.—In re Thompson's Estate, 183 Mich. 618.

¶ 421. It being competent for the administrator to dispose of a mortgage belonging to his intestate, the mortgagor has a right to rely upon the administrator's statements as to the present ownership of such mortgage, and if he makes payment in good faith to the person to whom the administrator says it belongs he cannot be held liable upon it afterwards.—Reynolds v. Smith, 57 Mich. 194.

§ 135. Waiver or release of rights and equities.

Release or waiver of rights in management or disposal of personalty, see ante § 123.

Surrender or loss of possession, see ante § 127.

¶ 422. An administrator, as such, has no authority to waive or release a contract made by his intestate for the purchase of lands, unless the personal property is insufficient to pay the debts; and then only by order of the probate court, duly obtained.—Hunt v. Thorn, 2 Mich. 213.

¶ 423. An administrator cannot waive a conveyance made to his decedent, either directly or indirectly; and if it is not avoided by the heirs who have the title by descent, he cannot sue the grantor to recover the consideration as if the transaction had been void. And if any of the heirs have reconveyed their interest to the grantor, the administrator is not concerned with the fairness of the latter's dealings towards them, but it is for the heirs to seek redress on their own complaint.—Campbell v. Kuhn, 45 Mich. 513.

§ 136. Requisites and sufficiency of deeds or other instruments.

Deeds by representatives as such as basis for estoppels, see Estoppel § 11.

¶ 424. Where a special statute authorized a named executor to sell lands, provided the approval of the probate judge is indorsed on the deed, no approval or record of approval need appear elsewhere than on the deed.—King v. Merritt, 67 Mich. 194.

¶ 425. The authority of an executor, who has given a bond under the statute, he being also residuary legatee, to sell the real estate is derived from his letters testamentary and the statute, and in selling he must act officially, the same as if acting under a license from the probate court; and his individual deed will only convey the land subject to the lien of creditors on the land.—Lafferty v. People's Sav. Bank, 76 Mich. 35.

F. POSSESSION OR DEALINGS BY PERSONS OTHER THAN REPRESENTATIVES.

§ 137. In general.

Right to follow property for creditors or heirs, see post § 138.

Purchase of property of estate, see post § 140.

Right of broker to sell out where representatives of deceased principal decline to supply margins, see Brokers ¶ 41.

¶ 426. Whoever, on the death of an intestate, takes possession and assumes control of any of his personal property, thereby becomes responsible for it to the administrator when appointed. He cannot safely deliver it to any one except the administrator or some one else who shows a better right to it than himself. This mere possession of such property, and consequent duty to preserve it, entitles the possessor to the ordinary legal remedies for its protection against any one who interferes with it without better right; and the administrator of such possessor succeeds to all his rights and remedies respecting such possession, until administration on the death of the owner.—Cullen v. O'Hara, 1 Mich. 132.

¶ 427. One lawfully in possession of a decedent's personalty prior to the appointment of an administrator is entitled to retain possession as against the decedent's vendee who has made part payment, and who has tendered the rest of the price to decedent's widow and to the person in possession.—Burke v. Dunn, 117 Mich. 430.

¶ 428. Devisee in possession before devisor's death and remaining therein need not apply to probate court for possession, his right being undisputed, and rents and profits not being needed for purposes of administration.—Rough v. Warner, 76 Mich. 375.

¶ 429. Under How. St., § 5744, an heir's right to participate in the rents and profits does not begin to run until proper steps have been taken for an assignment of dower or partition of the estate; so held where the widow, who was also administratrix, continued in the possession of the lands without ousting any heir.—Benedict v. Beurmann, 90 Mich. 396.

§ 138. Right to follow property for creditors or heirs.

Subjection of land charged with legacies, see post § 260.

Lands in hands of heirs' grantees, as assets for payment, see post § 215.

¶ 430. The personal creditors of an executrix who without the knowledge of the heirs has bought real property with moneys belonging to the estate and has taken conveyance thereof with habendum to herself, her heirs and assigns, cannot, on execution against her, acquire title to such real estate as against the heirs, especially if there is enough in the deed to the executrix to put them on inquiry as to the nature of her title.—Alterauge v. Christiansen, 48 Mich. 60.

¶ 431. In equity creditors can follow the funds liable for their debts into the hands of persons who know or have notice that the disposition by the administrator is fraudulent, or is for the purpose of the misapplication of the assets, as investing funds in a homestead, so long as the fund can be identified, and the sale will be avoided, or the person will be held as a trustee.—Pierce v. Holzer, 65 Mich. 263.

§ 139. Purchase of property of estate.

Purchase of property of estate by representative or in his behalf, see post §§ 271-274.

¶ 432. Any one, except the executor, may lawfully buy property at executor's sale for what it will bring.—Owen v. Potter, 115 Mich. 556.

¶ 433. The action of testator's widow and her two brothers in forming a partnership to buy at a discount claims against the estate, which was generally believed to be insolvent, and to apply them at their full value to the purchase of property belonging to the estate (an order of the probate court permitting them to be so applied to the amount of 40 per cent of the purchase price), thereby acquiring the bulk of the property of the estate at a large profit to themselves, was not fraudulent as to legatees and creditors whose claims remained unsatisfied.—Owen v. Potter, 115 Mich. 556.

VI. DEBTS AND LIABILITIES OF DECEDENT AND CLAIMS AGAINST ESTATE.

A. IN GENERAL; WHAT CONSIDERED DEBTS; DEFENSES.

[Note. In so far as a claim rests on a contract or a tort by decedent or imputable to him, the general law of contracts or torts is involved. Such law is treated in Contracts; Sales; Negotiable Instruments; Implied Contracts; Torts; Conversion; Fraud; and the like. It is not intended to encroach on such topics with this one, which treats of "claims" against the estate rather than of the causes of action out of which they arise.]

Presentment, establishment and enforcement of claims, see post, VI, C.

Debts and liabilities primarily resting on heirs or representative, see post, VI, B.

Liability of heirs, devisees and distributees for debts of estate, see post, VIII.

Liability of representative personally for debts of estate, see post, IX.

Payment and satisfaction of claims, see post, VI, D.

Recourse to land for payment of debts, see post, VII.
Claims against estate by representative as creditor, see post, X, B.

§ 140. Contract liabilities in general.

Of married women's estates, see post § 141.
Contracts payable at death or by share in estate, see post § 142.
Performance or breach occurring after death, see post § 143.
Preferred claims and rank and priorities of claims, see post § 213.
Negotiable instruments out of possession of claimant, see also post § 164.
Claim for fixed sum due from trustee, see also post ¶ 487.
Implied contract for rent by decedent's continued occupancy of premises after conveyance, see also post ¶ 606.
Liability of estate for disbursements of intermeddler made in good faith to benefit estate, see also post ¶ 972.
Occasion and grounds for implying a contract by decedent to pay for services or benefits received, see Implied Contracts, II; Payment, VI.
Right to claim reasonable value for services rendered under agreement for fixed sum, see also Contracts ¶ 1058.
Liability of grantee's estate on covenant to pay debt on transfer of mortgagor's title, see Mortgages, VII, B.
Partnership and individual debts and application of partnership assets, see Partnership, IV, C.
Contract rights and liabilities of wife in general, see Husband and Wife, IV.
Contracts for work or services in general, see Master and Servant, II.
Considerations for promises by decedent, see Contracts, V.
Validity of forbearance until death as consideration, see Contracts § 113, ¶ 473.
Liability of estate of nonresident stockholder for debts of bank, and enforcement of such liability, see also Banking ¶ 256.
Liability of estate for debts contracted when using partnership name which included name of deceased, see Pub. Acts 1917, No. 72, § 41, ¶ 10.

¶ 434. There must be either an express or an implied contract between the deceased and the claimant before there can be any recovery against the estate for services rendered the deceased.—Decker v. Kanous' Estate, 129 Mich. 146.

§ 141. ——Of married woman's estate.

¶ 435. Claimant made a contract with his wife and her father by which he agreed to pay the premiums on a life insurance policy written on the life of the father on the condition that claimant be reimbursed for the amount so advanced from the proceeds of the policy. Held, the contract related to the separate property of the deceased wife so as to entitle claimant to present his claims against her estate for the premiums advanced by him.—In re Reid's Estate, 170 Mich. 476.

¶ 436. A wife's estate is not liable for her funeral expenses where her husband is able to pay them.—Galloway v. McPherson's Estate, 67 Mich. 546.

§ 142. ——Contracts payable at death, or by share in estate.

Services rendered under terms of will for family, see also post § 152.

¶ 437. An agreement to pay for services at death is valid, and may be enforced against the estate of the promisor.—Sammon v. Wood, 107 Mich. 506.

¶ 438. Services rendered upon a decedent's promise to reward the same by provision in his will, or, in case of his death without a will, to give an interest in a farm, or a certain sum of money, held sufficient ground for a valid claim against his estate.—Sword v. Keith, 31 Mich. 247.

¶ 439. Where a promise is made to compensate for services by will, and the promisor dies without so providing, the value of the services may be recovered as a claim against the estate.—In re Williams' Estate, 106 Mich. 490.

¶ 440. A son is entitled to recover from his father's estate the value of his services in working his father's farm and in taking care of his parents until their death if his father applied to him to do these things and promised that he should have pay for his services, and, also, that after his death he should have the farm, and if the value of the support and services exceeded the value of all he obtained from the farm, and no arrangement was made by which it really became his property.—Dickerson v. Dickerson, 50 Mich. 37.

§ 143. ——Performance or breach occurring after death.

¶ 441. The estate of a decedent is liable on his contract, if carried out by the other party according to its terms, although not completed until after his death.—McKeown v. Harvey, 40 Mich. 226.

¶ 442. A claim for damages arising from the breach of a warranty as to an animal delivered by an intestate to the claimant under a contract providing that, if the animal should not be returned within a given time, a specified amount would be charged to the claimant as the cost of the animal, is a claim against the estate, which must be presented to the commissioners, if any are appointed therein, as required by How. St., § 5901, although the intestate died before the time mentioned, and the title did not pass to the claimant until after his failure to return the animal at such time.—Boltwood v. Miller, 112 Mich. 657.

¶ 443. Where one agrees for himself and his administrator to compensate another for taking care of a third person during the latter's life, and the administrator refuses to carry out the agreement after the promisor's death, the fact that the person to be taken care of is still living does not affect the promisee's right of action against the administrator for the breach.—Buell v. Adams, 157 Mich. 248.

¶ 444. A woman bought land for which she agreed to pay out of her dower interest in the estate of a former husband, and she placed the dower interest in trust in the hands of a friend to apply the proceeds of it upon the purchase. She died before full payment was made and before the dower interest was entirely consumed. Held, that the sum remaining unpaid was a lawful claim against her estate.—Probasco v. Cook, 39 Mich. 714.

§ 144. Contingent and immature claims.

Presentment, hearing and enforcement of contingent and immature claims, see post § 196.

¶ 445. Notes past due and unpaid may be allowed as absolute claims in favor of the holders against the estate of a deceased indorser.—Owen v. Potter, 115 Mich. 556.

¶ 446. A bond given by directors and stockholders of a corporation to a bank to secure negotiable paper issued or to be issued and discounted in the business of such corporation during a period of one year up to a fixed sum, contemplated that the business should continue for the entire time fixed by the bond, and was a continuing guaranty, giving the right to the bank to discount and renew the company's paper up to the time of the expiration, and was not revoked upon the death of one of the obligors within the year, and therefore his estate remained liable the same as he would have been had he lived.—Home Sav. Bank v. Hosie, 119 Mich. 116.

¶ 447. Where one who has leased a piano with an option to purchase at the expiration of the term of the lease dies before the end of the lease without exercising such option, having, however, given the article to his wife, his estate is not bound to make, for the widow's benefit, the payment required for purchase.—Powell v. Eckler, 96 Mich. 538.

§ 145. Joint obligations and contribution.

Claim for contribution by surviving partner for payment of firm debts in excess of his proportion, see also post ¶ 488.

Liabilities of deceased and surviving partners in general, see Partnership, IV.

¶ 448. A claim against a surety upon his joint liability in a bond is a proper demand against his estate under Comp. L. 1871, § 4438, How. St., § 5906.—In re Stewart v. Bruen's Estate, 39 Mich. 619.

¶ 449. The fact that a note presented against an estate was signed by decedent's wife as surety would not discharge the estate; her liability is unimportant, as in the probate court no obligation but the decedent's could be established.—Johnson v. Johnson's Estate, 66 Mich. 525.

¶ 450. When one of two mortgagors, or his administrator or devisee, pays the mortgage, or redeems from it, he may maintain a claim for contribution against the estate of the other mortgagor.—Goodrich v. Leland, 18 Mich. 110.

¶ 451. A claim by a surviving partner for money advanced in excess of his proportion, on account of the debts of the firm, after its dissolution, is a proper demand for adjustment by the commissioners on the deceased partner's estate.—Wheeler v. Arnold, 30 Mich. 304.

§ 146. Taxes and insurance on real property.

¶ 452. Equity will not require the administrator of a mortgagor's estate to reimburse the holder of the first mortgage on the real property of such estate for sums advanced for insurance and taxes on the mortgaged property, where such mortgagor, for the purpose of defrauding his creditors, while insolvent furnished his daughter money with which she secured to herself the assignment of such mortgage, and where the funds in the hands of such administrator were insufficient to pay the general creditors of such decedent. Such payment if made would inure for the benefit of the holder of a second mortgage on such property, only.—Hatch v. Daugherty, 145 Mich. 569.

§ 147. Mortgage debts and other secured debts.

Effect of grant or devise subject to mortgage, see post § 148.

Mortgage of lands under statutes for payment of debts of estate, see post, VII, A.

Presentment, hearing and enforcement of mortgages and secured claims, see post § 194.

¶ 453. A mortgagor's estate is liable for any deficiency arising on the foreclosure sale, where such mortgagor, if he had lived, would have been subject to a decree both personal and for foreclosure.—Shelden v. Warner's Estate, 59 Mich. 444.

¶ 454. A personal covenant in a mortgage to pay certain debts charged on the land will bind the mortgagor's personal estate after his death.—Dennis v. Sharer, 56 Mich. 224.

§ 148. ——Effect of grant or devise subject to mortgage.

¶ 455. One owning the fee in lands which were subject to a mortgage granted the lands

subject to the mortgage, reserving a life estate to himself, and by will bearing date the next day, but delivered to the grantee with the deed, devised the land to the grantee. Held, that on the death of the grantor the estate granted was immediately reduced to possession in the grantee, leaving nothing for the will to operate upon, but leaving the land charged with the mortgage, and that the grantee had no claim against the estate of the grantor to have the mortgage paid off for his benefit.—In re Wisner's Estate, 20 Mich. 442.

¶ 456. Where land descending to the heir at law of an intestate is mortgaged for the payment of a note, the burden of the payment cannot be shifted to the personalty unless the note has been proved as a claim against the estate by the mortgagee, or as a contingent claim by the heir.—Clark v. Davis, 32 Mich. 154.

¶ 457. A devisee of land mortgaged for its purchase price is not bound to pay the amounts remaining unpaid therefor unless the will so provides; it is a charge against the estate.—Enders v. Enders, 49 Mich. 182.

§ 149. Expenses of administration and attorney fees.

Reimbursement of representative for expenses of administration and attorney fees, see post § 296.

¶ 458. A probate court has no power to direct an executor to pay an attorney for services rendered the estate.—In re Bender's Estate, 154 Mich. 44.

§ 150. Expenses of last sickness and funeral.

See also post ¶ 668.

Liability of husband's estate for funeral expenses of his widow, see post ¶ 464.

¶ 459. Commissioners may properly allow claims for funeral expenses, they being made a statutory charge on the estate.—Booth v. Radford, 57 Mich. 357.

§ 151. Sustenance and expenses of decedent's family.

Rendered or changed by terms of will, see post § 152.

¶ 460. The estate of a father is not chargeable with the support of his indigent adult son.—Clinton v. Laning, 61 Mich. 355.

§ 152. ——Rendered under or charged by terms of will.

¶ 461. A mother provided in her will for the support of her daughter, who died a minor. Held, that claims for care, nursing and medical attendance for the daughter were against the mother's estate, and the daughter's administrator had nothing to do with them.—Plant v. Weeks, 39 Mich. 117.

¶ 462. There was no privity between the physicians of a widow and the executors under the husband's will, although a life estate was given to the wife, and therefore the claims of such physicians were not allowed against the husband's estate for services rendered fifteen months after the husband's death.—Gray v. Seeley's Estate, 133 Mich. 319.

¶ 463. Under a will giving possession and control of all personal property to the widow during her widowhood, with an implied right to use of the principal, a charge by the executor for care of the widow who lived with him is properly allowed in his account as a charge against the estate in question rather than against her estate.—Gee v. Hasbrouck, 128 Mich. 509.

¶ 464. The unclosed estate of a testator is chargeable with the expenses of the burial of his widow when made a charge thereon by will.—Walsh v. Backus, 183 Mich. 527.

§ 153. Alimony, current and accrued.

Enforcement of claim for alimony, see post ¶ 594.

Duty of administrator as to paying alimony pending appeal taken after decedent's death, see Divorce § 179.

¶ 465. An administrator will not be required to pay alimony or an allowance to a wife who, after her husband's death, appeals from a decree of divorce obtained by him.—Shafer v. Shafer, 30 Mich. 163.

¶ 466. Where, after a decree of divorce awarding alimony in favor of the wife, the husband made no attempt to have it modified during his lifetime, and there is no showing why such alimony as accrued between the date of the decree and the subsequent remarriage of the wife should not be paid, this amount may be allowed as a claim against the estate of the former husband.—Martin v. Thison's Estate, 153 Mich. 516.

¶ 467. A wife living apart from her husband pending a decree for divorce, and receiving from him a stated allowance, fixed by the court, for her support, without objection to the amount, cannot maintain a claim against the estate for an additional sum on the ground that the alimony was not sufficient for her necessities during the same time. The commissioners cannot review the action of the court of chancery in fixing the amount, nor can a jury, on appeal from them, do so.—Crittenden v. Schermerhorn, 39 Mich. 661.

§ 154. Claims by wife for property or money used.

Widow electing to take under will in lieu of dower as creditor of the estate, see Dower § 38.

¶ 468. A wife has no legal right to compensation from her husband's estate for per-

sonal property which, at marriage, she brought into the household for use there, and which they together have used and enjoyed in the family without agreement that she should be paid therefor.—Cranson v. Cranson, 4 Mich. 230.

§ 155. Decedent's torts.

Torts and frauds of representative, see post § 156.

¶ 469. A suit for personal injuries based on alleged negligence of an intestate, is within the jurisdiction of the claim commissioners of the probate court under Comp. Laws 1897, §§ 9378, 9381.—In re Sullivan's Estate, 165 Mich. 585; Staniszewski v. Lane, Id.

§ 156. Torts and frauds of representatives.

Liabilities resting primarily on representative, see post, VI, B.

Torts of decedent, see ante § 155.

¶ 470. No recovery can be had against an estate for a negligent injury occurring after the death of the deceased, but the representative is personally liable.—Bannigan v. Woodbury, 158 Mich. 206.

§ 157. Set-offs and defenses.

Set-off and recoupment in general, see post § 316.

Equitable defenses in suits on claims, see post § 201.

Mode and requisites in general in presentment of set-offs, see post § 165.

Time for presenting set-offs and delay as bar, see post § 175.

Liability of joint obligor as defense to claim against estate, see also ante ¶ 449.

Defenses open in action based on allowance, see post § 203.

Objections to claims at hearing before commission, see post § 184.

Set-off as mode or medium of payment of distributive share, see post § 364.

Pleading and proof of payment, see Payment, V.

Insanity of decedent as defense against claim, see Insanity, I.

Manner of pleading and proving former adjudication as defense, see Former Adjudication, VII.

Causes, claims and defenses barred by former adjudication, see Former Adjudication, IV.

Estoppel of claimant in privity to husband to make claim by having failed to make objection when wife also claimed, see also Estoppel ¶ 100.

Estoppel of former claimant as affecting right of successor to assert claim, see also Estoppel ¶ 243.

Defense to action on contingent claim, see Jud. Act, chap. LVI, § 21, Comp. L. 1915, § 13903.

Set-offs against claims, see Jud. Act, chap. LV, § 9, Comp. L. 1915, § 13872.

¶ 471. The provisions of Comp. L. 1871, § 4428, How. St., § 5896, are not limited by the general set-off law, but are broad enough to allow a proper set-off in all cases. Unliquidated claims and unsecured demands may be set off as well as others.—Willard v. Fralick, 31 Mich. 431.

¶ 472. Offsets that under Comp. L. 1871, § 4428, How. St., § 5896, may be allowed against claims upon the estate of a deceased person are confined to claims of the deceased, and cannot include demands that never belonged to him, but have been purchased after his death by the administrator. —Willard v. Fralick, 31 Mich. 431.

¶ 473. Proceedings for the examination and allowance of claims against an estate are equitable in their nature, and governed by equitable principles; and the administrator is entitled to avail himself of any equitable or legal defense existing against the claim presented for allowance.—Foote v. Foote, 61 Mich. 181.

¶ 474. When an action is commenced against an administrator de bonis non for nonpayment of claims proved against the estate, the defense of plene administravit may be set up, and judgment shall only be rendered for so much as the assets, including real as well as personal, will warrant. (How. St., §§ 5936, 5938, 5939.)—Peckham v. Hoag, 57 Mich. 289.

¶ 475. The filing of a will for probate was not inconsistent with the claim of a son against the estate and does not discharge that obligation.—Laird v. Laird's Estate, 127 Mich. 24.

§ 158. Interest for delay in payment.

¶ 476. A mortgagor filed a claim against the mortgagee's estate for one-half of certain crops grown upon the mortgaged premises, and which the mortgagee, after bidding in the land on foreclosure, had sold to the mortgagor's tenant. Held, that the claimant is entitled to interest on his claim, if allowed, though not specifically mentioned in the claim, upon the principle that interest may be allowed on money illegally withheld, or property converted, without proof of special damages.—Dayton v. Dakin's Estate, 103 Mich. 65.

¶ 477. Where a claimant against an estate had not only neglected to procure administration but had delayed it, interest was refused on his claims as damages for delay in payment.—O'Connor v. Beckwith, 41 Mich. 657.

§ 159. Assignment or purchase of claims.

Liability of representative for failure to buy in claims at discount, see post § 285.

Assignment of claims for compensation of representative, see post § 294.

¶ 478. Any one but the personal representative may buy obligations of the estate at a discount and enforce them at face value.—Owen v. Potter, 115 Mich. 556.

B. DEBTS AND LIABILITIES RESTING ON HEIRS OR REPRESENTATIVE.

§ 160. In general.

[Note. The liability herein treated is the primary liability resting on the heirs or the representative for acts done in the course of administration; the liability for debts of the decedent which for any cause becomes secondarily the liability of the heirs or distributees is found post, VIII; and the liability secondarily resting on the representative for the decedent's debts is covered in post, IX.]

Liability of heirs, devisees and distributees for debts of estate, see post, VIII.

Liability of representative personally for debts of estate, see post, IX.

Liability of estate for torts and frauds of representative, see ante § 156.

Implied contract of representative for services rendered estate, see Implied Contracts, II.

¶ 479. Liability cannot be made out against executors and trustees, as such, for damages arising by reason of alleged leakage from the roof of a store leased by them to the plaintiff, without proof of the precise character of the powers granted to them by the will of the testator.—Weise v. Rich, 77 Mich. 325.

¶ 480. Where an administrator is lawfully in possession of the real estate of the intestate, it is his duty to keep it in a safe condition, so as to protect travelers along the streets.—Bannigan v. Woodbury, 158 Mich. 206.

¶ 481. An administrator in possession and control of a building of the deceased is personally liable for leasing it with a window in a defective condition, so as to cause injury from falling glass to a person on the adjacent street.—Bannigan v. Woodbury, 158 Mich. 206.

C. PRESENTMENT, HEARING AND DECISION ON CLAIMS, AND ENFORCEMENT OF ALLOWANCE OR JUDGMENT.

1. Mode and Requisites in General; Notices.

§ 161. Procedure in general.

Notice to creditors to present claims, see post § 162.

Claims provable on presentment or requiring suit, see post §§ 163, 164.

Presentment of set-offs, see post § 165.

Stating claim and petition for allowance, see post § 166.

Filing and notice of claim, see post § 167.

Notice of hearing on claims, see post § 168.

Notice of claim presented or made by representative, see post § 169.

Nature and requisites of probate procedure in general, see ante § 7.

Procedure on claims against residuary legatee bonded to pay debts, see post § 195.

Presentation of claim against estate of deceased partner as abandonment of suit against firm, see Partnership, VI, A.

¶ 482. Where a decedent's debts are not secured on property, they must be enforced under the probate laws.—Shannon v. Shannon, 48 Mich. 182.

¶ 483. How. St., chap. 229, provides the only methods by which claims against decedents' estates and the expenses of administration can be allowed and collected.—Armstrong v. Loomis, 97 Mich. 577.

¶ 484. It is not material whether a claim by an executrix against the estate of one indebted to her testator was presented before or after letters of administration were granted to her in Michigan. Probate here only furnished the evidence of her rights already existing and it was enough if this was shown on the trial.—Feustmann v. Gott's Estate, 65 Mich. 592.

§ 162. Notice to creditors to present claims.

Notice to creditors of time limited for payment of debts, see Jud. Act, chap. LVI, § 13, Comp. L. 1915, § 13895.

¶ 485. Claims against the estate of a deceased person can only be enforced by statutory proceedings in the probate court; and in such proceedings all concerned are bound by the proper publication of notice.—Aldrich v. Annin, 54 Mich. 230.

¶ 486. The entry of an order by the probate court closing an estate does not operate to close the estate where the notice to be given to creditors required by the statute has not been given.—North v. Tuscola Probate Judge, 84 Mich. 69.

§ 163. Claims provable on presentment or requiring suit.

Negotiable instrument out of creditor's possession, see post § 164.

¶ 487. Where a fixed sum is due from the estate of a trustee to one to whom he had agreed to make payment at a certain time a suit in equity is unnecessary, and a claim may be filed against the trustee's estate.—Pitcher v. Rogers' Estate, 199 Mich. 114.

¶ 488. Under the statute permitting any merely pecuniary claim against the estate of a deceased person, and involving no complication between more than two contending interests, to be established before commissioners on claims, a demand for contribution by a surviving partner, who, after dissolu-

tion of the firm, had advanced more than his share of the firm's debts, would be provable against the estate of his deceased partner without resort to equity.—Wheeler v. Arnold, 30 Mich. 304.

§ 164. ——Negotiable instrument out of creditor's possession.

¶ 489. One whose claim against an estate consists in a negotiable instrument which had passed out of his control cannot have it allowed until in some direct controversy with the person holding it he has negatived such person's right to it so as to protect the estate from further vexation on account of it.—McKinney v. Hamilton's Estate, 53 Mich. 497.

¶ 490. One who seeks to obtain against an estate the allowance of the amount for which decedent had given a negotiable instrument must be prepared to produce it, if possible, before the court on the trial of his claim, so that it may be identified with the judgment and surrendered, if satisfied. If he cannot produce it he must sue as on a lost note and bring himself within the statutory rule (How. St., §§ 7518, 7519), or the rule of equity which by order of the court dispenses with its production on giving full indemnity.—McKinney v. Hamilton's Estate, 53 Mich. 497.

§ 165. Presentment of set-offs.

Set-offs in general, see ante § 157.

Time for presenting set-offs, see post § 175.

¶ 491. Claims and set-offs must be investigated and settled in probate court.—Clark v. Davis, 32 Mich. 154; Shelden v. Walbridge, 44 Mich. 251; Dickinson v. Seaver, 44 Mich. 624; Cole v. McFall, 48 Mich. 227; Willard v. Van Leeuwen, 56 Mich. 15.

¶ 492. A claim against a decedent which was not presented to the probate judge who acted as commissioner of claims, within the required time, cannot be set off by the defendant in an action on a note given by him to such decedent; and testimony that such judge told defendant that it was not necessary to file the claim with him as it could be so used as a set-off, will not be admitted.—Benjamin v. Early, 123 Mich. 93.

§ 166. Stating claim and petition for allowance.

Sufficiency and form of claim and pleadings in actions, suits and hearing on appeal, see post § 202.

¶ 493. Rules governing the sufficiency of pleadings are not to be applied to claims filed in probate court, and great latitude as to the form and the amendment of claims should be permitted before commissioners on claims.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 494. It is not required that a claim filed before commissioners should have the formal elements of a declaration.—Grimm v. Taylor's Estate, 96 Mich. 5.

¶ 495. It is not necessary that the petition for the allowance of a claim against an estate or the declaration on appeal, should state that the evidence of the claim is in writing; written evidence can be introduced under the petition, and a failure to introduce it does not prove that the litigation in the two courts is upon different claims.—Comstock v. Smith, 26 Mich. 306.

¶ 496. There are no technical rules regulating the form for exhibiting claims in the probate court, or for framing issues for their trial on appeal; the simpler the statement the better, if sufficient to apprise the court and parties interested of the real claim. It is sufficient, therefore, if a petition in the probate court for the allowance of a claim against an estate, and the declaration in the circuit court in framing the same issue on appeal, clearly point to the same transaction and demand.—Comstock v. Smith, 26 Mich. 306.

¶ 497. A claim against a decedent's estate based upon an open account should give the items of which it is composed, with the dates when they accrued, and the respective amounts.—McHugh v. Dowd's Estate, 86 Mich. 412.

§ 167. Filing and notice of claim.

¶ 498. Under the probate statute, notice to the executor of the filing of a claim against the estate is not required.—In re Sullivan's Estate, 165 Mich. 585; Staniszewski v. Lane, Id.

§ 168. Notice of hearing on claims.

Notice of hearing as requisite to jurisdiction of commissioners on claims, see post § 181.

Sufficiency of notice of hearing before commissioners, see also post ¶ 534.

Notice of revival of commission for hearing of claims, see post ¶ 563.

¶ 499. Where notice of their meeting has, in fact, been published, the commissioners on claims may proceed to a hearing. Their jurisdiction does not depend on the production before them of proof of publication.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 500. Notice by publication is insufficient in any except the ordinary proceedings to adjust claims against an estate; if such adjustment is attempted by the probate court after the executor has given bond as residuary legatee, the notice, which, in such cases, is to the executor and his sureties, must be personally served.—Durfee v. Abbott, 50 Mich. 278.

§ 169. Notice of claim presented or made by representative.

Claims against estate presented by representative, see post, X, B.

Time for presentment of representative's claim, see post § 173.

Claim presented by representative of deceased claimant, see ante ¶ 484.

¶ 501. An executor of an estate stands in a trustee relation to the devisees and legatees, and must give them notice of a claim filed by himself and wife against the estate for board and care furnished the deceased. —Lapham v. Lacy, 161 Mich. 176.

¶ 502. Whether an administrator who is also a claimant against the estate is not bound to give notice to other persons interested in the estate in order that they may have an opportunity to test his claim before the commissioners, and whether an allowance of his claim in the absence of any impartial representative of the estate and of other persons interested therein has any binding effect quære.—Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525.

¶ 503. The defendant, a nephew of the deceased, and his wife, went to live at the home of the deceased. For many years the deceased paid them five dollars a week for board. Financial reverses overtaking him, he stopped making such payments, and continued to live with defendant and his wife for many years. In his will he gave defendant and his wife a large portion of his estate. To complainants, the other legatees and devisees, the defendant expressed satisfaction with the will. Defendant, who was made executor, filed a claim against the estate for board and care furnished the deceased without giving notice of such claim to the complainants. Held, a bill would lie to enjoin the payment of such claim.—Lapham v. Lacy, 161 Mich. 176.

2. Time for Presentment and Delay as Bar.

§ 170. In general; state or completion of administration.

Time limitations and claims affected, see post § 171.

Claims accruing during administration, see post § 172.

Claims by representative, see post § 173.

Claims by infants, see post § 174.

Time for presenting set-offs, see post § 175.

Extension of time for presentment or waiver of bar, see post § 176.

Extension by death of party or vacancy in administration, see post § 177.

Reopening administration, newly discovered assets, see post § 178.

Time for suing and effect of delay or vacancy in administration, see post § 315.

Time for accounting, delay, laches and estoppel, see post § 336.

Time within which representative may declare estate insolvent, see post ¶ 667.

Time during which creditors have lien on realty for debts, see also post ¶ 691.

¶ 504. Where a claimant against an estate neglects to take advantage of the means provided by statute for satisfying his claim he has no remedy at law or in equity.—Winegar v. Newland, 44 Mich. 367.

¶ 505. Claims against a decedent's estate can be presented until its distribution unless the time for their presentation is limited by the appointment of commissioners, or by the probate court when no commissioners are appointed.—Willard v. Van Leeuwen, 56 Mich. 15; explaining what had been said in Pratt v. Houghtaling, 45 Mich. 457.

¶ 506. Comp. L. 1871, §§ 4462, 4463, How. St., §§ 5930, 5931, providing for notice to creditors of the settlement of the estate of a deceased person, and two years in which to present claims, was not meant to extend the time in which claims should remain valid against the estate, but to fix a limitation upon the personal liability to which the executor or administrator is subjected by the preceding section.—Hoffman v. Beard, 32 Mich. 218.

¶ 507. Prior to the passage of Pub. Acts 1915, No. 256, barring claims against decedents after the lapse of a certain length of time in the absence of the appointment of commissioners on claims, or the substitute therefor—a hearing of claims before a probate judge, and a closing of the estate—the only method by which claims against an estate could be barred was by an appointment of commissioners, or a hearing of claims by the probate judge and the closing of the estate.—Ogooshevitz v. Arnold, 197 Mich. 203.

¶ 508. The presentation of claims is not conditional upon the filing of an inventory showing property that can be devoted to the payment of debts, nor does the statute require that the inventory precede the hearing of claims.—First Nat. Bank v. Sherman's Estate, 117 Mich. 602.

¶ 509. Where a creditor against a decedent's estate has failed to present his claim to the commissioners thereon while in commission, he is entitled at any time before the estate is closed to have it heard by the probate judge or have the commission revived, the only discretion in the probate court being to determine whether the court or commission will hear it, and within what time, inside of three months, it must be heard (How. St., §§ 5893, 5894, 5895). And mandamus lies to enforce the right to a hearing.—Hart v. Shiawassee Circuit Judge, 56 Mich. 592.

§ 171. Time limitations, claims affected.

Presentment of immature, contingent and secondary liabilities, see post § 196.

Bar on liability for claim as bar to action on bond given to secure claim, see post ¶ 1216.
Power of court to license sale of realty after claim is barred for delay in presentment, see also post ¶¶ 692, 693.
Time within which sale may be had after license has been granted, see post ¶ 723.
Limitation on right or cause of action on which claims are based, see Limitation of Actions, I.
Loss of right through laches to subject homestead to payment of debts, see Homesteads, IX.
Claims barred for failure to present, see Jud. Act, chap. LV, § 14, Comp. L. 1915, § 13877.
Time allowed for creditors to present claims, see Jud. Act, chap. LV, § 5, Comp. L. 1915, § 13868.
Claims barred for failure to demand debt from representative within time limited for payment after notice, see Jud. Act, chap. LVI, § 14, Comp. L. 1915, § 13896.
Claims against unprobated estate barred for failure to present, see Pub. Acts 1917, No. 348.

¶ 510. All statutes relating to the settlement of estates of decedents must be construed together, and harmonized so far as possible. Where limitations of time are imposed they must yield to the consideration that they cannot be held to apply if their application would defeat the general purpose of devoting the estate to the payment of debts.—In re Emmons' Estate, 142 Mich. 299.

¶ 511. It is only claims absolutely payable and which the executor or administrator would be bound to pay to the extent of the assets that are barred by Comp. L. 1897, § 9380, How. St., 2nd ed., § 11091, providing that every person having a claim against a deceased person, proper to be allowed by the commissioners of claims, who shall not, after the publication of notice, exhibit his claim to the commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever.—Rankin v. City of Big Rapids, 133 F. 670.

¶ 512. Under Comp. L. 1897, § 9380, How. St., 2nd ed., § 11091, providing that claims which are proper to be allowed by the commissioners and are not presented within the time limited shall be barred and section 9411 et seq., Comp. L. 1897, How. St., 2nd ed., § 11122 et seq., relating to the proof of contingent claims before the probate court and also authorizing the commissioners to take proof in relation thereto and make report to the probate court, and providing for the allowance of contingent claims within the period of two years of the time limited for presenting of claims by other creditors, and that if the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims the person having such claim may present it to the probate court and prove it within one year after it shall become absolute, only claims which are absolute and so capable of being established are barred, and such provisions do not operate to bar a recovery by a receiver of a bank against an heir of intestate of an assessment levied upon stock of deceased more than one year after death of intestate and nine months after the estate had been closed, the administrator discharged, and the property turned over to the heir.—Rankin v. Herod, 140 F. 661.

§ 172. Claims accruing during administration.

Expenses of administration as items for reimbursement of representative, see post § 296.

¶ 513. Where a will provides that as the testator's children become of age the executors shall set off to them their shares of the estate, and it is obviously the intent that the executors shall receive and pay out moneys in managing the estate and supporting, maintaining and educating the children, any resulting indebtedness incurred by the estate to the executors in the strict discharge of what they believe to be their duty will not stand on the same footing with debts contracted by the deceased in his lifetime, nor be subject to the statutory limitation requiring claims against the estate to be presented and allowed within four years and a half.—Church v. Holcomb, 45 Mich. 29.

¶ 514. A claim against the estate of a deceased surety on a bond "accrues" at the time when suit might be brought against the surety if living, and need not be deferred until time of the rendition of judgment against the principal and a surviving surety, within the meaning of How. St., § 5936, providing that, if the claim of any person shall accrue or become absolute after the expiration of the time limited for creditors to present their claims, such claim may be presented to the probate court for allowance at any time within one year after it shall have so accrued or become absolute. —John Hancock Mut. Life Ins. Co. v. Hill's Estate, 108 Mich. 126.

§ 173. Claims by representative.

Notice of claim presented by representative, see ante § 169.

¶ 515. Section 9380, Comp. Laws 1897, provides that persons failing to present their claims against the estate of a decedent within a certain time shall be forever barred from recovering such demand, or from setting off the same in any action whatever. Section 9373, as amended by Act No. 70, Pub. Acts 1901, authorizes a revival of the commission on claims, and further time for the presentation of claims on application made before the estate is closed. Held, that these provisions make no

exception of the claims of administrators individually, hence such a claim not being presented within the statutory period, is barred, and cannot be allowed as a part of the final account of the administrator. In re Hodges' Estate (Appeal of Ardiel), 157 Mich. 198.

§ 174. Claims by infants.

Statutory limitations on cause of action on which infant's claim is based, see Limitation of Actions, III, B.

¶ 516. An infant is bound by Comp. Laws 1897, § 9380, requiring the filing of claims against estates of decedents, and where such claim is not filed, it becomes barred. in the absence of fraud, ignorance or mistake, and the infant cannot maintain a suit in equity therefor.—Van Haaren v. Tierney, 180 Mich. 192.

§ 175. Time for presenting set-offs.

See also ante ¶ 492.

Set-offs in general, see ante § 157.

Mode and requisites in general in presentment of set-offs, see ante § 165.

¶ 517. Any set-off against the demands of creditors upon a decedent's estate must be presented on the hearing of the claims, unless there is reason to the contrary, and when once asserted it cannot be withdrawn. —Green v. McCutcheon, 40 Mich. 244.

¶ 518. How. St., § 5905, allowing set-off by a defendant sued by a personal representative "instead of presenting" the claim to the commissioners, has reference to that portion of section 5904, which authorizes the personal representative to prosecute "any action commenced by deceased in his lifetime," and thus limited is harmonious with section 5901, which bars all claims if not presented to the commissioners in time; hence defendant in an action begun by a decedent's administrator after time for presenting claims has expired cannot set-off a claim not presented.—Quinn v. McGovern, 97 Mich. 114.

¶ 519. The failure to present a claim arising against an intestate in his lifetime, to the commissioners of his estate, does not prevent the owner from availing himself thereof as a set-off in a suit against him by the assignee of the administrator of the estate, under How. St., § 5901, providing that every person having a claim against deceased, proper to be allowed by commissioners, who shall not exhibit his claim to them within the time limited for that purpose, shall be barred from recovering the same, or from setting it off in any action whatever, where it does not appear that commissioners have ever been appointed.—Boltwood v. Miller, 112 Mich. 657.

¶ 520. A claim of set-off against an estate is barred where it is not presented to the commissioners on claims within the time limited by Comp. Laws 1897, § 9380.—Thurber v. Aldrich, 167 Mich. 656.

§ 176. Extension of time for presentment or waiver of bar.

By death of party or vacancy in administration, see post § 177.

Revival of commission on claims, see post §§ 190-193.

Disability of representatives and fiduciaries to waive limitations or revive barred debt, see Limitations, VI.

Extension of time for creditors to present claims, see Jud. Act, chap. LV, § 6, Comp. L. 1915, § 13869.

¶ 521. An extension of time for the presentation of claims rests in the discretion of the probate court and cannot be compelled by mandamus.—People ex rel. United States Attorney v. Monroe County Probate Judge, 16 Mich. 204.

§ 177. ——By death of party and vacancy in administration.

Effect of death or vacancy in administration on right to sue, see post § 315.

Extension of statute of limitations by death or vacancy in administration, see Limitation of Actions, VI, C.

¶ 522. Where a widow, after being made executrix, remarries and an administrator de bonis non is appointed, the interim between her disqualification and the new appointment may be added to the four years and six months allowed by law for the payment of claims against the estate.—Pratt v. Houghtaling, 45 Mich. 457.

§ 178. Reopening administration; newly discovered assets.

Revival of commission, see post § 190.

¶ 523. After the settlement of an estate is once closed, and the statute Comp. L. 1871, §§ 4462, 4463, How. St., §§ 5930, 5931. has barred personal claims against the administrator, a probate court cannot reopen the matter on a mere statement that land has been found which belonged, at the time of the death of the intestate, to a person of his name, but is now claimed by third persons, who refuse to show the evidences of their title.—Hoffman v. Beard, 32 Mich. 218.

3. Hearing, Proof and Determination; Report of Commissioners.

§ 179. In general; hearing by commission or by court.

Appointment, compensation and jurisdiction of commissioners, and nature of their office, see post §§ 180, 181.

Stay or postponing of hearing, see post § 182.

Parties in hearing, see post § 183.

Issues, proof and objections, see post § 184.

Admissions or stipulations for allowance, see post § 185.
Decision and order on hearing, see post §§ 186-188.
Commissioners' report and return, see post § 189.
Revival of commission and proceedings thereof, see post §§ 190-193.
Necessity of hearing on claims against residuary legatee bonded to pay debts, see post § 195.
Necessity of proof of claims in probate court, see ante ¶ 74.
Equitable nature of proceedings for examination of claims, see also ante ¶ 473.
Procedure to enforce claims against estate by representative as creditor, see post § 277.
Effect and scope of stipulations in general, see Stipulations.
Disqualification of party to transaction with deceased as witness, see Witnesses, IV.
Participation by heirs in hearing of claims before probate judge as estoppel of them and also administrator to require hearing before commissioners, see also Estoppel ¶ 236.
Propriety of mandamus to compel court to hear and adjudicate claims, see Mandamus, II.
Examination and allowance of claims by probate judge, see Jud. Act, chap. LV, § 8, Comp. L. 1915, § 13871.
Notice and hearing of claims before commissioners, see Jud. Act, chap. LV, § 2, Comp. L. 1915, § 13865.
Allowance of claim for funeral expenses before general hearing of claims, see Jud. Act, chap. LV, § 8, Comp. L. 1915, § 13871.

¶ 524. The general idea underlying How. St. §§ 5888-5906, is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the probate court when no commissioners are appointed.—Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525.

¶ 525. A probate order, providing for the adjustment by the court of a claim against a decedent, contained the recital "the attorney for the executor of the last will and testament of said deceased being present in court and consenting thereto." Held insufficient in itself, and without at least identifying the attorney, to give the court jurisdiction.—Durfee v. Abbott, 50 Mich. 278.

¶ 526. A decedent's heirs having participated without objection in hearing of claims before probate judge prior to appointment of general administrator and having appealed from his decision on a claim, cannot question regularity of such hearing, or insist on appointment of commissioners on claims after such administrator has been appointed.—Jenks v. St. Clair Probate Judge, 96 Mich. 122.

§ 180. Appointment and compensation of commissioners.

Waiver of right to appointment of third commissioner by appeal from commissioners' decision, see Probate Courts, III.
Appointment of commissioners of claims, see Jud. Act, chap. LV, § 1, Comp. L. 1915, § 13864.
Appointment of commissioner on death, removal or incapacity of commissioner or disagreement, see Jud. Act, chap. LV, § 4, Comp. L. 1915, § 13867.

¶ 527. Commissioners for the allowance of claims are not themselves a court; and the statute authorizing probate courts to appoint them is valid.—Shurbun v. Hooper, 40 Mich. 503.

¶ 528. The appointment of a third commissioner on claims against the estate of a deceased person, under How. St., § 5891, is a proceeding directly affecting both claimant and the estate, and both have a right to be heard; and an ex parte appointment made on the application of a claimant, who has appealed from the rejection of his claim, is void, unless accepted by the administrator.—Smith v. Lloyd's Estate, 76 Mich. 619.

¶ 529. An executor or administrator who consents in open court to the appointment of two referees instead of one or three, as provided by the statute, and who appears before them and submits the matter in controversy, is estopped from questioning afterwards the court's jurisdiction to make such appointment, the doctrine that such officer cannot waive any of the rights of the estate having no application to such a case.—Shepherd v. Shepherd's Estate, 108 Mich. 82.

¶ 530. The supreme court will not overturn fees allowed by the probate court under Comp. Laws 1897, § 11228, to commissioners for services in hearing contested claims, where the evidence given in the circuit court tends to show that the amount allowed was not unreasonable.—In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

§ 181. Functions, jurisdiction and nature of commissioners' office.

See also post ¶ 583.
Jurisdiction of claims commissioners over secured claims and mortgages, see post ¶¶ 569, 570.
Effect of proceedings for removal of commissioner on jurisdiction and functions of commission, see post ¶ 559.
Commissioners on claims as a "court," see Constitutional Law § 34.
Commissioners on claims as "officers," see Officers, I.
Propriety of mandamus to compel commissioners to return evidence into probate court, see Mandamus, II.

Commissioner's oath, see Jud. Act, chap. LV, § 10, Comp. L. 1915, § 13873.

¶ 531. Commissioners for the allowance of claims against the estate of a decedent are not a part of the probate court: that court has no control over their actions.—Streeter v. Paton, 7 Mich. 341.

¶ 532. All claims for or against a decedent's estate must be passed upon by the commissioners on the estate, and cannot be withdrawn for adjudication elsewhere.—Shurbun v. Hooper, 40 Mich. 503.

¶ 533. Commissioners for the allowance of claims act judicially in the allowance of claims against estates, and where they are appointed, the probate court has no authority over the claims further than to order dividends from time to time among those whose claims are allowed, until all are paid.—Clark v. Davis, 32 Mich. 154.

¶ 534. Where notice of their meeting has, in fact, been published, the commissioners on claims may proceed to a hearing. Their jurisdiction does not depend on the production before them of proof of publication.—Wilkinson v. Conaty, 65 Mich. 614.

¶ 535. Under How. St., §§ 5907-5917, commissioners appointed to hear claims against an estate become a special tribunal, which for most purposes is independent of the probate court.—Johnson v. Powers, 139 U. S. 156, 35 L. Ed. 112, 11 Sup. Ct. Rep. 525.

¶ 536. Commissioners on claims against the estate of a deceased are not authorized to pass on a contingent claim.—Crosby v. Montcalm Circuit Judge, 125 Mich. 24.

¶ 537. The duty of commissioners on claims to report the proof of a contingent claim presented to them is not judicial but ministerial, and its omission cannot be remedied, rectified or redressed by appeal; its observance must be enforced by warrant (Comp. L. 1871, § 5200, How. St., § 6763) or by mandamus, or by attachment, or the proof must be supplied, if necessary, in some special way.—Buchoz v. Pray, 36 Mich. 429.

¶ 538. A claim not presented to and allowed by the commissioners before filing their report cannot afterwards be considered by them and included in such report after their commission has expired.—McGee v. McDonald's Estate, 66 Mich. 628.

§ 182. Stay or postponement of hearing.

¶ 539. Commissioners for the allowance of claims are a special tribunal which for most purposes is independent of the probate court. Their proceedings are not stayed nor affected by the pendency of an appeal from the order appointing the administrator, though it may temporarily suspend the hearing and disposal of claims unless there is a special administrator.—Lothrop v. Conely, 39 Mich. 757.

§ 183. Parties in the hearing.

¶ 540. No one can, under the statutes, be recognized in proceedings to prove claims except the administrator and the creditor.—Daniels v. Stevens, 60 Mich. 219.

¶ 541. If there is a special administrator pending an appeal from an order appointing an administrator, he should represent the estate on the hearing.—Lothrop v. Conely, 39 Mich. 757.

¶ 542. Under How. St., §§ 5907-5917, as against an adverse claimant, the administrator, general or special, represents the estate before commissioners appointed to hear claims and on appeal.—Johnson v. Powers, 139 U. S. 156, 35 L. Ed. 112, 11 Sup. Ct. Rep. 525.

§ 184. Issues, proof, and objections.

Issues before court on application for revival of claims commission, see post ¶ 564.

Defenses and set-offs to claim, see ante § 157.

Equitable defenses in suits on claims, see post § 201.

Presumptions and evidence as to implied promises, see generally Implied Contracts, II; Contracts, X, B, § 313.

Value of services or benefits received, measure and proof of their reasonable worth, see Values.

Failure of representative to inventory chose in action as working estoppel to present it as a claim against another estate, see also Estoppel ¶ 103.

Manner of pleading and proving former adjudication, see Former Adjudication, VII.

Issues and matters triable by commissioners, see Jud. Act, chap. LV, § 12, Comp. L. 1915, § 13875.

¶ 543. No formal issue is required to be taken on a hearing before commissioners on claims against the estate of a deceased person, nor need objection be made before them to their allowance of the claim.—Winter v. Winter, 90 Mich. 197.

¶ 544. As no obligation but decedent's can be established in the probate court, the liability of decedent's wife, who signed as surety the note presented against the estate, is unimportant.—Johnson v. Johnson's Estate, 66 Mich. 525.

§ 185. Admissions or stipulations for allowance.

Disability of representative to waive defenses, see also post ¶ 1033.

Right and authority of representative to make compromises, arbitrations and confessions, see also post § 317.

Effect of stipulations to bind estate or objecting heir as to validity of claim, see Stipulations.

Public policy as to agreements not to resist or object to claims, see Contracts § 63.

¶ 545. All claims against the personalty of an estate must be duly proved in the probate court or before commissioners before they can be allowed; they cannot be established by the admission of the administrator. —Clark v. Davis, 32 Mich. 154; White v. Ledyard, 48 Mich. 264.

¶ 546. An executor or administrator cannot bind the estate, by an arrangement with one having a demand against it and also one against a third party, to submit the question of liability and the amount thereof on both demands directly to the circuit court in a single suit.—Barry v. Davis, 33 Mich. 515.

¶ 547. An executor under ordinary bonds must defend the estate against claims, and can pay none that have not been judicially approved; he cannot dispense with proof, or bind himself or the estate by admissions. But an executor who has given bond as residuary legatee can settle claims at his discretion; no one can question his acts but his sureties, nor can they, except when it is sought to charge them personally on his default in making payment.—Durfee v. Abbott, 50 Mich. 278.

¶ 548. All claims against the estate of a decedent, when commissioners have been appointed, must be presented to and be allowed by them; the estate is not bound by any account stated by the administrator. —Fish v. Morse, 8 Mich. 34.

¶ 549. The commissioners, in acting under How. St., §§ 5907-5917, act judicially in the allowance of claims against an estate and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode.—Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525.

§ 186. Decision and order on hearing.

Conclusiveness and effect, see post § 187.
Collateral attack, see post § 188.
Necessity of adjudication of claims before suits to annul decedent's fraudulent transfers, see ante ¶ 298.
Necessity for decision and finding by commission as to indebtedness before granting of license to sell realty, see post ¶ 713.
Appeals to circuit court from order allowing or rejecting claim, see Probate Courts, III; see also note, post § 197.
Writ of error from circuit judgment on appeal to supreme court, see Appeal.

¶ 550. Funeral expenses, like the expenses of the last sickness, rank as a preferred claim against the estate, and may properly be allowed by commissioners; and the allowance of both as one item, though irregular, will not be invalid if the whole is to be paid to one claimant.—Booth v. Radford, 57 Mich. 357.

¶ 551. The decision of the commissioners appointed to hear claims, or of the circuit court on appeal, should properly be only an allowance or disallowance of a claim, and not in the form of a judgment at common law.—Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525.

§ 187. ——Conclusiveness and effect.

Allowance of commissioners as conclusive adjudication, see Former Adjudication, II.
Necessity that adjudication be on the merits to be a bar to subsequent suit, see also Former Adjudication ¶ 83.
Decrees and orders of probate court in general, see Probate Courts, III.
Disagreement of commissioners as an appealable order, see Probate Courts, III.

¶ 552. The conclusion reached by the claims commissioners, if within their power, and not appealed from, is final.—Shurbun v. Hooper, 40 Mich. 503.

¶ 553. The unappealed decision of commissioners allowing a claim at a certain sum is a final judicial decision.—Flynn v. Lorimer's Estate, 141 Mich. 707.

¶ 554. The allowance of claims against an estate conveys no title to the claimants in the land subject to sale to pay the debts of decedent.—Hunt v. Rabitoay, 125 Mich. 137.

¶ 555. The count on an account stated with an administrator is bad in a suit against the estate, where commissioners have been appointed to hear and adjust such claims.—Fish v. Morse, 8 Mich. 34.

¶ 555a. The allowance of claims by the commissioners who had jurisdiction to pass on them, in the absence of fraud is conclusive against the estate and all persons who had an opportunity to be heard.—Chapoton v. Prentis, 144 Mich. 283.

¶ 555b. Where a claimant against an estate has taken all the statutory steps required to bind the resident and nonresident heirs, and has had his claim allowed, the matter is res adjudicata, and cannot be opened except for fraud.—Andrews v. Osborn, 159 Mich. 77.

§ 188. ——Collateral attack.

Collateral attack on letters, see ante § 32.

¶ 556. The validity of a claim allowed by the probate court cannot be attacked in a subsequent proceedings to set aside a deed and for an accounting.—Griffin v. Hovey, 179 Mich. 104.

¶ 557. The allowance of claims against an estate by a court of competent jurisdic-

tion cannot be impeached in a collateral proceeding if there was no fraud in allowing them and no appeal was taken.—In re Palm's Appeal, 44 Mich. 637.

§ 189. Commissioners' report and return.

Allowance of claim by commissioners after filing report and expiration of commission, see ante ¶ 538.

Report of commissioners, see Jud. Act, chap. LV, § 11, Comp. L. 1915, § 13874.

¶ 558. Comp. L. 1897, §§ 9377-9411, requiring a report from the commissioners on the hearing of claims, do not require that report to state the character of the claims passed on, whether absolute or contingent. —Flynn v. Lorimer's Estate, 141 Mich. 707.

¶ 559. Section 9386, Comp. Laws 1897, provides for the returning of the reports of commissioners of claims in the probate court. A report was lodged with the probate judge until he should dispose of an application of a claimant for the removal of the commissioners. Held, the return was not made until the judge had finally made a decision of the matter of the application.—In re McLaughlin's Estate (Appeal of Hinckley), 160 Mich. 284.

¶ 560. A premature return by the commissioners cannot be objected to by any one connected with the estate, where their allowance of the claim presented to them was appealed from.—Johnson v. Johnson's Estate, 66 Mich. 525.

§ 190. Revival of commission.

See also ante ¶ 509.

Application for revivor, see post § 191.

Proceedings of revived commission, see post § 192.

Second revival and proceedings thereunder, see post § 193.

Extension of time for presentment of claims, see ante §§ 176, 177.

Re-opening administration on discovery of new assets, see ante § 178.

¶ 561. Until an estate has been formally closed, the commission on claims may be revived.—Draper v. Brown, 153 Mich. 120.

§ 191. ——Application for revivor.

¶ 562. Under Comp. Laws 1897, § 9373, as amended by Act No. 70, Public Acts of 1901, a revival of the commission on claims at any time before the estate is closed is not a matter of discretion but of right, and all that is necessary to be shown in the petition is that the petitioner is a creditor whose claim has not been presented and passed upon by the commission, and that the estate is not yet closed.—In re Reid's Estate, 170 Mich. 476.

¶ 563. The revival of the commission for the examination of claims against a decedent's estate under How. St., § 5894, at any time before the estate is closed, upon the payment of costs by the creditor making the application, is a matter not of discretion, but of right, and hence the probate court may enter the order without giving notice of the application to the administrator, heirs, or creditors.—Heavenrich v. Nichols' Estate, 113 Mich. 508.

¶ 564. The merits of a claim against an estate are not open upon an application to the probate court for the revivor of a commission to hear it; nor are they upon an application for mandamus to compel such revivor.—Hart v. Shiawassee Circuit Judge, 56 Mich. 592.

§ 192. Proceedings of revived commission.

Procedure and costs on revival of commission, see Jud. Act, chap. LV, § 7, Comp. L. 1915, § 13870.

¶ 565. The fact that the meeting of the commissioners was delayed without the fault of the creditor, two days beyond the time provided in the order reviving the commission, will not defeat the claim.—Heavenrich v. Nichols' Estate, 113 Mich. 508.

¶ 566. So long as the estate remains open, the statute (Comp. Laws 1897, § 9373) permits a creditor to present to a revived commission any claim not previously presented. —Bresler v. Wayne Probate Judge, 152 Mich. 167.

§ 193. Second revival and proceedings thereunder.

¶ 567. Although a creditor against an estate in probate has once before secured an order of court to revive a commission on claims, he is entitled as a matter of right to an order for a second revival on a newly discovered claim, and such order of the probate judge is not appealable.—Bresler v. Wayne Probate Judge, 152 Mich. 167.

4. Contingent, Immature and Secured Claims.

§ 194. Secured claims and mortgages.

Mortgages and secured claims as debts of estate, see ante § 147.

Claims secured by bond of residuary legatee, see post § 195.

¶ 568. Claims secured by mortgage or otherwise are no exception to the rule that all personal demands against estates must be regularly presented and proved, and that all not proved are barred.—Clark v. Davis, 32 Mich. 154.

¶ 569. A mortgagee who means to hold the estate of his deceased mortgagor for any deficiency on foreclosure should present his claim for allowance to the commissioners on the estate, if any are appointed, or to the probate court, if not; and if he does not do so the executor may disregard the contingency that such a claim may thereafter be

made and can proceed voluntarily or even be compelled to proceed to make final distribution of the estate upon the expiration of the time limited for the payment of claims against it.—Willard v. Van Leeuwen, 56 Mich. 15.

¶ 570. A mortgage debt secured on land is an absolute claim against the estate of the maker of the note; and as such the commissioners are authorized to try and decide it under Comp. L. 1897, § 9378, providing that they shall have power to try and decide all claims which by law survive against or in favor of executors and administrators, except claims for the possession or title of real estate.—Flynn v. Lorimer's Estate, 141 Mich. 707.

¶ 571. Mortgage debts not included in claims against an estate and not allowed by the probate court but valid and enforceable against the land owned by the deceased may be paid by the administratrix and allowed in final settlement.—Russell v. Wheeler, 129 Mich. 41.

¶ 572. The decedent's note secured by mortgage may be proved as a claim against his estate, and the realty may, if necessary, be sold to satisfy it, notwithstanding the holder may have lost his mortgage lien by the prior recording of a subsequent conveyance.—Burns v. Berry, 42 Mich. 176.

§ 195. Claims against residuary legatee bonded to pay debts.

See also ante ¶ 547.

Sufficiency of notice of hearing on claims where residuary legatee has given bond, see ante ¶ 500.

Effect of bond of residuary legatee as executor on rights and lien of creditors for payment, see post § 220.

¶ 573. Where an executor, as residuary legatee, has given bond to pay the debts and legacies, no commission need be issued to consider claims against the estate, nor need they be proved in the customary way to make them a valid debt.—Durfee v. Abbott, 50 Mich. 278; Wheeler v. Hatheway, 58 Mich. 77.

§ 196. Immature, contingent and secondary liabilities.

Contingent and immature claims as debts of estate, see ante § 144.

Authority of commissioners to pass on contingent claims, see ante ¶ 536.

Duty of commissioners to report proof of contingent claim, see ante ¶ 537.

Evidence as to contingent character of claim, see also post ¶ 1109.

Contingent claims, see Jud. Act, chap. LVI, §§ 15-30, Comp. L. 1915, §§ 13897-13912.

Immature claims, see Jud. Act, chap. LV, § 13, Comp. L. 1915, § 13876.

When court may order sufficient estate retained for payment of contingent claim, see Jud. Act, chap. LVI, § 16, Comp. L. 1915, § 13898.

When contingent claim may be presented, see Jud. Act, chap. LVI, § 17, Comp. L. 1915, § 13899.

Contingent claims becoming absolute after time limited for presentation of claims, see Jud. Act, chap. LVI, § 19, Comp. L. 1915, § 13901.

When contingent claim payable, see Jud. Act, chap. LVI, § 18, Comp. L. 1915, § 13900.

¶ 574. Commissioners on claims cannot allow contingent claims; they can only receive and report the evidence relating thereto, and such claims are not definitely adjudicated until they are supposed to have become absolute.—Buchoz v. Pray, 36 Mich. 429; Campau v. Miller, 46 Mich. 148.

¶ 575. A note payable absolutely, secured by a real estate mortgage, is not, as between the holder and the estate of the maker, a contingent claim, within How. St., § 5932, providing that "if any person shall be liable as security for the deceased, or have any other contingent claim against his estate, which cannot be proved as a debt before the commissioners, or allowed by them, the same may be presented, with the proper proof, to the probate court or to the commissioners, who shall state the same in their report."—Osmun v. Oakland Circuit Judge, 107 Mich. 27.

¶ 576. The purpose of Comp. L. 1897, § 9411, How. St., 2nd Ed., § 11122, providing that any person having a contingent claim against an estate, which shall not be proved before the commissioners or be allowed by them, may present the same to the probate court, or to the commissioners, who shall state the same in their report, if such claim was presented to them, and section 9412, How. St., 2nd Ed., § 11123, providing for an order by the court that the administrator retain in his hands sufficient estate to pay such contingent claim when it becomes absolute, or the proper proportion equal to the dividends of other creditors, if the estate is insolvent, and section 9413, How. St., 2nd Ed., § 11124, providing that if such contingent claim shall become absolute, and shall be presented to the probate court, or to the executor or administrator within two years from the time limited for other creditors to present their claims to the commissioners, it may be allowed by the court upon due proof, or it may be proved by the commissioners already appointed or by others appointed for that purpose, in the same manner as if presented before the commissioners made their report, and section 9414, How. St., 2nd Ed., § 11125, providing that if such contingent claim shall be allowed, as mentioned in the preceding section, or established on appeal, the creditor shall be entitled to receive payment to the same ex-

tent as other creditors, if the estate retained by the executor or administrator shall be sufficient for that purpose, but if the claim shall not be finally established, or if the assets retained in the hands of the executor or administrator shall not be wholly exhausted in the payment of such claims, such assets, or the residue of them, shall be disposed of by order of court to the persons entitled to the same, was to hold the estate open for a limited time to enable a creditor having a contingent claim which might become absolute within that period to come in and share with other creditors before the administration should be closed, and if it did not become absolute, the estate should be closed without further regard to such claim.—Rankin v. City of Big Rapids, 133 F. 670.

¶ 577. Comp. L. 1897, § 9415, How. St., 2nd Ed., § 11126, providing that if the claim of any person against an estate shall accrue or become absolute, at any time limited for creditors to present their claims, the person having such claim may present it to the probate court and prove the same at any time within one year after it shall accrue or become absolute, and if established in the manner prescribed in the chapter, the executor or administrator shall be required to pay it, if he shall have sufficient assets for that purpose, and shall be required to pay such part as he shall have assets to pay, and, if estate shall afterwards come to his possession he shall be required to pay such claim, or such part as he may have assets sufficient to pay, not exceeding the proportion of the other creditors, in such time as the probate court may prescribe, and section 9416, How. St., 2nd Ed., § 11127, providing that when a claim shall be presented within one year from the time when it shall accrue, and be established, as mentioned in the preceding section, and the executor or administrator shall not have sufficient assets to pay the claim the creditor shall have a right of recovery for any balance not paid him from the heirs, devisees or legatees receiving a sufficient portion of the estate, require as a condition that the estate has not been closed and no provision is made for a claim which does not become absolute until the jurisdiction of the probate court over the estate has ceased.—Rankin v. City of Big Rapids, 133 F. 670.

5. *Actions, Suits and Hearings on Appeals on Claims; Judgment and Execution.*

§ 197. Original jurisdiction and appellate hearings.

[Note. The general law of evidence and procedure in actions on contracts has been treated in Contracts, X. In this connection it is not designed to cover the same ground but to collate merely those decisions on the procedure which distinctively pertain to the proving of contract claims in the probate court or in the circuit court in trying the matter de novo on an appeal. For the general law of pleading, proof and procedure in actions on contracts, see Contracts, X; and see also Sales, VIII, IX; Negotiable Instruments, XIV; Vendors and Purchasers, XII.

The practice on appeals from the probate court or from the report of the commissioners on claims will be treated in Probate Courts, III. Matters of substantive law and evidence in proof of the claim only will be retained in this division, when they are raised on a retrial of the issues on appeal in the circuit court.]

Jurisdiction and remedies in equity, see post §§ 199-201.

Form and sufficiency of claims and pleadings, see post § 202.

Issues, defenses and variance on appellate trial, see post §§ 203, 204.

Presumptions and evidence, see post §§ 205-207.

Jury trial and questions for jury, see post § 208.

Directed verdict and instructions, see post §§ 209, 210.

Verdict and findings, see post § 211.

Execution and attachment, see post § 212.

Procedure to determine and enforce personal liability of representative for debts, see post § 268.

Replevin against representative, see also post ¶ 984.

Remedy and procedure on representative's bond for enforcement of claims, see post § 391, ¶ 1236.

Nature of right of appeal from probate court, see Probate Courts, III.

Appeals from the probate court in general and appellate procedure thereon, see Probate Courts, III.

Time for appeal to circuit court and jurisdiction for extension of time, see Probate Courts, III.

Record on appeal, see Probate Courts, III.

Sufficiency of notice and bond on appeal, see Probate Courts, III.

Costs on appeal to circuit court, see Probate Courts, III.

Right of special representative to appeal from allowance of commissioners, see Probate Courts, III.

Proper mode of reviewing judgment on appeal from allowance of claim, see Appeal, I, III; Certiorari § 14.

Review of decision of circuit court on appeal in proceedings on claims, see Appeal § 28.

Lack of jurisdiction in superior courts to entertain appeals from allowances, see Municipal Courts, II.

Right of subrogation to claim against estate, see Subrogation, I.

Trial on appeal in circuit court, see Jud. Act, chap. LXV, § 11, Comp. L. 1915, § 14155.

Powers of circuit court on appellate hearing, see Jud. Act, chap. LXV, § 19, Comp. L. 1915, § 14163.
Suits not to be brought against representative after appointment of commissioners, see Jud. Act, chap. LV, § 15, Comp. L. 1915, § 13878.

¶ 578. The circuit courts have no original jurisdiction over claims against estates.—Patrick v. Howard, 47 Mich. 40.

¶ 579. The probate court is the proper court to settle the rights of a widow's estate in a sum due from the husband's estate which one of the children claims as compensation for support furnished by agreement to the widow in which agreement the other children and the representative of the husband's estate joined; since there must be a hearing of claims against the widow's estate before any claimant is entitled to a share of it.—Morse v. Allen's Estate, 99 Mich. 308.

§ 198. Jurisdiction and remedies in equity.

Relief from fraudulent claims, see post § 199.
Enforcement of allowance order or subjection of assets, see post § 200.
Laches and equitable defenses, see post § 201.
Garnishment, bill or other remedy to reach shares of distributees for creditors, see post § 382.
Propriety of injunction against appeal from allowance of claim, see Injunction, II.
Jurisdiction of equity in suit for reformation of instrument to determine claims against estate, see Reformation of Instruments, III.
Creditors' suit by surety against estate of cosurety for contribution, see Creditors' Suits ¶ 34.
Bill against personal representative of defrauding corporate officer, see also Corporations § 177, ¶ 660.

¶ 580. Under Comp. Laws 1897, §§ 6759, 6760, How. 2nd Ed., §§ 12098, 12099, a probate court has exclusive jurisdiction in the matter of allowance of claims except as a court in chancery may, in exceptional cases, render them aid and assistance by means of such auxiliary remedies as may be useful to prevent wrong and injustice before the probate jurisdiction can be effectual.—Buck v. Lockwood, 193 Mich. 242.

¶ 581. The probate laws do not afford the only remedy a creditor may have in Michigan for the recovery of a claim against the estate of a deceased person, and when those laws do not avail to protect equities arising from special circumstances, its equity courts will give relief by applying the principles and remedies peculiar to that jurisdiction.—Rankin v. City of Big Rapids, 133 F. 670; Rankin v. Herod, 140 F. 661.

¶ 582. A court of equity will not allow or disallow claims against estates of deceased persons, or administer estates, especially after the subject has been entered upon in the probate court.—Draper v. Brown, 153 Mich. 120.

¶ 583. A claim for money due upon a decedent's written agreement can properly be submitted to the commissioners upon his estate, and if disallowed the only remedy is by appeal from them; a bill in chancery is not a proper proceeding.—Patton v. Bostwick, 39 Mich. 218.

¶ 584. The remedy in the probate court and on appeal in the circuit court for investigating and settling claims and set-offs is not only sufficient, but is imperative when the controversy has been opened; and a resort to equity cannot be had to examine into the subject.—Sheldon v. Walbridge, 44 Mich. 251.

¶ 585. A court of equity cannot examine into the question of the rights of an estate against the widow or of her claims against the estate, where it has already been passed upon by commissioners on the estate and is still in litigation on an appeal.—Shelden v. Walbridge, 44 Mich. 251.

¶ 586. A man cannot maintain a bill in equity against his brother's estate, after the estate has been closed by distribution, to recover the share for which his brother would have been liable, had he lived, upon a mutual contract to support their mother. It is not a case for specific performance, and there is no authority to decree payments from distributees in favor of a creditor at large.—Shannon v. Shannon, 48 Mich. 182.

¶ 587. Inasmuch as a court of equity has jurisdiction to enforce the performance of a contract to pay the taxes on land until the timber has been removed therefrom, it may also make a binding decree upon the estate of the original, but since deceased, defendant where the administrator of the estate by his pleading and conduct has made the obligations of the contract those of the estate, and no claim was made that the administrator and heirs were not proper parties.—Michigan Iron & Land Co. v. Nester, 147 Mich. 599.

¶ 588. In cases in which the relation between the deceased and the defendants resembles a partnership, and all the evidence of the dealings of the parties is in the possession of the defendants, it is impossible for the commissioners on claims to adjust the equities of the parties.—Graham v. Graham, 171 Mich. 307.

¶ 589. Under How. St., § 5902, providing that no "action shall be commenced against the executor or administrator, except actions of ejectment, or other actions to recover the seizin or possession of real estate, and actions of replevin," a bill in aid of execution lies in form of a judgment creditor

against the executors and trustees of the estate of a deceased wife of a deceased debtor to subject property held by defendants as the property of the estate of the deceased wife under authority and direction of a probate court prior to attachment of the land by the creditor, but which land it was claimed had been fraudulently conveyed by the debtor to his wife, since such statute permits suits to try title or possession of property during the progress of the settlement of the estate.—Lant v. Manley, 75 Fed. 627.

¶ 590. A bill in equity for contribution from the representatives of a surety on a bond will lie in the circuit court if the case involves an inquiry into the liability and solvency of the other sureties that cannot be settled before the probate court of commissioners.—Rynearson v. Turner, 52 Mich. 7.

¶ 591. Chancery is the proper forum in which to litigate a claim for damages against a decedent's estate for the nonperformance of a contract providing for the sale by the decedent of certain lands conveyed to him in trust to secure advances made to the claimant, or the manufacture and sale of the timber thereon, and that, after the repayment of said advances and interest, the remainder of the lands should be owned in common by the parties to the contract; it not being claimed that there was any breach of the contract or default on the part of the decedent in his lifetime, but claimant relying upon a breach by the administrator.—Nester v. Ross' Estate, 98 Mich. 200.

¶ 592. On a bill by the widow of a testator against the administrator of the estate of his former wife, the administrator of estate of decedent, and the heirs of decedent by the former wife to set aside assignments of insurance policies by decedent to heirs and a release of a claim of decedent against the estate of the former wife in favor of the heirs, and to set aside an allowance of a claim in favor of the heirs against the estate of decedent, a court of chancery, upon decreeing relief, inasmuch as it has all the parties before it, may, when the amount of a claim against the estate of the former wife in favor of decedent is undisputed, properly allow such claim.—Yalomstein v. Yalomstein, 190 Mich. 615. (Ostrander and Kuhn, JJ., dissenting.)

§ 199. ——Relief from fraudulent claims.

Remedies and rights for fraud generally, see Fraud, III.

¶ 593. The rightful owner of a promissory note executed by a decedent and allowed as a valid claim against the estate in favor of one who got possession of it by fraud and deceit, may, having been denied an opportunity to prove title thereto before the commissioners on the estate, sue in equity to have such note decreed to be his property and to enjoin payment by the administrator to the fraudulent holder.—McKinney v. Curtiss, 60 Mich. 611.

¶ 594. A bill in aid of execution against lands of the decedent based on a judgment for alimony, designed to set aside a fraudulent conveyance by decedent to defendant his brother, and to enjoin the brother from presenting and proving a claim collusively against the estate of the decedent to the end that all of decedent's lands may be applied to a fictitious debt and complainant's execution thereby defeated, is not objectionable as reviewing a probate decision in chancery.—Babcock v. Babcock, 150 Mich. 558.

§ 200. ——Enforcement of allowance order or subjection of assets.

Assets available for payment of claims, see post, VI, D, 1.

Subjection of land to payment of claims, see post, VII.

¶ 595. A father obtained the allowance of a claim against his son's estate, but the son's widow, who was his executrix, refused to pay it, and conveyed away the property out of which it should have been satisfied, and the estate remained unsettled. Held, that his remedy was not in equity, but, if not lost by neglect, was in the probate court, where, in spite of the conveyances, the land was liable in due course of administration and for a limited period to the claims of creditors, and after the arrival of the time of payment the executor was liable personally or on his bond.—Winegar v. Newland, 44 Mich. 367.

¶ 596. An equitable lien upon assets that are subject to the payment of debts in the hands of the administrator arises in favor of creditors, which may be enforced in a court of equity, after distribution by the probate court, to reach assets misapplied by the administrator.—Pierce v. Holzer, 65 Mich. 263.

§ 201. ——Laches and equitable defenses.

Defenses to claims in general, see ante § 157.

Defenses open in action based on allowance, see post § 203.

¶ 597. Where in a bill by nonresident heirs to set aside a claim allowed against an estate, the complainants were not ignorant of the death of the deceased nor of the fact that she owned personalty and realty, failure to bring suit for several years constitutes laches.—Andrews v. Osborn, 159 Mich. 77.

§ 202. Form and sufficiency of claim; pleadings.

Method of stating claim and petition for allowance by commission or probate court, see ante § 166.

Variance from form of claim on appellate hearing, see also post § 204.

General rules of pleading on appeals from probate, see Probate Courts, III.

¶ 598. On appeal a claim for "services in the care and aiding and supporting" decedent's sister and her minor children is broad enough to include aid and support by the contribution of money.—Grimm v. Taylor's Estate, 96 Mich. 5.

¶ 599. A claim in the probate court referring to a mortgage to the deceased, stating the amount and interest as $1343.78, and followed by the words "my claim, due March 25, $343.78." is erroneously denied by the court, on the ground that it would not support any proof, and that it is not clear that it was the same claim tried before commissioners, when it appears that the defendant made no objection to the form of the claim when it was tried before the commissioners, and later by a jury. Claims in a probate court are not governed by technical rules, and substance is more regarded than form.—King v. Brewer, 121 Mich. 339.

§ 203. Issues and defenses open in action based on allowance.

Issues on appellate hearing of claims, see post § 204.
Objections and issues as to claims on hearing before commission, see ante § 184.
Defenses to claims in general, see ante § 157.
Equitable defenses in suits on claims, see ante § 201.
Admissibility of defense evidence, see post ¶ 611.
When appeals from commissioners at issue, see Probate Courts, III.

¶ 600. The objection that a claim is barred by the statute of limitations should be raised before the commissioners on the estate or on appeal; it cannot properly be considered in an action for the amount found due by the commissioners.—Shurbun v. Hooper, 40 Mich. 503.

¶ 601. Any objection growing out of the statute of limitations to the validity of claims against an estate must be raised before the commissioners or on appeal, and cannot be presented later in a bill to set aside the claim.—Andrews v. Osborn, 159 Mich. 77.

§ 204. Issues and variance on appellate trial.

Issues in action or suit based on claim, see ante § 203.

¶ 602. In a claim for services against an estate, items not presented to the probate commissioners cannot for the first time be presented on appeal to the circuit court.—In re De Haan's Estate, 169 Mich. 146.

¶ 603. Upon an appeal from the disallowance by commissioners of a claim against an estate, it appeared by their testimony that the issue before the commissioners was whether the estate was indebted to claimant upon an accounting as trustee. The claim upon its face was equally consistent with the theory that it was based on an absolute sale of property. Held, that the claimant could not present his claim in the circuit upon the latter theory.—Raub v. Nesbett, 111 Mich. 38.

¶ 604. Claimant was not entitled, on appeal to the circuit court, to enlarge a written claim against decedent's estate, filed in probate court, for "attendance and services rendered decedent during her lifetime and last sickness," so as to cover demands for bedding belonging to claimant, which, it is alleged, was required to be destroyed, on account of the nature of decedent's illness, and for loss sustained by claimant as a boarding house keeper, resulting from the dismissal of her boarders in the interest of quiet and proper nursing of decedent.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 605. Proceedings upon a claim against an estate are in the nature of an action at law, where questions of fact are triable by a jury; and this forum is not the proper one to litigate the question whether a valid trust in claimant's favor was not created by an agreement made by her brother (the decedent) with their father, in consideration of the father's revoking a devise previously made in her favor and devising the same property to the son, to pay her a certain sum per month as long as she shall live.—Linneman v. Moross' Estate, 98 Mich. 178.

§ 205. Presumptions and burden of proof.

Admissibility of evidence, see post § 206.
Sufficiency of evidence, see post § 207.
As to burden of proof, see also post ¶ 659.
Presumptions as to assets and title of decedent, see ante § 102.
Presumption of validity of judgment after twenty years, see Judgments, VII; Probate Courts, III.
Presumptions as to payment, discharge or satisfaction of debts and demands, see Evidence § 52; Payment, V.
Presumption as to payment from lapse of time, see Payment, V.
Presumption as to gratuitousness of services rendered in family relation, see Implied Contracts, II; Parent and Child, IV.
General law of evidence, including competency of particular kinds or means of proof, see Evidence.
Presumption from failure of representative to take stand and testify, admissibility of presumption as against estate, see Evidence ¶ 336.

¶ 606. A claim against an estate for rent cannot be allowed unless the facts tend to show an agreement, express or implied, therefor with decedent. And the claimant has the burden of proof. But an agreement is not necessarily implied from decedent's

continued occupancy of the premises after having deeded them to claimant.—Stevens v. Hulin, 53 Mich. 93.

¶ 607. It is the duty of courts to protect a decedent's estate from claims for board and care furnished merely in discharge of filial duty, and substantial proof establishing such claims should be required before allowing a jury to speculate as to the existence of the contract necessary to support them.—Wright v. Senn's Estate, 85 Mich 191.

¶ 608. Presumptions both of law and fact are that services rendered decedent by a friend during her last illness, her board, room rent, the board and rent of nurses, if furnished, are in no sense gratuities, but are to be paid for, and no proof is required of contract other than the law implies, to enforce against the estate such claim.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 609. Where one who seeks to recover against a decedent's estate upon a promissory note was the business manager of decedent's affairs during her lifetime, it is not incumbent upon him to show that in all his dealings with her while he was he agent he properly accounted to her. Tha' is matter of defense.—Blakley v. Cochran, 117 Mich. 394.

¶ 610. Burden of proof of the execution of a note made the basis of a claim in the probate court against a decedent's estate and appealed to the circuit court, held to be all the time on the claimant.—Hampton v. Van Nest's Estate, 196 Mich. 404.

§ 206. Admissibility of evidence.

[Note. The admissibility and sufficiency of evidence to prove a claim ex contractu or ex delicto is in substantive aspects the same as would be required in an action on the same cause against the decedent. It has therefore been deemed better digesting to place all of the cases in such topics as Contracts; Sales: Implied Contracts; Conversion; etc. Where the question is upon Agency, or the mutual rights of Husband and Wife, the existence of Trusts, the existence of Fraud or of Mistake or Duress, the making of Payment or Releases or Accord and Satisfaction, or other particular issues, the topics treating of such issues, like those just mentioned, should be consulted. It is not intended to treat here any of the substantive or evidential law of specific causes of action or defenses.]

Sufficiency of evidence, see post § 207.

Evidence as to assets and title of decedent, see ante § 102.

Evidence and proof on hearing for license to sell realty, see post § 231.

Validity of claim on appellate hearing after having been established before commission by incompetent evidence, see post ¶ 621.

Allowance of claims commissioners as prima facie evidence of indebtedness, see also ante ¶ 306.

Admissible evidence as to existence of contract with decedent, see also Contracts § 312.

Admissibility of evidence to show decedent was party to contract, see also Contracts §§ 310, 311.

Admissibility of parol evidence to contradict or vary receipt acknowledging payment, see Evidence, V.

Admissibility and sufficiency of evidence as to payment of debt, see Payment, V.

Admissibility of declarations and admissions made out of court by decedent or by others in general, see Evidence, VII.

Presentment of claim to commissioners at lower sum as an admission against claimant's interest, see also Evidence ¶ 2077.

Parol evidence that judgment assigned to decedent and collected by him was for real benefit of claimants of proceeds, see Evidence ¶ 1070.

Use on appeal of deposition used before commissioners on claims, see Depositions ¶ 98.

Declarations of intent to compensate by legacy as admissions of decedent binding on estate, see Evidence § 398.

Qualifications of experts as to value of services rendered, see Evidence § 288.

Evidence as to consideration or contract being for benefit of married woman's separate estate or property, see Husband and Wife, IV, D.

Evidence as to claim's being the separate property of married woman claimant, see Husband and Wife, IV, D.

Evidence to rebut claim based on given note, see also Evidence ¶ 439.

Self-serving declarations by decedent rebutting claim or debt, see Evidence § 488.

Harmless error in admission of evidence, see Harmless Error, II, B.

¶ 610a. On the hearing on appeal of a claim presented against an estate, where the question in dispute is whether the deceased had, just before his death, borrowed the amount of two notes produced, or whether, on the other hand, one of them represented a sum which was afterwards included in the other, much latitude of examination is allowable, within the discretion of the trial court, into circumstances that would tend to throw light upon the controversy, such as the amount of money the deceased received, or had, at about the time alleged.—Anderson v. Russell, 34 Mich. 109.

¶ 611. Where a claim on quantum merult was brought against an estate for the value of services and boarding rendered to decedent for support in claimant's home, the defense was entitled to give evidence in offset of contributions by decedent to the support of claimant as well as of himself; both on the theory of mutual gratuities and as bearing on the value of what was rendered and

such proofs could not be excluded on the ground that they were not specific as to particulars.—Ludlow v. Pearl's Estate, 55 Mich. 312.

¶ 612. In an action for board and lodging a note given by a daughter to her aged and infirm father, to whom she has furnished board and care for nine months, tends to show that at the time of its execution no claim was made against him for board, etc., and that there was no intention to make such claim.—Wright v. Senn's Estate, 85 Mich. 191.

¶ 612a. Evidence as to the value of services rendered a decedent is admissible in an action against the estate for the value of such services.—In re Wigent's Estate, 187 Mich. 507.

¶ 612b. To rebut the claim that a decedent offered to settle an alleged debt, thus recognizing it, decedent's son may testify that his father, upon being informed of the claim, denied its existence.—Passmore v. Passmore's Estate, 60 Mich. 463.

¶ 613. In a claim by a husband against his wife's estate for money advanced by him to pay premiums on a policy written on the life of the wife's father, evidence as to the relations between the claimant and his deceased wife, whether pleasant or unpleasant, harmonious or otherwise, is immaterial.—In re Reid's Estate, 170 Mich. 476.

¶ 614. Where collusion in the presentation of her claim between an administrator and his wife, a claimant against the estate, was charged, evidence of a sale by the administrator and of a purchase at such sale by the claimant was admissible as bearing on the good faith of the claim and upon their credibility as witnesses.—Stackable v. Stackable's Estate, 65 Mich. 515.

¶ 614a. A decedent's reputation for solvency and a claimant's reputation for insolvency were admissible upon the trial of a claim against an estate, as having some bearing upon the probability of the claimant's lending decedent large sums of money.—Wilson v. Estate of Hotchkiss, 81 Mich. 172.

¶ 615. Claimant presented a claim against the estate of the deceased for services. A witness was asked by defendant whether she knew of the deceased doing any acts of kindness to the claimant and her husband. Held, it was not error to exclude this question as being colorless on the question of claimant's expectation of reward.—In re Johnson's Estate, 160 Mich. 585; Beecham v. Wetherbee, Id.

¶ 616. In a proceeding to enforce a claim against an estate for services rendered the deceased, testimony of the deceased's statements showing animosity towards his other children and abuse by them is objectionable as tending to prejudice the jury in favor of the claimant and against the other children.—Laird v. Laird's Estate, 127 Mich. 24.

¶ 617. The owner of land on which there was a mortgage agreed with a railroad company to leave to arbitrators the sum the company was to pay him for the right of way over his land, but before the amount was paid the mortgage was foreclosed, and he could not give title. The title was transferred from the purchaser at the sale to one who had advanced the amount to redeem the land as security for the amount advanced, and the owner never sought to redeem from him, but after his death an assignee of the landowner filed a claim in the probate court against his estate. The person who had taken the title brought ejectment against the railroad company which thereupon sought to enjoin the suit, and enforce the original agreement with the result that it was successful and a decree was entered and the amount agreed by the arbitrators paid to the plaintiff. Held, in the action on the claim against his estate the decree and records of the chancery case were admissible to prove the origin of the fund, since taking the fund was an admission of the source.—Rapley v. McKinney's Estate, 143 Mich. 508.

¶ 618. In a suit against an estate to recover the value of a mortgage which the decedent, by mistake or otherwise, had appropriated and sold without the owner's consent or ratification, testimony is admissible to show the difference between the amount called for by the mortgage and the sum which the decedent had received for it; since liability is not limited to what was received. —Ward v. Ward, 37 Mich. 253.

¶ 618a. Where, in a suit by an administrator to recover moneys paid to defendant upon policies of insurance held by defendant as security for loans made to the decedent (her son), defendant seeks to set off a claim for the rent of part of a house which decedent occupied in his lifetime,—the remainder being occupied by decedent's father up to the time of his death, and afterwards by defendant,—it is competent for plaintiff, as tending to establish his claim that the occupancy of the house by decedent was rent free, to show that decedent had contributed largely to the construction of the house, and had, both before and after the death of his father, made expensive improvements and paid taxes upon the entire property, and that during the entire time of such occupancy the decedent paid no rent, nor was any claim for rent ever made upon him.—Maybury v. Berkery, 102 Mich. 126.

§ 207. Sufficiency of evidence.

See also note under preceding section.

Evidence of representative authority, see ante § 54.

Sufficiency of proof of loss of original contract to admit secondary evidence of contract, see Evidence § 150.
Weight and sufficiency of evidence of making of contract, see also Contracts § 323.
Conclusiveness, weight and effect of receipts acknowledging payment, see Evidence, X; Payment, V.
Conclusiveness of alimony award in proceedings to enforce claim for amount due, see Divorce § 175.
Books of account as evidence in proof of claim, see Evidence, VIII, B.

¶ 619. In all cases where by reason of the death of a party a claim must be disposed of upon the testimony of disinterested parties and circumstances, courts should not be too strict in the admission of testimony. Any and all circumstances that have a bearing, however slight, upon the questions at issue, should be permitted to go to the jury for their consideration in arriving at the truth of the disputed matters before them.—Seligman v. Ten Eyck's Estate, 74 Mich. 525.

¶ 620. On appeal from commissioners, testimony should be offered from which the jury may find the value of the services performed, and whether they remain unpaid for, to entitle a claimant to enforce a claim on a quantum meruit against decedent's estate for attendance and services to decedent.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 620a. A valuation by decedent is not shown to have been placed upon claimant's services by testimony that decedent stated that she wanted to execute a codicil to her will to add a bequest to claimant, that claimant had been the best friend she ever had, that she wanted to repay her, that claimant was a hard working woman, and that she wanted to leave her money for a home.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 621. When a claim is heard by the circuit after it has been prima facie established by the allowance by the commissioners, the issue being its invalidity against the estate, the award will be sustained if there is no evidence of invalidity, regardless of the fact that the claimant's testimony in support of the claim was incompetent for that purpose.—Warren v. Sheehan, 156 Mich. 432.

¶ 622. Where neither a deceased debtor nor his executors have been misled by the failure of the executrix of the creditor's estate to schedule and inventory the claim in the debtor's lifetime, the elements of an estoppel from asserting the claim against his estate are wanting; and the force of the omission as evidence against the claim is but slight, where it appears that the executrix supposed that the claim was merged in a collateral agreement, which the debtor failed to carry out.—Ewers v. White's Estate, 114 Mich. 266.

¶ 622a. Particularly strong and convincing proof is required to establish an implied contract to pay for services in an action against an estate for services rendered by a son-in-law of decedent when the claim is stale, and the services extended over a considerable period, and no demand for compensation was made during lifetime of deceased.—Vandecar v. Nowland's Estate, 188 Mich. 429.

¶ 623. Testimony of witnesses that decedent, an uncle of claimant, had stated that he "hired" claimant to remain at home with his mother and help her, and that he meant to "leave" claimant $1000, is insufficient to warrant submission to the jury of the question whether there was a distinct contract to pay claimant such a specified sum of money for services rendered decedent.—Grimm v. Taylor's Estate, 96 Mich. 5.

¶ 624. The right to recover against an estate for services rendered in caring for the deceased is not made out by evidence that the claimant stayed home and cared for the deceased in the absence of any evidence of express or implied contract or even knowledge by the claimant of the deceased's intention to compensate for such services.—Decker v. Kanous' Estate, 129 Mich. 146.

¶ 625. Testimony of the interested parties alone, as to an obligation that rests entirely in parol, and which, in fact, does not sustain the claim, is not sufficient to show that the relation of debtor and creditors existed between mother and daughters such as to give them a claim upon her estate.—Winter v. Winter, 90 Mich. 197.

¶ 626. In proof of the right of a claimant against the estate of a husband for the value of property of the wife's estate left in his hands, where the claimant is sole legatee of the wife's estate and executrix thereof and took without any commission to hear claims and on a family agreement with the husband waiving full administration, the fact that no debts were outstanding against the wife's estate was shown prima facie by the claimant's testimony given twenty-six months after probate of the wife's will that there were no debts of the wife.—Ewers v. White's Estate, 114 Mich. 266.

¶ 627. In an action against an estate to recover on a claim for money received by decedent from his wife, plaintiff's mother, under an alleged arrangement whereby deceased was to pay the money to plaintiff on his wife's death, evidence held sufficient to sustain a verdict for plaintiff.—Pitcher v. Rogers' Estate, 199 Mich. 114.

¶ 628. Evidence tending to show that the decedent had promised to increase the claimant's salary after a certain date, but not showing an actual agreement so to do, will not support a claim for additional wages.—Marsh v. Tunis, 39 Mich. 100.

¶ 629. A claim against a decedent's estate by the administrator of a deceased son-in-law for the value of support for the father-in-law and his wife for the later part of their life is not proved by controverted testimony as to the making of an oral contract 32 years before, whereby the father-in-law agreed to convey an 80-acre farm for such support, where there is other testimony that a son was to pay for the support, and 3 years after the alleged agreement the father-in-law made a will leaving the farm to a son, the contents of which will was known to the son-in-law at the time.—Clancy v. Leach's Estate, 125 Mich. 630.

¶ 630. Entries made by decedent's bookkeeper in his books, at his express direction, showed that notes were discounted by decedent, and the proceeds credited to "Bills Payable"; that in the journal entries of the notes there was a memorandum "for me to pay," and in a separate book, on a page headed "Bills Payable," the notes were entered, with a descriptive memorandum, showing when and where they were due. Held, that the notes and the entries are so connected as to leave no room for doubt, that they were for accommodation of decedent though in form indorsed to him and, in connection with the other proofs, are sufficient to warrant a judgment against the estate.—Bliss v. Plummer's Estate, 103 Mich. 181.

¶ 631. A claim against an estate for a loan is not made out by a canceled check, payable to the deceased five years before his death, and testimony of the deceased's brother that he and his brother several times loaned money to each other but never borrowed from strangers, where the evidence also shows that both the deceased and claimant were in excellent financial condition at the time of the alleged loan and the deceased who was a business man had made no record of the transaction.—Bernard v. Fee's Estate, 129 Mich. 429.

¶ 632. Evidence of an understanding between a deceased person and a claimant, based on declarations by the former to the effect that payment for board and care furnished by the claimant was to be settled out of her estate after her death, is such evidence as to charge her estate with payment of the entire claim, including the amount claimed for support prior to the earliest of these declarations.—Coleman v. McGowan's Estate, 149 Mich. 624.

¶ 633. The fact that a father at about the same time paid off a debt of about the same amount does not tend to show that he, rather than the mother of the lender, was the real borrower, the claim being against the mother's estate by the lender and disputed by the representative.—McGregor v. McGregor's Estate, 156 Mich. 487.

¶ 634. In a proceeding for the allowance of a claim for services against the estate of a deceased person, evidence that decedent asked a witness whether it would not be better to have given claimant a certain farm from which she would always have an income, does not refute the claimant's contention of a contract made between herself and the decedent, prior to such statement, contemplating a different remuneration.—In re Thompson's Estate, 157 Mich. 669; Forsythe v. Thompson's Estate, Id.

¶ 635. In an action against decedent's estate for services rendered in loaning money for decedent, it appeared that decedent had stated to a brother of claimant that he would pay claimant "handsomely and more than any percentage would amount to." Held, that the contract was established by the evidence of claimant's brother as a contract to pay reasonable value.—In re Mitchell's Estate, 178 Mich. 493.

¶ 636. A finding and judgment for $2,000 for services in placing loans for decedent is sustained on testimony that decedent promised to pay "handsomely and more than any percentage would amount to," that according to the customary rates as proved by a money lender on the amount of interest realized the percentage and interest on it would exceed $2,000, to which amount the claim was limited by its terms, there being testimony also that decedent proposing to pay after his death declined to give $2,000 on a certain occasion, saying that it "would not be a drop in the bucket" to what he expected to pay.—In re Mitchell's Estate, 178 Mich. 493.

¶ 636a. Statements of parents which are equally consistent with the purpose to give a gratuitous preference to a son on their decease, are not sufficient to show a binding promise to compensate him for services which are presumably gratuitous.—In re Colburn's Estate (More v. Luther), 153 Mich. 206.

§ 208. Jury trial and questions for jury.

Directing verdict, see post § 209.
Instructions, see post § 210.
Court and jury questions as to existence, terms and liability on contract with decedent, see also Contracts, X, C.
Disqualification of party to transaction with deceased as witness, see Witnesses, IV.

¶ 637. A testator gave to his daughter the use of his real and personal property during the lifetime of his widow, conditioned upon the daughter's supporting the widow. The daughter filed a claim against the estate for expenditures made and services rendered in excess of the income from the property. Held, that under Comp. Laws 1897, § 6731, and Act No. 253, Pub. Acts 1899, the suit on appeal to the circuit court was properly treated as an action at law and the case properly submitted to a jury.—In re Howard's Estate, 163 Mich. 556; Linton v. Howard, Id.

¶ 638. An old man went to live at the house of a poor woman not related to him, and after his death she presented a claim for the value of his board and for his care. No agreement was shown to have existed between them, and it appeared that both had continuously contributed to the joint support, without, so far as known, keeping any mutual accounts. Held, that the defense was entitled to have the case submitted to the jury on the theory that the understanding between them may have been that neither was to charge for what was furnished for the benefit of both.—Ludlow v. Pearl's Estate, 55 Mich. 312.

¶ 639. A man brought a claim against the estate of his sister-in-law for board, lodging and services during her last sickness. Held, that it was for the jury to determine, in view of the relationship, wealth and social position of the parties, the nature of the services, and other circumstances, whether there was a promise to pay.—In re Young's Estate, 39 Mich. 429.

¶ 640. Where, in an action against an estate for services rendered to decedent by way of attendance and companionship, there was evidence of statements made by the deceased indicating that such services were performed and received upon an understanding that they should be well paid for, and that they were requested by decedent as a matter of right, it was proper to submit to the jury the question whether claimant was entitled to recover, under instructions that the amount of a bequest accepted by claimant under decedent's will should be deducted from the amount of the verdict.—Lathrop v. Sinclair, 110 Mich. 329.

¶ 641. On appeal from the allowance of an heir's claim against the estate of an administrator who died without filing an account, it is proper to submit to the jury the questions how much came into the administrator's hands, what disbursements he made, and what is claimant's share of the balance, if any.—Bitely v. Bitely, 85 Mich. 227.

¶ 642. Claimant was entitled to submit to the jury proof of attentions to decedent extending over a period of some two years, in an appeal to the circuit court from a decision of the commissioners disallowing a claim against decedent's estate for services rendered decedent during her lifetime and last illness, where there is evidence that such attentions were rendered in accordance with a mutual understanding of the parties that they were to be paid for.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 643. A testator gave to his daughter the use of his real and personal property during the lifetime of his widow, conditioned upon the daughter's supporting the widow. Held, that in a claim against the estate by the daughter for care of the widow, it was proper to submit to the jury the question of fact as to the items of expenditure and the value of services rendered the widow.—In re Howard's Estate, 163 Mich. 556; Linton v. Howard, Id.

¶ 644. On a claim by a son against the estate of his father for labor and services on a farm after he became of age, there was evidence that the father agreed to pay him for his service, that he had willed him a tract of land, that he had executed a note in the son's favor payable after death that was not delivered, that he had destroyed the will and made a new one not giving the land to the son, and that thereupon he had executed another similar note of larger amount reciting it was in payment for services. The son did not claim on the notes but on the value of his services, and introduced the notes as evidence of such value. Held, the question whether recovery could be had for the amount of the former note in addition to the amount of the latter note was properly submitted to the jury.—Abel v. Roosenraad, 173 Mich. 93.

§ 209. Directing verdict.

Instructions, see post § 210.

Directing verdict for want of proof of agreement, see Contracts § 348.

¶ 645. In an action of assumpsit against the representative where the report of the commissioners upon an estate had been burned, but evidence showed that their proceedings in adjusting claims had been irregular, and their records illegally tampered with, and implied that the claim had been allowed and reported within the life of the commission, it was error to direct a verdict for defendants without submitting to the jury the question whether it had been allowed and reported.—Hardwick v. Richardson, 28 Mich. 508.

¶ 646. Claimant was the wife of the tenant of the deceased. There was evidence that she rendered services to the deceased; that the deceased often said she expected to see claimant paid for them; and that claimant was no relation to the deceased. Held, in a suit for compensation the court properly refused to instruct a verdict for defendant.—In re Johnson's Estate, 160 Mich. 585; Beecham v. Wetherbee, Id.

¶ 647. Where decedent executed a note to his daughter on the day before his death, it was error to direct a verdict in favor of the estate, evidence that the note was executed on Sunday and was without consideration making an issue for the jury.—McQuillan v. Eckerson, 178 Mich. 281.

¶ 648. Claimant filed a claim against decedent's estate for services rendered decedent during his lifetime. There was evidence that claimant from 1879 to 1896 performed services for decedent. In 1890 claimant dropped a suit and took a payment of fifty

dollars from decedent. Whether he was paid at all, or how much he was paid otherwise, did not appear. There was no evidence that decedent ever agreed to pay for services, except testimony that several years before his death decedent stated that claimant was a good fellow, that there was no need of a settlement of accounts with him, as he intended to take care of him in his will. Held, the court properly directed a verdict in favor of the estate.—In re Gibson's Estate (Appeal of Davidson), 163 Mich. 502.

§ 210. Instructions.

¶ 649. A charge intimating to the jury that they should disallow plaintiff's claim, there being evidence to support it, is erroneous.—Buell v. Adams, 157 Mich. 248.

¶ 650. A claimant against an estate must not be allowed a larger sum than he claims: and a charge that leaves the jury to allow more is erroneous.—Weyburn v. Kipp's Estate, 63 Mich. 79.

¶ 651. On a claim for services against the decedent's estate, where a few months prior to her death she had transferred by deed to claimant certain property in escrow to be delivered after death, which property was accepted, it was error of the trial court to instruct that the burden of proof as to whether this property was intended as payment or was a gift was on the contestant, since it was prima facie a payment.—In re McNamara's Estate, 148 Mich. 346.

¶ 652. A claim was presented against an estate for services rendered under an alleged promise by deceased to "pay the claimant well and liberally for all her services out of her estate at the time of her death." Deceased, shortly before her death, had signed and acknowledged a deed to claimant of certain property, and in claimant's presence had stated that the property was in compensation for claimant's services, and had delivered the deed to a third party to be delivered to claimant upon the grantor's death. Held, that the jury were properly instructed to deduct the value of the property from what they found due for services, notwithstanding the fact that there was evidence that deceased had said just before her death that she had never paid claimant anything for her services.—In re McNamara's Estate, 155 Mich. 585; McNamara v. Michigan Trust Co., Id.

¶ 653. In a suit by a claimant against an estate for services rendered the deceased, an instruction is correct which states that the mere rendering of the services does not create a liability, but they must have been given in expectation of being paid for.—In re Johnson's Estate, 160 Mich. 585; Beecham v. Wetherbee, Id.

¶ 654. On the trial of an appeal from the allowance of a claim filed by a husband against the estate of his deceased wife for materials furnished and work done in improving her land, the court, after instructing the jury at claimant's request that they might find that the improvements were made under an implied contract between the parties, defined express and implied contracts, and added that, as between husband and wife, the law does not imply any agreement on the part of one to pay for labor performed or money expended for his or her benefit by the other, without any agreement or understanding that such services should be paid for or expenditures repaid; but that, if they found that the claimant did the work and furnished the materials upon an understanding with his wife that he should be paid for the same, he would be entitled to recover, even though the very words of the bargain between them might not be proved or be susceptible of proof; and that this was all that was meant by the word "implied," as used in the instruction first given. Held, that while the request, standing alone, was clearly erroneous, with the explanation given, the jury could not have failed to understand the law applicable to the case.—Westra v. Westra's Estate, 101 Mich. 526.

¶ 655. In a claim against an estate for services, for which it was claimed that the decedent agreed that the claimant would be well paid in the end, an instruction stating that if the services were rendered under an agreement that they were to be paid for out of the estate of the decedent after his death, such agreement was binding on the estate, and that the statute of limitations would not begin to run until after the death of the decedent, held to have fairly presented the issue.—Allen v. Fields' Estate, 124 Mich. 466.

¶ 656. In an action by the estate of a wife against the estate of her husband upon a claim that certain property was her personal estate, it is not error for the court to state that the fact that no claim was made during the ten years that the husband survived her might be taken into consideration in determining the probabilities of the justness of the claim.—Mains v. Webber's Estate, 131 Mich. 213.

¶ 657. Undisputed testimony that deceased had stated to witness that she had purchased certain notes and given hers in payment sufficiently established that fact and justifies the court in so stating to the jury, when claim is founded on her notes so given.—Crampton v. Newton's Estate, 132 Mich. 149.

¶ 658. In an action of a claim against an estate for services a request to charge reciting the mere facts that decedent lived two years after the last services were performed, that a settlement whereby claimant had released certain rights was effected, and that no demand for services was made, without making a request for the application of the facts in the charge, is properly refused be-

cause such facts were not controlling of a motion to direct a verdict for the estate.—In re Barclay's Estate, 146 Mich. 650.

¶ 659. On a claim for the proceeds collected by him, it appearing that a father assigned two mortgages to his daughter, reciting that the same were for her individual use, to be hers over and above any part of the father's estate which he might leave at his death, and where the securities were retained by the father and the amount of the same was collected by him and not turned over to the daughter, and where by his will the father made provision for this daughter, but did not refer to the gift of such two mortgages, an instruction that a trust was created in favor of the daughter and that the burden of showing a contrary intention was upon the estate, was not error.—Hilton v. Woodman's Estate, 124 Mich. 326.

§ 211. Verdict and findings.

Costs in actions and suits, see post, XI, C.
Invalidity against estate of judgment rendered in action against representative for personal liability, see post ¶ 843.
Findings in actions against representative to establish his personal liability, see post ¶¶ 841-842.
Measure of damages for breach of agreement to pay for services by devise or bequest, see Damages § 84.
Right to new trial on ground of newly discovered evidence, see New Trial, II, H.
Determination of values in general, see Values.

¶ 660. The verdict of a jury on appeal from the allowance of an heir's claim against an administrator's estate must be set aside if it does not show how much the administrator received or disbursed, or what items of claimant's claim were disallowed.—Bitely v. Bitely, 85 Mich. 227.

¶ 661. Where it is not sought to enforce a lien for a claim for an annuity but a claim is presented against the estate of a deceased the question as to the extent to which the property made security for the payment of the annuity is chargeable with it need not be determined.—Stringer v. Stevens' Estate, 146 Mich. 181.

¶ 662. A son filed two claims against his father's estate, and appealed to the circuit court from the disallowance of certain items of one of the claims, and the verdict of the jury included the amount of the claim allowed in addition to the previously rejected items of the other claim. The record in the supreme court made no mention of the allowed claim, other than that contained in the charge to the jury. It was not urged that the claim was unjust, and the record of the probate court, referred to by stipulation, showed it has been allowed. Held, under the circumstances, the verdict for the amount of both the claims was proper.—Abel v. Roosenraad, 173 Mich. 93.

§ 212. Execution and attachment.

Execution for costs, see post § 331.
Statutory provision for execution as to devised lands or lands assigned to heirs, see post § 225.
Garnishment of representative before distribution, see also post ¶ 1037.
Right to action, attachment and execution to enforce contingent claims, see Jud. Act. chap. LVI, §§ 29, 30, Comp. L. 1915, §§ 13911, 13912.

¶ 663. Execution cannot issue against assets of a decedent's estate for collection of an ordinary money judgment.—Peckham v. Berrien Circuit Judge, 74 Mich. 287.

¶ 664. How. St., § 5902, which forbids actions against estate when commissioners are appointed, except for realty or in replevin, and declares that no attachment nor execution shall issue against an estate before the time limited for the payment of debts, creates no liability to execution or attachment, and cannot recognize any that is not authorized by some other provision of law.—Peckham v. Berrien Circuit Judge, 74 Mich. 287.

¶ 665. Where, under R. S. 1838, relating to discontinuing or staying actions against representatives of insolvent estates, an estate had been represented insolvent by an administrator de bonis non, a motion was granted staying proceedings on executions for balances due on mortgage foreclosures which had been levied before such representation of insolvency.—Quackenbush v. Campbell, W. 525.

¶ 666. It is immaterial whether the estate be represented insolvent by the original administrator or the administrator de bonis non; the provisions of the statutes relating to discontinuing or staying actions against representatives of insolvent estates which apply to the former apply also to the latter, where there was no express provision to the contrary.—Quackenbush v. Campbell, W. 525.

¶ 667. No time was limited by the statute within which an estate must be declared insolvent by an administrator or executor.—Quackenbush v. Campbell, W. 525.

D. PAYMENT AND SATISFACTION OF CLAIMS.

1. Assets and Securities for Payment; Rank and Priorities of Claims.

§ 213. In general; liens, rank and priorities.

Land as an asset for payment, see post § 214.
Lands in hands of heirs' grantees, see post § 215.
Lands occupied as homestead, see post § 216.

Primary exhaustion of personalty, see post § 217.
Election between general claim and lien, see post § 218.
Payment and discharge of claims, see post, VI, D, 2.
Right of creditors to follow property liable for debts, see ante § 138.
Right of creditor to petition for administration, see ante ¶ 24.
Right of creditors to administer estate, see ante § 19, ¶¶ 82-85.
Right of representative to borrow money to pay debts, see ante § 56.
Sufficiency of creditor's petition for administration, see ante ¶¶ 104-108.
Right of creditors to petition removal of representative, see ante § 42, ¶ 151.
Priority of funeral expenses and expenses of last sickness, see also ante ¶ 550.
Right of representative to invest funds of estate in homestead to injury of creditors, see ante ¶ 375.
Payment of shares in the estate, see post, XIII.
Priority of lien attached by creditors' bill over rights of representative, see Creditors' Suits § 31.
Presentment of claim to estate as releasing lien held by pending creditors' bill, see Creditors' Suits, § 31.
Payment of debts as limiting right and subjects of disposal by will, see Wills, I.
Rank and priority of claims and order of payment, see Jud. Act. chap. LVI, §§ 6, 7, Comp. L. 1915, §§ 13888, 13889.
Liability of estate for payment of debts and expenses of administration, see Jud. Act. chap. LII, § 22, Comp. L. 1915, § 13794.

¶ 668. Funeral expenses and the expenses of the last sickness rank as preferred claims next after expenses of administration.—Booth v. Radford, 57 Mich. 357.

¶ 669. A widow's relinquishment of her dower and acceptance of a legacy do not place her in the position of a purchaser for a valuable consideration so far as to entitle her claim as legatee to priority over the claims of creditors of the estate; she is placed on the same footing with other creditors, and if the estate is insufficient is entitled to share pro rata with them.—Tracy v. Murray, 44 Mich. 109.

¶ 670. A ward's claim against the estate of her guardian for his neglect to collect money belonging to her stands upon the same footing with the claims of the general creditors, and is to be paid ratably there with.—Dodson v. McKelvey, 93 Mich. 263.

¶ 671. Land having been devised by A. to his widow, B., for her life, with remainder to two children, a third child, C. presented after B.'s death against A.'s estate a claim based upon an agreement between B., the other children, and the executors of A.'s will, that she should receive from the accumulated income of B.'s life estate due from A.'s executors, compensation for supporting B. Held, that all of B.'s creditors were equally entitled to share in the amount so due to B.; that the claims against B.'s estate must be allowed before any claimant is entitled to a share of it.—Morse v. Allen's Estate, 99 Mich. 303.

§ 214. Land as an asset for payment.

Land in hands of heirs' grantees, see post § 215.
Lands occupied as homestead, see post § 216.
Liability of land for claims allowed against estate, see also ante ¶ 595.
Recourse to lands for payment, see post, VII.

¶ 672. Subject to the homestead right the lands of a decedent are assets of his estate when needed for the payment of debts.—Brown v. Keiser, 182 Mich. 432.

¶ 673. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of the will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case of an insufficiency of personalty.—Marvin v. Bowlby, 142 Mich. 245.

¶ 674. Where the personal assets left by a testator exceed debts and expenses of administration the income from a trust estate in favor of a life tenant is not liable to a charge for this purpose, and should go intact to one entitled thereto under the will.—Poole v. Union Trust Co., 191 Mich. 162.

¶ 675. Where a father desiring to make provision for his son and family conveyed land to him as his agent, really as trustee, with no intention of conveying the title in fee, the creditors of the son after his death cannot reach the land.—Fleming v. Wood, 147 Mich. 513.

§ 215. Lands in hands of heirs' grantees.

See also post ¶ 817.
Right to follow property for creditors or heirs which may be exercised by persons other than representative, see ante § 138.
Procedure against heirs' grantees on recourse to land for payment of claims, see post § 228.
Right and title of heirs' grantees or transferees, see post § 358.

¶ 676. Real estate descends to heirs subject to the payment of decedent's debts; and conveyances made by the heirs before administration, or before claims against the estate are paid or barred, are also subject to his debts.—Burns v. Berry, 42 Mich. 176.

¶ 677. Purchasers of land from the heirs of an estate, before administration has been had and closed, take the land subject to debts and expenses of administration.—Arm-

strong v. Loomis, 97 Mich. 577; Flood v. Strong, 108 Mich. 561; In re Norton's Estate, 169 Mich. 531.

¶ 678. Purchasers of lands from heirs before the estate is closed take subject to the debts and administration expenses, and the heirs are not liable to refund, for the satisfaction of claims against the estate, the money paid them by their vendees.—Armstrong v. Loomis, 97 Mich. 577.

¶ 679. The grantees of certain realty conveyed by the heir at law of the intestate were allowed an injunction against the administrator and their grantor to restrain them from attempting to dispose of the land to satisfy claims against the estate when the personalty was sufficient to meet them.—Hill v. Mitchell, 40 Mich. 389.

§ 216. Lands occupied as homestead.

Investment in homestead by representative to defeat creditors, see also ante ¶ 375.
Exception of homestead lands, see also ante ¶ 672.
Sale of homestead lands, see post ¶ 702.
Sale of homestead for payment of debts, see Jud. Act, chap. LIX, § 45, Comp. L. 1915, § 14031.

¶ 680. Lands occupied as a homestead are, subject to the homestead right, assets when needed for the payment of demands against the estate.—Drake v. Kinsell, 38 Mich. 232.

¶ 681. Homestead property conveyed for a nominal consideration, the grantee agreeing, orally, to pay the grantor's debts, is properly subjected, on the grantor's death, to decedent's debts.—Farrand v. Caton, 69 Mich. 235.

§ 217. Primary exhaustion of personalty.

See also post ¶ 697.
Insufficiency of personalty to pay debts as condition precedent, see also ante ¶ 673.
Exhaustion of personalty for payment of debts, see Jud. Act, chap. LIV, § 5, Comp. L. 1915, § 13849.

¶ 682. In satisfying the debts of an intestate who has left realty and personalty, the personal estate must first be exhausted, and then so much of the real estate as may be necessary may be applied.—Marvin v. Bowlby, 142 Mich. 245.

§ 218. Election between general claim and lien.

Law as to election of remedies in general, see Election and Waiver.

¶ 683. Prior to the issue of letters of administration, an heir at law of the decedent, who was also a general creditor of the estate, paid the balance due on a contract for the purchase of the homestead occupied by the decedent at the time of his death, and the same was conveyed to all of the heirs, some of whom were minors. Said heir then filed a claim against the estate, made up of the money so paid, and moneys claimed to have been loaned to the decedent to pay on the contract and for other purposes. The claim was allowed, after which the claimant filed a bill to declare the same a lien upon the homestead, and for its sale to satisfy said lien. The bill failed to show that there was no personal property belonging to the estate, or that the rents were insufficient to take care of complainant's claim. Held, that complainant, having voluntarily submitted his claim to the jurisdiction of the probate court, and having rested content with such jurisdiction until after the time for appeal had expired, has elected his remedy, and will not be allowed to put either the estate or the other heirs to an expensive suit in chancery to enforce the claim for the moneys paid on the contract.—Kraft v. Kraft, 102 Mich. 439.

¶ 684. Plaintiff in attachment, after the death of the defendant, revived the suit against his administrator and obtained judgment. He thereafter released the property levied upon and proved his claim as an absolute claim against the estate in probate court with nothing to indicate any intention to retain the lien. The estate proved insolvent and the probate court certified the judgment back to the circuit court and a new writ of execution was issued and levy made. Held that plaintiff had abandoned the attachment levy, since permitting him to retain the lien would give him an unfair advantage over other creditors.—Lafferty v. Lafferty, 139 Mich. 176.

2. Payment or Discharge, Shares and Distribution Among Creditors.

§ 219. In general.

See also ante ¶¶ 651, 652.
Assets and securities for payment and rank and priorities of claims, see ante, VI, D, 1.
Garnishment, bill or other remedy to reach shares of distributees for creditors, see post § 382.
Payment of debts of estate as prerequisite to distribution, see post ¶¶ 1142, 1143.
Payment and distribution of shares in the estate, see post, XIII.
Absence of creditors as prerequisite to family settlement without administration, see ante § 2.
Legacy as payment of debt, see Wills, VI.
Settlement of claim by accord, where it was carried along by decedent's official successor, see Accord and Satisfaction ¶ 51.
Public policy as to agreements of representative and creditors consenting to action taken or for advantage, see Contracts § 63.
When representative to pay debts in full, see Jud. Act, chap. LVI, § 5, Comp. L. 1915, § 13887.
Allowance of time to representative for payment of debts, see Jud. Act, chap. LVI, § 1, Comp. L. 1915, § 13883.

Extension of time to representative for payment of debts and procedure to obtain, see Jud. Act, chap. LVI, §§ 2-4, Comp. L. 1915, §§ 13884-13886.
When special administrator to pay claims, see Jud. Act, chap. LIII, § 6, Comp. L. 1915, § 13824.

¶ 685. Under a contract to compensate claimant for personal services out of the estate of the decedent, a conveyance of realty to claimant deposited in escrow to be delivered after death of the grantor must be considered a transfer in kind and prima facie payment pro tanto.—In re McNamara's Estate, 148 Mich. 346.

¶ 686. An agreement between a member of a mutual benefit association and his mother, to whom his certificate is payable, that the amount thereof, when received, shall be applied upon, and shall pro tanto extinguish, an existing indebtedness of his to her, is valid.—Maybury v. Berkery, 102 Mich. 126.

¶ 687. An executor under a will who owed an indebtedness to the testator's estate, was guilty of no wrong where he paid a note of testator's without its having been allowed by the commissioners on claims, and secured the collateral which had been given for such note and sold it at par, and duly accounted for the proceeds of such sale and the balance of his own indebtedness.—Houghteling v. Stockbridge, 136 Mich. 544.

§ 220. Effect of bond by residuary legatee as executor.
Title of residuary legatee as executor, see ante § 66.
Obligation, breach and liability on bond of residuary legatee as executor, see post § 388.
Remedy on bond of residuary legatee as executor, see post § 392.
Requisites and sufficiency of deed of executor as residuary legatee, see ante ¶ 425.
Presentment and establishment of claim against residuary legatee as executor, see ante § 195.
Effect of bond of residuary legatee on right of creditor to sale of lands, see also post ¶ 696.
Authority of residuary legatee as executor to mortgage property of estate, see post ¶ 800.
Bond of executor as residuary legatee, see Jud. Act, chap. LII, § 37, Comp. L. 1915, § 13809.

¶ 688. Filing of a residuary legatee's bond by an executrix under Comp. L. 1897, § 9312, does not have the effect of vesting the title to the property in such executrix and making her liable personally for the debts, and closing the estate, but on the contrary the probate court retains jurisdiction with power to compel application of the assets to the payment of debts and will prohibit the giving of a preference by the executrix to one creditor over another.—In re Vedders' Estate, 122 Mich. 439.

¶ 689. The lien created in favor of creditors by the statutes declaring that all of a testator's property shall be chargeable with the payment of all his debts, remains unaffected by the giving of a bond by an executor who is also residuary legatee to take the estate free from inventory on condition of paying debts.—Lafferty v. People's Savings Bank, 76 Mich. 35.

§ 221. Shares or dividends, and distribution.
Order of payment and distribution to creditors and procedure thereon, see Jud. Act, chap. LVI, §§ 8-11, Comp. L. 1915, §§ 13890-13893.

¶ 690. An agreement by two children, remaindermen after the widow's devise for life, with a third child and with the executors that the third child should receive from the accumulations of the widow's life estate compensation for supporting the widow is not equivalent to an equitable assignment of the amount due from the estate to the widow, such as to subrogate the third child to that sum.—Morse v. Allen's Estate, 99 Mich. 303.

VII. RECOURSE TO LAND FOR PAYMENT OF DEBTS, CHARGES AND EXPENSES.

A. SALE OR MORTGAGE UNDER THE STATUTES.

1. Occasion and Propriety.

§ 222. In general.
Prerequisites to the proceedings, see post § 223.
Estates and interests liable, see post § 224.
Mode of recourse to lands devised or assigned to heirs, see post § 225.
Right to possession before recourse, see post § 226.
Sale under power or license for purpose other than to pay debts, see ante § 128.
Right and title of representative in realty in general, see ante §§ 61, 62.
Jurisdiction and remedies to subject assets to payment of claims, see ante § 200.
Exhaustion of personalty before resort to lands, see ante § 217.
Lands as assets for payment, see ante §§ 214-216.
Sale or mortgage under terms of will, see post, VII, B.
Power to sell or dispose of realty in course of management for purposes other than payment of debts, see ante § 128.
Discharge of incumbrances on land and redemption, see ante § 121.
Validity of statute providing for sale of lands by representative (Pub. Acts 1909, No. 209), see Statutes, V.

Validity of statute authorizing sale of lands for payment of debts (Pub. Acts 1897, No. 121), see Statutes, III.
Sale of real estate by representative, see Jud. Act, chap. LIX, § 1, Comp. L. 1915, § 13987.
Purposes for which representative may mortgage estate, see Jud. Act, chap. LIX, § 49, Comp. L. 1915, § 14035.
Compensation of representative for services in sale of realty, see post § 290.
Lands descend subject to debts, see Comp. L. 1915, § 11795.

¶ 691. The time within which an administrator is required to close up an estate cannot be extended beyond four and a half years, during which period creditors have a lien on the realty belonging to the estate; the provisions of statutes in this regard operate, in effect, as a limitation of this lien. —Hoffman v. Beard, 32 Mich. 218.

¶ 692. After the lapse of the period beyond which the probate court is not authorized to extend time for the payment of debts and the settlement of the estate, that court has no longer any authority to license the sale of lands belonging to the estate for the payment of the debts which have been proved against it, and which, by the statute, have in the meantime become barred.—Hoffman v. Beard, 32 Mich. 218.

¶ 693. If the creditors have lost their remedy against the executor or administrator by lapse of time, the courts will not license a sale of the real estate for the amount of claims thus barred.—In re Godfrey's Estate, 4 Mich. 308.

¶ 694. Where the administrator, seventeen years after the estate was reported insolvent, petitioned for license to sell lands to pay debts, held, that the license should be refused whether the action of creditors against the administrator was barred by the statute or not.—Brooks v. McIntyre, 4 Mich. 316.

¶ 695. The mere failure of a creditor of a decedent's estate, upon which no administration has been had, to assert his claim for a period of five years after the death of the deceased, does not constitute such laches as will preclude him from enforcing the claim against land of the decedent in the possession of a purchaser from the sole heir, where the personal property of the decedent was in the possession of the surviving member of a firm to which he belonged, and the interest on the claim continued to be paid until a defalcation by the survivor, and the creditor had no knowledge that the property was being misused by the latter.—Flood v Strong, 108 Mich. 561.

¶ 696. The giving, by an executor who is also the residuary legatee, of bond conditioned to pay debts and legacies (How. St., § 5836, as amended Laws 1887, Act No. 169), does not destroy creditors' right to have realty of estate sold for payment of their claims by proceedings in probate court.—Lafferty v. People's Savings Bank, 76 Mich. 35.

¶ 697. Before R. S. 1846 an administrator had no interest in or authority over real estate unless the personal property of the intestate was insufficient to pay his debts; and then he could only dispose of it as empowered by the probate court. — Thayer v. Lane, W. 200; In re Campbell, 2 D. 141.

§ 223. Prerequisites to the proceeding.

See also ante ¶ 697.
Exhaustion of personalty as prerequisite to subjection of land to payment of claims, see ante § 217.
Insufficiency of personalty to pay debts as ground for sale of real estate, see Jud. Act, chap. LIX, § 1, ¶ 1, Comp. L. 1915, § 13987, ¶ 1.

¶ 698. No other requisites to the jurisdiction of a county court of proceedings by an administrator under the Act of July 27, 1818, to sell land to pay debts of the estate are presented than the death of the deceased, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where deceased lived or his real estate was situated, making these facts appear to the court, and its decision is the exercise of jurisdiction as conferred by the representation.—Lessee of Grignon v. Astor, 2 How. (U. S.) 319, 11 L. ed. 283.

§ 224. Estates and interests liable.

Subjection of homestead lands to payment of debts, see ante § 216.
Liability of lands conveyed by representative for claims allowed against estate, see also ante ¶ 595.
Liability of homesteads for payment of debts, see Homesteads, IV.

¶ 699. The probate court cannot authorize an executor to sell, in order to satisfy debts of the estate, decedent's land incumbered by mortgages placed thereon after his death or by interests created by the will; the sale must be of the interest whereof he died seized.—Hewitt v. Durant, 78 Mich. 186.

¶ 700. An executor cannot be empowered by the probate court to sell an undivided interest in lands of which the testator owned the complete title.—Eberstein v. Oswalt, 47 Mich. 254.

¶ 701. An administrator who has bought in an undivided interest of the heirs in certain real property, and for his own personal advantage has withdrawn it from the estate, cannot be licensed to sell the parcel for the payment of his own claims as administrator, because the law only permits him to sell the whole interest of which the intestate was seized.—Daly's Appeal, 47 Mich. 443.

¶ 702. Whether lands can rightfully be sold to pay debts of a decedent, subject to a homestead right, quære.—Showers v. Robinson, 43 Mich. 502.

§ 225. Statutory provision as to lands devised or assigned to heirs.

Statutory liability of devised lands for payment of debts and expenses of administration, see Jud. Act, chap. LII, § 25 et seq.; Comp. L. 1915, § 13797 et seq.

Jurisdiction of probate court to settle amount of liabilities of devisees and to issue execution to enforce contribution, see Jud. Act, chap. LII, §§ 27-29; Comp. L. 1915, §§ 13799-13801.

¶ 703. An executor cannot be empowered by the probate court to sell devised land of which the devisee has taken possession for the purpose of satisfying debts of the estate: contribution must be enforced by execution (How. St., §§ 5816-5820).—Atwood v. Frost, 51 Mich. 360; Atwood v. Frost, 59 Mich. 409.

§ 226. Right to possession before recourse.

Authority of representative with respect to realty and right to possession, see ante § 61.

Right to possession of realty in general in course of administration, see ante § 126.

Right of surviving spouse, children or heirs to possession of homestead, see Homesteads, VII.

¶ 704. A widow whose husband died seized of land, leaving neither parents nor children, has a life estate, and is entitled to possession until a superior right is shown, and accordingly neither she nor her grantee is to be disturbed by creditors on the possibility that an administrator may be appointed who may be empowered to sell the land to pay debts.—Finch v. Rhodes, 49 Mich. 33.

2. Procedure, Pleading and Proof.

§ 227. In general.

Procedure against heir's grantee, see post § 228.

Petition for license, see post § 229.

Notice and hearing on petition, see post § 230.

Evidence and proofs, see post § 231.

Special bonds and oaths, see post § 232.

Order, license and sale of mortgage thereunder, see post, VII, A, 3.

Character of the proceeding to sell, in personam or in rem, see also Courts ¶ 134.

Sale of interest of decedent in contract for purchase of land and procedure thereon, see Jud. Act, chap. LIX, §§ 28-32; Comp. L. 1915, §§ 14014-14018.

Sale of lands subject to incumbrances and bond of purchasers for protection of estate, see Jud. Act, chap. LIX, § 33; Comp. L. 1915, § 14019.

Procedure for mortgaging estate, see Jud. Act, chap. LIX, §§ 50, 51; Comp. L. 1915, §§ 14036, 14037.

License to representative to sell at private sale and procedure thereunder, see Jud. Act, chap. LIX, § 42; Comp. L. 1915, § 14028.

Procedure for sale of homestead to pay debts, see Jud. Act, chap. LIX, §§ 45-48; Comp. L. 1915, §§ 14031-14034.

¶ 705. The proceedings for the sale of an equitable title in lands should be the same as in case of a legal.—Woods v. Monroe, 17 Mich. 238.

¶ 706. It seems that it is not necessary that the indebtedness of a decedent should be found by commissioners in this state before a petition for the sale of land to pay his debts and expenses of administration is filed.—Cahill v. Bassett, 66 Mich. 407, affirming by equal division on other points the judgment of the lower court.

§ 228. Procedure against heir's grantee.

Right and title of heirs' grantees in general, see post § 358.

¶ 707. The administrator of an intestate, claiming that the realty was needed to satisfy claims against the estate, complained that a deed of the realty had been obtained from the heir at law by fraud, and filed a bill to have that and subsequent conveyances decreed void and the land declared the property of the estate. Held, that as it did not concern the administrator whether the deeds were void or not, and as the conveyance from the heir at law, in stating the heirship, assumed that the land belonged to the estate, the proceeding was idle and the bill ought to have been demurred to and dismissed.—Hill v. Mitchell, 40 Mich. 389.

§ 229. Petition for license.

Notice and hearing on petition, see post § 230.

Effect of irregularity in petition, see post ¶ 761.

Petition for sale of real estate, see Jud. Act, chap. LIX, § 3; Comp. L. 1915, § 13989.

¶ 708. A petition for leave to sell land to pay debts, claims and charges is not vitiated by the unnecessary averment that petitioner has in view "the distribution of the balance over and above the amount necessary to pay the debts."—Norman v. Olney, 64 Mich. 553.

¶ 709. Where on the original administrator's removal an administrator de bonis non has been appointed, his petition for license to sell realty to pay debts is sufficient if it alleges that there are just debts and charges against the estate, and that the personalty came into the hands of the administrator de bonis non; it need not also allege an insufficiency of personal assets in the hands of the original administrator.—In re Beniteau's Estate (Beniteau v. Dodsley), 88 Mich. 152.

¶ 710. Proceedings in probate court for the sale of real estate to pay debts and

administration expenses do not become void because the executors' petition embraces the widow's account for maintenance of minor children.—Egan v. Grece, 79 Mich. 629.

§ 230. Notice and hearing on petition.

Notice and hearing on petition for sale of real estate, see Jud. Act, chap. LIX, §§ 3-7; Comp. L. 1915, §§ 13989-13993.

¶ 711. Where the court order for the hearing of an administrator's petition for leave to sell real estate gave the session of court at which issued as January 26, 1897, and by a clerical error in publishing the order the date was given as January 26, 1896, the variance was merely a clerical one, and did not invalidate the proceedings under the order.—Brown v. Hannah, 152 Mich. 33.

¶ 712. Under Comp. L. 1857, § 3090, How. St., § 6076, a failure to publish the application for license the full statutory period will not avoid the proceedings.—Woods v. Monroe, 17 Mich. 238.

§ 231. Evidence and proofs.

Evidence on establishing claims, see ante §§ 205-207.

Evidence to rebut presumption or impeach title under sale, see post § 253.

Admissibility of parol proof of mistake in date of report of sale, see Evidence § 158, ¶ 815.

Admissibility of parol evidence of matters, including representations as to title, anterior to sale in action on bid, see Evidence ¶ 1038.

¶ 713. It seems that it is not necessary that the indebtedness of a decedent should be found by commissioners in this state before a petition for the sale of land to pay his debts and expenses of administration is filed; proof of the indebtedness may be made by other evidence.—Cahill v. Bassett, 66 Mich. 407, affirming decision below by equal division on other points.

§ 232. Special bonds and oaths.

Sufficiency of bond for general administration, see ante §§ 35, 36.

Obligation, breach and liability of special bond for sale of real estate, see post § 387.

Remedy and procedure on bonds for sale of real estate, see post § 391.

Failure to give special bond on sale as defect in proceedings, see post ¶ 765.

Effect on purchaser's title where not special bond was required of representative by court, see post ¶ 780.

Sufficiency of evidence as to execution of special bond, see post § 253, ¶ 790.

Bond of representative on sale of realty, see Jud. Act, chap. LIX, § 15; Comp. L. 1915, § 14001.

Oath of representative on sale of realty, see Jud. Act, chap. LIX, § 14; Comp. L. 1915, § 14000.

Effect of bond to pay debts on license to sell, see Jud. Act, chap. LIX, § 10; Comp. L. 1915, § 13996.

¶ 714. An administrator licensed to mortgage the property of his intestate is not required to take a special oath before acting.—Griffin v. Johnson, 37 Mich. 87.

¶ 715. Where the bond required by Comp. L. 1871, § 4627, How. St., § 6107, of an administrator upon granting him a license to mortgage his intestate's property is given before the acknowledgment of the mortgage, and is approved by the court, the statute is satisfied.—Griffin v. Johnson, 37 Mich. 87.

3. Order and License and Sale or Mortgage Thereunder.

§ 233. Order or decree and license.

Recordation of license, see post § 234.

Notice of sale, see post §§ 235, 236.

Conduct of sale, time, place and manner, see post § 237.

Terms of sale, credit, default of purchaser, see post §§ 238, 239.

Report of sale and confirmation, see post § 240.

Setting aside sale and persons entitled to object, see post §§ 242, 243.

Collateral attack, see post §§ 244, 245.

Title and rights of purchaser, see post §§ 246-248.

Recovery back of bid on avoidance of sale, see post §§ 249, 250.

Statutory force and effect of sale, see post §§ 251-253.

Validity and effect of mortgage by representative, see post §§ 254-257.

Invalidity of sale by representative appointed without proper notice, see ante ¶ 114.

Note relating to appeals from orders of probate court, see ante § 197.

Appeals to circuit court from order of probate court for sale or mortgage, see Probate Courts, III.

Writ of error from circuit judgment on appeal to supreme court, see Appeal.

Review of proceedings in circuit respecting sale of lands to pay debts, see Appeal § 28.

Final judgment on appeal or remand to probate court as proper practice, see Probate Courts, III.

Presumption on appeal to supreme court that sale was made after enactment of statute affecting it, see Appeal ¶ 1574.

Order for sale of real estate, see Jud. Act, chap. LIX, §§ 12, 13; Comp. L. 1915, §§ 13998, 13999.

¶ 716. Without lawful license, a valid sale of real estate cannot be made by executor, administrator, or guardian.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 717. The petition for license to sell did not describe any lands, but as it was followed by a license fully and properly describing

the lands, except one lot, as to which a supplemental order was made and appended to the original license, authorizing and directing the administrator to sell it, the license was held good as to all lands.—Woods v. Monroe, 17 Mich. 238.

¶ 718. Whether, where the probate judge refused an administrator's petition to sell real estate to pay debts, but authorized a mortgage, the petition containing facts essential to either decree, that court afterwards, upon the administrator's failure to effect a mortgage, could, after continuances without a new petition and notice, act upon the prayer it had before denied, and grant a license to sell, quære.—Cahill v. Bassett, 66 Mich. 407. [The lower court's judgment that the sale was valid was affirmed by equal division.]

¶ 719. Where license to sell real estate for debts was granted by the county court, and after license but before sale the law giving that court jurisdiction was repealed, it was held that the repeal of the law was a revocation of the license, and a sale subsequently made was void.—Campau v. Gillett, 1 Mich. 416.

§ 234. Recordation of license.

¶ 720. The recording of a license to sell lands to pay debts, etc., is not a prerequisite to the sale, nor is its record at any stage of the proceedings necessary to sustain the jurisdiction of the probate court.—Egan v. Grece, 79 Mich. 629.

§ 235. Notice of sale and adjourned sale.

Proof of notice, see post § 236.

Duty of representative to adjourn sale, see also post ¶ 724.

Notice of sale of realty, see Jud. Act, chap. LIX, § 18; Comp. L. 1915, § 14004.

Adjournment of sale and notice of adjournment, see Jud. Act, chap. LIX, §§ 19, 20; Comp. L. 1915, §§ 14005, 14006.

¶ 721. Whether a notice of an administrator's sale of lands that is defective in having too short a time of publication can be cured by adjournment of the sale and further publication containing an underwritten notice of adjournment, quære; the court being equally divided and so affirming decision that it was cured.—Cahill v. Bassett, 66 Mich. 407.

§ 236. ——Proof of notice.

Affidavit of notice of sale of realty, see Jud. Act, chap. LIX, § 21; Comp. L. 1915, § 14007.

¶ 722. Where no affidavit of posting notices of sale was filed, but the report of the administrator showed such posting, and there was proof of the publication in a newspaper, it was held sufficient. But affidavits made ten years after the sale are not evidence of the fact of posting.—Woods v. Monroe, 17 Mich. 238.

§ 237. Time, place, manner, and conduct of sale.

Place, manner and time of sale of realty, see Jud. Act, chap. LIX, § 24; Comp. L. 1915, § 14010.

Duty of representative to sell on receipt of copy of order of sale, see Jud. Act, chap. LIX, § 16; Comp. L. 1915, § 14002.

¶ 723. A sale under a license granted under the territorial statute of July 27, 1818, was held void where it was made more than four years after the license was granted—the statute of limitations then in force barring all claims against the estate after four years.—Campau v. Gillett, 1 Mich. 416.

¶ 724. Where the day appointed for an administrator's sale is rainy and inclement, and but few persons appear and bid, and the bids do not exceed half the value of the property, it is the duty of the administrator to adjourn the sale.—Beaubien v. Poupard, H. 206.

¶ 725. An administrator cannot make a public plat of his intestate's lands under a probate license to sell them; but a sale of lands not platted may be made, with the probate court's approval, by boundaries running with the centers of streets and conforming to streets and alleys to be opened by public authority, so far as they can be ascertained. —People ex rel. Lothrop v. Detroit Board of Public Works, 41 Mich. 724.

¶ 726. The fact that an executor before the sale secured an agreement to bid does not bear against the good faith of the purchasers. Such an agreement would not prevent higher bids.—Norman v. Olney, 64 Mich. 553.

§ 238. Terms of sale and sale on credit.

Default of purchaser and resale, see post § 239.

Right of representative to give credit on sale of realty, see Jud. Act, chap. LIX, § 26; Comp. L. 1915, § 14012.

¶ 727. Whether, under the Code of 1833, an administrator was authorized, in any case, to give credit upon a sale of real estate of the intestate for the payment of his debts under a license of the probate court, and whether, if he did so, he was not chargeable with the price as money in his hands, quære. —In re Palmer, 1 D. 422.

§ 239. Default of purchaser and resale.

Default of purchaser as irregularity affecting title, see post ¶ 769.

Resale after sale set aside, see post ¶ 734.

¶ 728. A purchaser of land at an administrator's sale cannot be said to be legally in default in neglecting or refusing to pay the purchase price until after the service upon him of the notice required to be given by How. St., § 6045 (C. L., § 9098).—Peirson v. Fisk, 99 Mich. 43.

¶ 729. Under How. St., § 6045, providing for confirmation of sale by an administrator and for revocation and resale on failure of the purchaser to pay within 20 days upon "such notice to the purchaser as the probate court may direct," notice may be either that the purchaser pay the amount of his bid within a certain time, or, in default thereof, that a resale be had, and he held for the deficiency, if any, arising on such resale, or that he appear and show cause why he should not pay his bid and complete the sale.—Peirson v. Fisk, 99 Mich. 43.

§ 240. Report of sale and confirmation.

Failure to make report of sale as irregularity, see post ¶ 764.

Confirmation by court of sale of realty, see Jud. Act, chap. LIX, §§ 22, 23; Comp. L. 1915, §§ 14008, 14009.

Return of proceedings under order of sale, see Jud. Act, chap. LIX, § 27; Comp. L. 1915, § 14013.

Confirmation of sale of real property by representative, see Prob. Ct. Rule 8.

Procedure on objection to confirmation of sale of real estate by representative, see Prob. Ct. Rule 8.

¶ 730. An administrator who makes a sale of real estate under a license from the probate court must report the sale to that court, which alone has power to determine what further proceedings shall be had; and he cannot himself declare the sale off, and proceed to a resale.—Peirson v. Fisk, 99 Mich. 43.

§ 241. Deeds and other instruments of transfer.

Effect of deed as representative to create estoppels and matters estopped thereby, see Estoppel § 11.

¶ 731. The purchaser at an administrator's sale agreed with the administrator that the amount of any incumbrance against the parcels should be deducted from the face of any nominal bid therefor. Held, that this was in accordance with the statute which requires a purchaser to take the title as it stands, and that a deed stating the consideration to be the unincumbered value having been corrected according to this understanding at the instance of the purchaser's counsel, the purchaser could not object to the deed on the ground that it stated a smaller consideration than the nominal bid.—Stebbins v. Field, 43 Mich. 333.

¶ 732. That one authorized to sell real estate deeds as administrator instead of as executor is a mere irregularity which cannot affect the purchaser's title.—Norman v. Olney, 64 Mich. 553.

¶ 733. An administrator who has, under license from the probate court under How. St., § 5347, sold, for the payment of the intestate's debts, a part-paid swamp-land certificate left by him, and his interest in the lands therein described, may, after confirmation of such sale, properly assign such certificate to the purchaser thereon, such assignment being necessary to meet the requirements of the land office.—Louden v. Martindale, 109 Mich. 235.

§ 242. Setting aside sale or deed.

Setting aside sale where representative is purchaser or benefited by purchase, see post §§ 271-274.

Sufficiency of allegations of fraud in bill to cancel sale, see also Fraud § 96.

Vacation of sale of realty, see Jud. Act, chap. LIX, § 27, Comp. L. 1915, § 14013.

¶ 734. Where a sale of real estate was ordered by a judge of probate, and it appeared that he himself became interested in the purchase, the sale was set aside and a resale ordered under the direction of the court.—Walton v. Torrey, H. 259.

¶ 735. Courts recognize the fact that the records in probate courts are often carelessly and imperfectly kept, and refuse to set aside titles of long standing on account of defects in the record.—Egan v. Grece, 79 Mich. 629.

¶ 736. An administrator's sale of real estate will not be set aside for fraud on evidence that the administrator's stepfather purchased the property a little below appraised value and afterwards conveyed it to the administrator where the sale was advertised and many bidders were present and the price is not shown to be inadequate.—Kammerer v. Morlock, 125 Mich. 320.

¶ 737. A sale of land by an administrator will not be set aside where the evidence shows that the consideration received was adequate.—In re Thompson's Estate, 183 Mich. 618.

¶ 738. The value of the land in an estate was uncertain because of outstanding tax titles. The attorney of complainant administratrix advised a sale for one hundred dollars, and also advised defendants to purchase for that sum. The price proved afterwards to have been very inadequate, but there was no evidence of collusion or bad faith on the part of defendants. Held, in a bill by the administratrix to set aside the deed, the evidence of fraud was inadequate.—Turnbull v. Leavitt, 158 Mich. 545.

§ 243. Persons entitled to urge objections; estoppel.

¶ 739. Where within four years and six months after the original administrator's appointment a license for sale of realty has been obtained by the administrator de bonis non, the fact that the sale will not take place until after the expiration of the four years and six months cannot be raised as an

objection by the original administrator, who was decedent's sole heir at law and who was removed for failing to pay debts.—In re Beniteau's Estate (Beniteau v. Dodsley), 88 Mich. 152.

¶ 740. Where an administrator's sale under How. St., § 6050, has been duly confirmed by the probate court and conveyance made thereunder to a bona fide purchaser, it cannot be set aside at the instance of a minor heir whose general guardian has acquiesced in the sale and received from the proceeds thereof the share due such minor.—Wheelock v. Lake, 117 Mich. 11.

¶ 741. Under How. St., § 6075 (Comp. Laws 1897, § 9128), an erroneous administrator's sale of real estate can be opened only as to those complainants who have not rested on their rights more than five years after coming of age.—Kammerer v. Morlock, 125 Mich. 320.

¶ 742. Complainant in a bill to quiet title had been induced through the representations of her brother, to permit the administratrix of a former owner of the property in question to sell such property at an administratrix's sale, under an agreement that the property should be bid in by another brother, and then deeded to complainant. Held, that since complainant acted in ignorance of her legal rights, she was not estopped from asserting that the title to the premises was not in the estate of the former owner.—Blount v. Eames, 150 Mich. 35.

§ 244. Collateral attack and impeachment.

Loss of jurisdiction by delay, see post § 245.
Effect of irregularities on rights or title of purchasers, see post § 248.
Collateral attack on mortgage, see post § 256.

¶ 743. The finding of the probate judge as to the existence or amount of debts against the estate cannot be examined in a collateral attack upon an executor's sale.—Norman v. Olney, 64 Mich. 553.

¶ 744. The determination of the probate judge that there were debts owing by a decedent's estate which justified a sale of land cannot be reviewed in a collateral proceeding wherein it appears that third parties have in good faith acquired rights which cannot be protected in such proceedings.—King v. Nunn, 99 Mich. 590.

¶ 745. Whether an order allowing an administrator to sell lands to pay for the support of the intestate's children as a lawful claim against the estate can be assailed collaterally, quære.—Toll v. Wright, 37 Mich. 93.

¶ 746. Whether an administrator's sale to pay debts can or cannot rightfully be subject to a homestead right, such sale, if ordered and made, is voidable only on appeal and not subject to collateral attack in ejectment.—Showers v. Robinson, 43 Mich. 502.

¶ 747. The proviso in How. St., § 6076, that a sale of land by an administrator, etc., shall not be avoided if it appears, among other things, that he gave a bond, "in case a bond was required," means in case the probate judge required it, and the judge's neglect to require a bond cannot, in a collateral suit, affect an innocent purchaser's rights under an executor's sale confirmed by the probate court.—Norman v. Olney, 64 Mich. 553; settling a point raised but not decided in Drake v. Kinsell, 38 Mich. 232.

¶ 748. An administrator's sale, duly confirmed by the probate court, will not be set aside in a collateral proceeding because the notices of sale, instead of being posted in three public places in the ward in which the property was situated, as provided by How. St., § 6040, were posted in three public places just outside of the ward.—Averill v. Jackson City Bank, 114 Mich. 20.

¶ 749. Sale by an administrator of two parcels of real estate at one bid is not void. The omission to sell in parcels is a mere irregularity, that cannot be set up to destroy the title in a collateral proceeding, like an action of ejectment between a grantee of the purchaser and an heir of the deceased.—Osman v. Traphagen, 23 Mich. 80.

¶ 750. Where an administrator sells several lots subject to the widow's homestead rights in all of them, when in fact she has such rights in one of them only, this is at most a mere irregularity in the sale, which cannot be collaterally attacked.—Brown v. Hannah, 152 Mich. 33.

¶ 751. Where an administrator was directed to sell certain lots in numerical order, and he sold them instead all in one parcel, this mere irregularity did not invalidate the sale so as to subject it to collateral attack.—Brown v. Hannah, 152 Mich. 33.

§ 245. ——Loss of jurisdiction by delay.

Effect of delay in giving deed after license and sale, see post ¶ 766.

¶ 752. The probate court does not lose its jurisdiction to order a sale of real estate if the settlement of the estate is delayed beyond the statutory period by causes beyond its control and that of the administrator.—Larzelere v. Starkweather, 38 Mich. 96; Norman v. Olney, 64 Mich. 553.

¶ 753. A probate court does not lose jurisdiction to license the sale of real estate for the payment of debts if the order is made within the period to which the time may properly be extended, even if the extension is not actually made.—Pratt v. Houghtaling, 45 Mich. 457.

¶ 754. A probate license to sell or mortgage real estate is not necessarily void for being granted after the expiration of the statutory time allowed for closing up the estate, if it has not been closed up in fact, and if the will contemplates that it shall remain in the hands of the executors for a longer period.—Church v. Holcomb, 45 Mich. 29.

¶ 755. It seems that a probate license to sell real estate for the payment of debts will not necessarily be held invalid for having been granted after the period allowed therefor by statute when inquired into collaterally, as in an action of ejectment against the purchaser.—Pratt v. Houghtaling, 45 Mich. 457.

¶ 756. Jurisdiction to administer an estate and to sell the real estate for payment of debts is not lost by lapse of time where the estate has not been closed.—Peckham v. Hoag, 92 Mich. 423.

§ 246. Title and rights of purchasers.

Rights to crops on lands, see post § 247.
Effect of irregularities in deed or proceedings, see post § 248.
Purchase of property by representative, see post §§ 270-274.
Right of purchaser not to look back of license, see also post ¶ 777.
Claim of adverse possession founded on right of administrator's grantee as against heirs, see Adverse Possession ¶ 30.

¶ 757. A purchaser at an administrator's sale has all the title the intestate had if the transfer was duly made by deed under a probate license to sell (Comp. L., 1871, §4598, How. St., § 6078).—Curtis v. Campbell, 54 Mich. 340.

¶ 758. Every one is bound to satisfy himself of the authority under which a judicial sale—e. g., one by an executor to enforce a decree of the probate court—is made, and buys at his peril.—Frost v. Atwood, 73 Mich. 67.

§ 247. ——Right to crops on land.

Taking crops under purchase at probate sale as a conversion, see Conversion § 6.

¶ 759. Under L. 1877, Act No. 138 (see How. St., § 5875), an intestate's estate is subject to sale for his debts for six years after his death, but except for this, and for the jurisdiction of equity to restrain waste, the heir's right of enjoyment during that time is absolute. Held, that an heir who had sown a portion of the estate before a probate order for its sale was asked for, was entitled after the sale to cut and carry the crop away, and could maintain trespass against the purchaser and the administrator for interfering with his right of possession.—McDaniels v. Walker, 44 Mich. 83.

§ 248. ——Effect of irregularities in deed or proceedings.

Collateral attack and impeachment for irregularities, see ante § 244.
Effect of irregularities in sale proceedings, see Jud. Act, chap. LIX, §§ 38, 39, Comp. L. 1915, §§ 14024, 14025.

¶ 760. Irregularities in the proceedings by an administrator for the sale of real estate of the decedent will not affect the title of the purchaser, where there has been a compliance with so much as the statute makes essential to the validity of the sale, and the good faith of the purchaser is not questioned.—Howard v. Moore, 2 Mich. 226; Coon v. Fry, 6 Mich. 506; Marvin v. Schilling, 12 Mich. 356; Woods v. Monroe, 17 Mich. 238; Osman v. Traphagen, 23 Mich. 80.

¶ 761. An executor's sale is not to be defeated by a mere technicality of expression or a want of it in the petition or license when the ends really worked out by the action of the probate court come clearly within the statute.—Norman v. Olney, 64 Mich. 553.

¶ 762. A purchaser has a right to presume that the sale is conducted under the provisions of the general law; and if it is good according to that law, he will be protected notwithstanding the existence of a private statute authorizing the sale, of which he had no knowledge, and the provisions of which were not regarded.—Browning v. Howard, 19 Mich. 323.

¶ 763. A sale made by an administrator de facto is not to be assailed by questions concerning the regularity of his appointment.—Woods v. Monroe, 17 Mich. 238.

¶ 764. Where the application of the administrator for license to sell was not verified by oath, guardians were not appointed for the infant heirs, and the administrator's report of the sale to the probate court omitted to show the price at which the land was sold, it was held that none of the omissions affected the title of the purchaser.—Coon v. Fry, 6 Mich. 506.

¶ 765. Where land that is subject to a homestead right is sold to pay charges against the estate and brings no more than is needed for that purpose, it is not a fatal defect in the proceedings that, on receiving license to sell, the administrator gave no bond to account for surplus moneys.—Drake v. Kinsell, 38 Mich. 232.

¶ 766. The omission to give an administrator's deed within a year from the granting of the license to sell cannot be urged against the title.—Howard v. Moore, 2 Mich. 226; Osman v. Traphagen, 23 Mich. 80.

¶ 767. The fact that a lot of land sold at an administrator's sale was deeded by the

purchaser to the judge of probate is not such notice of fraud or wrong as would preclude any other person becoming purchaser in good faith, even though the deed was by mistake made to bear date before the confirmation of the sale.—Woods v. Monroe, 17 Mich. 238.

¶ 768. That one authorized to sell real estate deeds as administrator instead of as executor is a mere irregularity which cannot affect the purchaser's title—Norman v. Olney, 64 Mich. 553.

¶ 769. The fact that the purchase money was not all paid before an administrator's deed was given does not invalidate the title of a subsequent bona fide purchaser of the lands.—Osman v. Traphagen, 23 Mich. 80.

¶ 770. Where an administrator and administratrix had together applied for and obtained a license to sell real estate of the deceased, the subsequent refusal of the administratrix to join in the sale, her objection to it, and her omission to qualify and afterwards to unite in the deed—the administrator alone having regularly conveyed the premises, and the probate court having confirmed the sale—did not avoid the sale nor invalidate the title of a subsequent purchaser in good faith as against an heir of the deceased.—Osman v. Traphagen, 23 Mich. 80.

¶ 771. Where the widow becomes a purchaser at an executors' sale under license of the probate court, adult children cannot question the validity of the deed on the ground of her being at the time guardian of a minor heir who does not complain.—Egan v. Grece, 79 Mich. 629.

§ 249. Recovery back of bid on avoidance of sale.

Lien for price on avoidance of sale, see post § 250.

¶ 772. Money paid by a bidder at an administrator's sale, and to be forfeited should he for any cause whatever fail to pay his bid, may be recovered back where the parties learn for the first time after the sale that a building which they believed stood entirely on the land sold is partially upon adjoining land not belonging to the estate.—McKay v. Coleman, 85 Mich. 60.

¶ 773. It is no defense to an action to recover money paid by a bidder at an administrator's sale under a mutual mistake of fact as to the property that the money has been accounted for by the administrator to the probate court as belonging to the estate, he having been informed before doing so of plaintiff's claim, who demanded the repayment of the money.—McKay v. Coleman, 85 Mich. 60.

§ 250. ——Lien for price on avoidance of sale.

¶ 774. Where an executor's sale under order of the probate court of specifically devised land has been held void in ejectment brought by the devisee's grantee, the vendee cannot claim a lien for the price, nor will equity charge the land therewith, though the executor has used the proceeds for the estate's benefit.—Frost v. Atwood, 73 Mich. 67.

§ 251. Statutory force and effect of sale and deed.

Effect of lapse of time without question, see post § 252.

Evidence to rebut presumption or impeach title, see post § 253.

¶ 775. How. St., § 6074, barring in five years any action for recovery of any estate sold by an executor, etc., for fraud alleged, applies to a sale on petition not to pay debts but to provide support for minor children.—Toll v. Wright, 37 Mich. 93; Egan v. Grece, 79 Mich. 629.

¶ 776. Laws 1867, Act No. 20 (How. St., § 5678), providing that deed by executor, etc., or record thereof, or certified copy of record, shall be prima facie evidence of regularity of all anterior proceedings, applies to records existing at time of its passage.—Sauers v. Giddings, 90 Mich. 50.

¶ 777. An administrator's petition for a license to sell real estate to pay debts did not specify the amount of debts due from the decedent, or the amount of the charges of administration, or the value of the personal estate, as required by the statute. License was granted. Held, under R. S. 1838, p. 318, § 36 (see How. St., § 6076), that the purchaser was not bound to look behind the license for any other purpose than to see that it was granted by the probate court of the proper county, and that the person to whom it was granted was the administrator.—Howard v. Moore, 2 Mich. 226.

¶ 778. Comp. L. 1871, § 4596 (How. St., § 6076), providing that sales by executors, etc., shall not be avoided on account of any irregularity in the proceedings, provided certain things appear, does not validate such a sale as no statute has empowered the court to license; e. g., a sale of an undivided interest where testator held the whole title.—Eberstein v. Oswalt, 47 Mich. 254.

¶ 779. The action of the administrator under the license, whether open to legal objections or not, was at most an irregularity only, that was shielded from attack in a collateral action by the confirmation of the court.—Osman v. Traphagen, 23 Mich. 80.

¶ 780. The proviso in How. St., § 6076, that a sale of land by an administrator, etc., shall not be avoided if it appears, among other things, that he gave a bond, "in case a bond was required," means in case the probate judge required it (this point was raised but not decided in Drake v. Kinsell, 38 Mich. 232); and accordingly the judge's neglect

to require a bond called for by section 6032 cannot, in a collateral suit, affect an innocent purchaser's rights under an executor's sale confirmed by the probate court.—Norman v. Olney, 64 Mich. 553.

¶ 781. The truth or falsity of the averments in an executor's petition for license to sell real estate is for the determination of the probate court; and it will be presumed that the judge performed his duty, and that there was a full investigation and determination thereupon.—Norman v. Olney, 64 Mich. 553; Egan v. Grece, 79 Mich. 629.

¶ 782. An order of the probate court licensing the executor to sell land "for the purpose of paying debts, claims, interest, and charges" and further reciting that "it would be for the best interest of all persons interested in the estate to have all the same sold," will not be regarded as an order beyond the probate court's jurisdiction to sell for distribution; but, the land being burdened with a charge of a legacy which was paid out of the proceeds and the balance having been distributed and accounted for and all parties consenting thereto, will be regarded on a record showing such facts as made under How. St., § 6031 (Comp. L. 1871, § 4551), as ordered where it was necessary to sell part of the real estate and because of injury to the residue it was necessary to sell the whole of it.—Norman v. Olney, 64 Mich. 553.

¶ 783. How. St., § 6076, which provides that an administrator's sale of land shall not be void, provided certain things appear, protects the purchaser's subsequent grantee by deed, which though absolute in form was intended as security merely of the purchaser's debt.—King v. Nunn, 99 Mich. 590.

¶ 784. Under Comp. L. 1897, § 9129, an administrator's deed under which the defendant in ejectment was in possession, afforded him full protection, when it met statutory requirements.—Upton v. Gerber, 136 Mich. 72.

¶ 785. An administrator advertised lands of an estate by insertions in a newspaper from June 9, 1888, to September 1, 1888. The probate record showed no order for hearing the petition for a license to sell the land, nor any proof of publication, nor any order granting a license to sell the land. The files contained a purported license to sell. This paper had been dated Saturday the eighth day of September, 1888. The words eighth and September had been crossed out and the words twenty-fifth and July substituted. The paper was not signed by the judge, but the certificate therein was signed by him and dated September 8, 1888. The sale was reported September 8, 1888, and deeds were issued September 14, 1888. Held, that on the face of the papers the license was issued September 8th, and not July 25th, and the sale was therefore void as not complying with the provisions relating to such license contained in § 9129, Comp. Laws 1897.—Houlihan v. Fogarty, 162 Mich. 492.

§ 252. ——Effect of lapse of time without question.

¶ 786. Under How. St., § 6076, an executor's deed is not after ten years have passed, to be declared void because apparently the license to sell is not of record, where the deed and papers in the record of the probate court recite such license.—Egan v. Grece, 79 Mich. 629.

¶ 787. The validity of an executor's sale to the testator's widow cannot be questioned by reason of her fiduciary relation to the testator's children when acquiesced in for twenty-six years, and the widow's possession had throughout been open, notorious and exclusive.—Egan v. Grece, 79 Mich. 629.

¶ 788. An administrator's sale, when void for want of jurisdiction to order it, is not within Comp. L. 1871, § 7137, How. St., § 8698, protecting one who holds land thereunder from an action for its recovery after five years from the origin of a right of action.—Toll v. Wright, 37 Mich. 93.

¶ 789. When a purchaser's title under an administrator's sale has been perfected by lapse of five years, under How. St., § 6074, it is not to be questioned. The sales protected are those purporting to be made under How. St., chap. 229, and in pursuance of orders professedly based thereon; it is not necessary that the sale should have been a valid one.—Toll v. Wright, 37 Mich. 93; Watson v. Lion Brewing Co., 61 Mich. 595.

§ 253. ——Evidence to rebut presumption or impeach title.

¶ 790. By his license to sell lands an administrator was required to give bond. In a suit to quiet title derived through the sale, no bond was found in the probate files, but the administrator and the probate judge testified that they had no doubt one was given, and there was independent evidence that one was drafted. But a person, who, as the probate judge testified, was one of the sureties, denied having signed any such bond. Whether there was proof that the bond required by statute was given, quære.—Woods v. Monroe, 17 Mich. 238.

§ 254. Validity and effect of mortgage by representative.

Variance between mortgage and authority, see post § 255.

Objections available collaterally or on foreclosure, see post § 256.

Subrogation under void mortgage, see post § 257.

Purposes for which representative may mortgage estate, see ante, VII, A, 1.

Procedure for mortgaging estate, see ante, VII, A, 2.

Authority to mortgage estate, see Jud. Act, chap. LIX, § 49, Comp. L. 1915, § 14035.

¶ 791. An administrator's mortgage is not avoided for mere irregularities.—Griffin v. Johnson, 37 Mich. 87.

¶ 792. Parties claiming under a mortgage made in pursuance of a license duly granted are protected by the license without investigating the truth of the facts upon which it was granted.—Griffin v. Johnson, 37 Mich. 87.

¶ 793. Where an administrator mortgages the homestead of his intestate, and the widow joins, no rights are involved but those of minor heirs, and so much of the land as remains beyond the amount and value of the statutory homestead is not affected.—Griffin v. Johnson, 37 Mich. 87.

¶ 794. Where a presumptively legal claim, approved by the probate court, exists against an estate, which still remains unsettled after the time limited for that purpose, and is still, for some purpose, in the hands of the probate court, it is within the jurisdiction of that court to license the giving of a mortgage on the estate to meet the expenses of administration; and if no appeal is taken and the probate order is confirmed the mortgage becomes a valid claim.—Church v. Holcomb, 45 Mich. 29.

¶ 795. An administrator's mortgage given upon the estate to raise money to pay its debts is invalid if the order allowing it and the proceedings thereon do not comply with Comp. L. 1871, § 4626, How. St., § 6106, and specify the time for which it may run, and the rate per cent at which it shall be given; and the good faith of the parties will not save it.—Detroit Fire & Marine Ins. Co. v. Aspinall, 45 Mich. 330.

¶ 796. The holder of a mortgage made by an administrator to raise money for the payment of debts, but invalid for want of compliance with the statutes, may be subrogated to a mortgage made by the decedent and senior, which was paid with the proceeds of the mortgage made by the administrator.—Detroit Fire & Marine Ins. Co. v. Aspinall, 48 Mich. 238, settling the question left open for want of facts in Detroit Fire & Marine Ins. Co. v. Aspinall, 45 Mich. 330.

¶ 797. Where an administrator gives a mortgage on the testator's estate to meet the needs thereof under authority of the probate court and with the written consent of the beneficiaries under the will, the mortgage is a valid subsisting lien on the realty covered by it so far as the mortgagee is concerned and the matter of the contribution is between the beneficiaries.—Stroh v. O'Hearn, 176 Mich. 164.

§ 255. ——Variance between mortgage and authority.

¶ 798. A license granted to an administrator to mortgage the property of his intestate made the interest thereon payable annually on the 15th of October. The mortgage being dated in February, the first instalment fell due within a year. Held to be no departure from the terms of the license.—Griffin v. Johnson, 37 Mich. 87.

¶ 799. The insertion of an attorney's fee clause does not invalidate an administrator's mortgage, even if unauthorized by the license under which the mortgage was made; it could only support a claim for the reduction of the amount due.—Griffin v. Johnson, 37 Mich. 87.

¶ 800. A mortgage given pursuant to license, by an executrix who had filed a residuary legatee's bond, which failed to comply with requirements in the license as to amount, as to interest payments and that it be made subject to all incumbrances, was so materially variant from the license that its confirmation was refused.—In re Vedders' Estate, 122 Mich. 439.

¶ 801. A mortgage for $3000 made by the administratrix under authority of the probate court based on a petition for leave to make a mortgage of $1500 is not valid although the facts show that the mortgage for $1500 could not be made while prior mortgages were unpaid and that the mortgage allowed was made to pay off the prior mortgages and leave a balance for purposes specified in the petition.—Russell v. Wheeler, 129 Mich. 41.

§ 256. ——Objections available collaterally or on foreclosure.

Collateral attack on sale, see ante § 244.

¶ 802. If the facts upon which a court of competent jurisdiction licenses an administrator to mortgage real estate are sufficient to support the license, their truth cannot be questioned in a merely collateral action.—Griffin v. Johnson, 37 Mich. 87.

¶ 803. An order of the probate court authorizing an executor to mortgage property in order to realize money to pay assessments and taxes cannot be attacked in a collateral proceeding to foreclose the mortgage where the petition is sufficient to confer jurisdiction upon probate court, as the general doctrine is that parties claiming under a mortgage made in pursuance of a license are not required to investigate the truth of those facts but have a right to assume that the court acted correctly, it having jurisdiction.—Long v. Landman, 118 Mich. 174.

¶ 804. An order of the probate court authorizing an executor to mortgage property in order to realize money to pay assessments

and taxes cannot be attacked in a collateral proceeding to foreclose the mortgage where the petition is sufficient to confer jurisdiction upon probate court, as the statute (How. St., § 6105), provides that the probate court may authorize the giving of a mortgage for the purpose of paying the debts against the estate of any deceased person.—Long v. Landman, 118 Mich. 174.

¶ 805. A mortgage by an executor to pay taxes cannot be objected to in a suit to foreclose the mortgage, because of money being expended needlessly and without authority, by the executor, as the probate court is entirely competent to deal with such questions. —Long v. Landman, 118 Mich. 174.

¶ 806. A mortgage by an executor to pay taxes cannot be objected to in a suit to foreclose the mortgage, because of money being retained improperly by the executor in the way of compensation, as the probate court is entirely competent to deal with such questions.—Long v. Landman, 118 Mich. 174.

¶ 807. On foreclosure a mortgage by an executor to pay taxes and assessments cannot be objected to on the ground that the estate should have been closed at the time of mortgaging where it appears that such estate was not closed, and that none of the heirs had asked for a partition, and the statute (How. St., § 5875) gives an executor possession of real estate until the estate is settled or delivered over by order of the probate court.—Long v. Landman, 118 Mich. 174.

¶ 808. The terms of an administrator's mortgage being prescribed in the license allowing it to be made, and nothing being left to the administrator's discretion, it was held that his action might be confirmed nunc pro tunc even after foreclosure.—Griffin v. Johnson, 37 Mich. 87.

§ 257. ——Subrogation under void mortgage.

See also ante ¶ 796.

¶ 809. An administrator having contracted in writing with his intestate's widow for the purchase, for the heirs' benefit, of her interest in the estate, mortgaged under a license from court part of the land of the estate, and paid the proceeds to the widow, who relinquished possession but did not formally release dower. Upon the mortgagee's foreclosure bill the mortgage was declared to be void, but a valid claim or lien upon the widow's dower interest, while the heirs were given the right to pay complainant the amount due on the mortgage and thereupon to require the widow to release dower, or, on their failure to elect to make such payment, complainant was given the right to apply for commissioners to assign the dower interest, which was then to be sold and the proceeds applied to pay costs and expenses, and complainant's claim, the surplus, if any, to go to the administrator. Held, that defendants could not complain of subrogation of the mortgagee to their rights under the contract.—Campbell v. Smith, 103 Mich. 427.

B. UNDER TERMS OF WILL.

§ 258. In general.

Sale by administrator with will annexed, see post § 259.
Sale or subjection to legacies charged, see post § 260.
Remedy in equity, see post § 261.
Right of executor to purchase where will confers power to do so, see post ¶ 851.
Estoppel of heir to set up adverse claim against sale after receiving benefits therefrom, see Estoppel, III.
Estoppel of witness to deed by representative to assert want of disposing power under will, see Estoppel § 34, ¶ 147.
Interpretation and construction of will as to powers conferred, see Wills, VI, F.

¶ 810. A testator devised property in trust to three executors empowering them or the survivor or survivors of them to pay or compromise incumbrances. One of the executors died before probate, another failed to qualify, and letters testamentary issued to a third, who as sole executor conveyed certain land in satisfaction of a mortgage. Held, that such deed was valid.—Herrick v. Carpenter, 92 Mich. 440.

¶ 811. A private sale of timberlands by executors under power given by the will should not be set aside for fraud merely on account of a delay in perfecting the sale after contract made, where such delay was agreed to when payment was in default and because no more profitable use of the money was attainable, as the contract rate of interest was high, and where a claim of inadequate consideration is not convincingly made out as of time of contract.—Brown v. Brown, 64 Mich. 75.

¶ 812. A sale by executors under a power is not shown to be unfair by the mere fact that the purchaser some months afterwards sells the land at a great advance, it not appearing that the executor had reason to assume the land was worth more than he received for it, and the dealings in such lands at the time being largely speculative. —Brown v. Brown, 64 Mich. 75.

¶ 813. Where the executors are given by a will no power to transfer real estate, a deed from them to a purchaser of certain tax titles to the land is void.—Vincent v. Evans, 165 Mich. 695.

¶ 814. In ejectment by an heir, testimony that the executor who conveyed in excess of authority under a will, received full value for the premises, and that the money so received was distributed for the benefit of the heirs, including plaintiff, was not avail-

able to defeat plaintiff's title.—Petit v. Flint & P. M. R. Co., 119 Mich. 492.

¶ 815. Heirs who have taken a release from an executor to lands which he had discharged from mortgages made by such heirs with others, and who have thereafter caused lands including such lands to be partitioned, must be regarded as having acquiesced in the sale by the executor under power to sell for debts of a parcel intended to have been included in the release, the proceeds of which parcel were used to discharge the mortgages. —Cleland v. Casgrain, 92 Mich. 139.

§ 259. Sale by administrator with will annexed.

¶ 816. An administrator with the will annexed has the same power to sell without order from the probate court that the executor named in the will had where the power of sale given the executor was not of a personal nature.—Green v. Russell, 103 Mich. 638.

§ 260. Sale or subjection to legacies charged.

Remedy in equity, see post § 261.

¶ 817. Where, upon a bill filed to restrain executors of a will from selling certain lands to pay debts and legacies, it appeared that complainant derived title from some of the devisees, that the estate was charged with certain legacies, that the executors had made no accounting until twelve years after their appointment, that no account had been approved, that there was a large quantity of other real estate and personal property, and that the probate court had ordered complainant's land to be sold first, contrary to How. St. § 6037, equity had jurisdiction to interfere and to direct the real estate to be sold in the inverse ratio of its alienation by the devisees.—Ireland v. Miller, 71 Mich. 119.

¶ 818. Where an estate was charged with a legacy, land sold without order of court by a devisee who was also the executor, and who failed to pay a balance found due against him on his accounting, was subjected, the personalty being insufficient, to the legacy; but lands sold by order of the court, being presumably sold for the lawful purpose of paying debts and legacies, were not charged.—In re Moores' Appeal, 84 Mich. 474.

§ 261. ——Remedy in equity.

¶ 819. Where lands devised subject to a legacy have all been sold by leave of court to pay debts, etc., except one parcel which has been sold by the devisees, the probate court has power to order sale of such parcel to pay the legacy, and a resort to chancery is unnecessary.—In re Moores' Appeal, 84 Mich. 474.

¶ 820. A court of chancery is the proper forum in which to enforce a lien upon real estate given to secure the payment of a legacy.—Smith v. Jackman, 115 Mich. 192.

¶ 821. A bill to subject land to the payment of a legacy is not demurrable on the ground that other legatees, similarly situated, are not made parties, where the bill avers that defendant has assumed and agreed to pay all other legacies, thus opening the way for proof of a novation sufficient to relieve the land from the lien of such legacies. —Chase v. Warner, 106 Mich. 695.

VIII. LIABILITY OF HEIRS, DEVISEES AND DISTRIBUTEES FOR DEBTS.

§ 262. In general.

Primary liability of heirs, devisees and distributees arising in course of administration, see ante, VI, B.

Collection of debts due to estate from heirs and distributees, see ante § 89.

Remedy to enforce liability, see post § 263.

Garnishment, bill or other remedy to reach shares of distributees for creditors, see post § 382.

Liability of the land to be resorted to for payment, see ante, VI, D, 1, VII, A, 1.

Right of ward against distributees for amount due for fraudulent misappropriation of decedent as guardian, see Guardianship, V.

Subjection of heir's interest to payment of debts, see also Descent ¶ 39.

Liability of heirs, devisees and distributees for contingent claims, see Jud. Act, chap. LVI, § 23, Comp. L. 1915, § 13905.

¶ 822. Heirs as such are not responsible for their ancestor's debts.—Rynearson v. Turner, 52 Mich. 7.

¶ 823. There is no authority to decree payments from distributees in favor of a creditor at large.—Shannon v. Shannon, 48 Mich. 182.

§ 263. Remedy to enforce liability.

¶ 824. Decree for contribution by devisees and legatees to pay debts, etc., is to be enforced by personal proceedings.—Frost v. Atwood, 73 Mich. 67.

¶ 825. A creditor of decedent who is entitled by the terms of the will to look to a fund in the hands of a legatee as a trust for his security need not proceed in probate but may enforce the trust in equity.—Woodruff v. Tilman, 112 Mich. 188.

IX. LIABILITY OF REPRESENTATIVE PERSONALLY TO CREDITORS.

§ 264. In general.

Nature and limit of liability, see post § 265.

Liability imposed by delay, fraud, waste or misappropriation, see §§ 266, 267.

Procedure to determine and enforce, see post § 268.

Primary liability of representative arising in course of administration, see ante, VI, B.

Accountability of representative to estate and distributees for income received and losses suffered, see post, X, C.
Personal liability of representative for costs on forced or needless litigation, see post § 329.
Bill by representative for exoneration from distributees who had assumed payment. see Indemnity, III.
Administrator's personal liability for broker's commission, see Brokers ¶ 55.
Right of surety to subrogation on payment to creditors, see Subrogation, I.
Personal liability of representative after order for distribution of assets among creditors, see Jud. Act, chap. LVI, § 12, Comp. L. 1915, § 13894.

¶ 826. An executor is not personally liable for the amount of the deficiency on foreclosure of a mortgage given by his decedent on the ground that he did not apply for the appointment of claim commissioners, so long as the mortgagee has never established his claim in the probate court or before commissioners, and never sought to enforce it until after the final distribution made by the executor at the expiration of the time limited for the payment of debts.—Willard v. Van Leeuwen, 56 Mich. 15.

¶ 827. The liability of an administrator to the creditors is to be tested by equitable rules, regardless of mere technicalities; and this on appeal as well as in the probate court.—Brown v. Forsche, 43 Mich. 492.

¶ 828. A creditor of an estate who delays the presentation of his demand until he can bring it in as matter of favor only must take all risks of being able to collect it in the condition in which he finds the estate. He cannot hold the administrator personally responsible, except upon the ground of some personal wrong or default.—Brown v. Forsche, 43 Mich. 492.

¶ 829. Where an administrator had turned over property to the distributees after paying all claims that had been allowed against the estate, and after the time for presenting claims had expired, but had neglected to file his final account, and some time afterwards another claim was presented and allowed by the probate judge, at which time the property had been used up by the distributees, held, that notwithstanding his final account was not settled, the administrator was not responsible for the claim, or for the use made by the distributees of the property.—Brown v. Forsche, 43 Mich. 492.

¶ 830. An administrator is not conclusively bound by the inventory he files of the decedent's estate so as to impose a personal liability to pay the creditors of the estate, but he may explain and correct it; he may show, e. g., that property inventoried did not belong to decedent, but to a firm in which he was a member.—Hilton v. Briggs, 54 Mich. 265.

§ 265. Nature and limit of liability.

¶ 831. The executor's personal liability to creditors of the estate is limited to the amount of assets in his hands; and it is to be satisfied from the assets, and not as if it were his individual debt.—Basom v. Taylor, 39 Mich. 682.

¶ 832. Where claims against an estate are made a personal charge against the administrator it is presumed that he retains sufficient assets to extinguish them, which assets, if he does not pay the debts, pass after he dies to his representatives, who remain liable for the debts.—In re Palm's Appeal, 44 Mich. 637.

¶ 833. When an administrator's statutory liability for claims against the decedent's estate has once attached, the creditor's right becomes absolute against him and his estate, whether the claim could or could not have been enforced against the decedent's estate.—In re Palm's Appeal, 44 Mich. 637.

§ 266. Liability imposed by delay.

By fraud, waste or misappropriation, see post § 267.
Personal liability of representative for failure to pay claims allowed against estate, see also ante ¶ 595.

¶ 834. An administrator should hasten the payment of claims against the decedent's estate, and if he allows payment to be delayed, so that he becomes personally liable, he cannot claim to be prejudiced.—In re Palm's Appeal, 44 Mich. 637.

¶ 835. Where the probate court had delayed for nearly eight years to order the payment of claims allowed against an estate, and had then directed them to be paid within a fixed time, after which they would become a personal claim against the administrator, and he neglected to pay them, and died within six years thereafter, it was held that they became a valid claim against the administrator's estate.—In re Palm's Appeal, 44 Mich. 637.

§ 267. ——By fraud, waste or misappropriation.

¶ 836. An administratrix withdrew from the custody of the court a fund belonging to the estate, and on the same day was relieved, by her own request, from her position as administratrix. It seems that the court still retains power to recall the fund on a satisfactory showing that it had been imposed on, and that the fund had been withdrawn in fraud of the solicitor of the estate, who had a lien on it.—Dennis v. Kent Circuit Judge, 42 Mich. 249.

¶ 837. If an executor has wasted the estate or has so appropriated the personal property, profits and income as to be indebted to the estate, he becomes personally liable to the estate, and it would be inequi-

table to sell it to reimburse a person who has furnished necessaries to minor devisees at the executor's instance and compel the minors to look to the latter for the amount.—Roscoe v. McDonald, 91 Mich. 270.

¶ 838. Executors accept not only the trusts imposed by the will under which they act, but also all the trusts with which their testator was charged in respect to the assets which come into their hands; and where the executors of a deceased attorney in fact who had defrauded his principals and coclaimants in a settlement, were informed of the facts, but nevertheless caused to be discounted a note for $10,000 that had been received by their testator upon the settlement, they were held liable to the defrauded parties for the proceeds notwithstanding their final accounting had been had in the probate court.—Richardson v. Richardson, 100 Mich. 364.

§ 268. Procedure to determine and enforce.

Commitment of executor for default as imprisonment for debt, see Constitutional Law, § 194.

Effect of justice court's judgment against representative for creditor's distributive share, see Former Adjudication, II.

¶ 839. An order that an administrator shall pay the claims against the estate in a given time will not bind him if made as of course on a showing merely that all claims are in, and that they amount to less than the estate as appraised; it will at most oblige him in a later proceeding to show cause for not doing so. And on his default an order permitting his bond to be prosecuted determines only the right to sue on it; it does not fix the administrator's liability.—Hilton v. Briggs, 54 Mich. 265.

¶ 840. In an action by the creditor of an estate against an executor or administrator to recover his distributive share of the assets under Comp. L. 1871, § 4461, How. St. § 5929, facts must be alleged and proved showing that the defendant has been acting as executor or administrator, and had thus become liable upon the claim.—Basom v. Taylor, 39 Mich. 682.

¶ 841. It seems that in a proceeding against an administrator for not paying a claim against the estate there should be some finding of fact as to whether defendant is responsible for the failure to sell lands as ordered to pay debts.—Peckham v. Hoag, 57 Mich. 289.

¶ 842. A finding that does not show the actual value of assets in the hands of an administrator is insufficient to sustain judgment and causes a mistrial where suit is brought against him for not paying a claim against the estate.—Peckham v. Hoag, 57 Mich. 289.

¶ 843. A judgment against a decedent's estate rendered in a suit against the administratrix for her personal liability under How. St., § 5929, on her failure to pay a claim allowed against the estate after being ordered to do so by the probate court, is void.—Peckham v. Berrien Circuit Judge, 74 Mich. 287.

X. RIGHTS AND LIABILITIES OF REPRESENTATIVES AND DISTRIBUTEES IN THE ESTATE OR TOWARDS EACH OTHER.

A. IN GENERAL; DEALINGS RESPECTING SHARES AND PROPERTIES.

§ 269. In general.

Management, custody and disposal of properties of estate, see ante, V, E.

Accountability for corepresentatives, predecessors and surviving partner's acts and omissions, see post, X, E.

Liability of representative for bequest improperly delivered or paid, see post § 368.

Right of representative to invest estate property upon his own account or that of estate, see ante ¶ 374.

Personal liability of representative for use of one fund for benefit of another, see also post ¶¶ 930-931.

Settlements by agreement dispensing with administration, see ante, I.

[Note. Because of the great diversity of rights, duties and liabilities of the parties within the estate it would be impossible to collect the matter in one place without ignoring established principles of classification. Therefore such matter has been placed and should be sought in that portion of this topic treating of the stage of administration or the administrative act out of which the duty, right or liability arises. Rights and liabilities not involving the law of administration but merely involving a party to an estate collaterally or involving the general law of trusts will be treated in other appropriate topics. Construction of wills to ascertain what rights are created thereby is treated in Wills, VI. See generally cross-references which follow.]

Construction of directions in will as to expenses and charges on estate, see Wills, VI, G.

Family settlements of rights under wills, see Wills, VII.

Administrator taking title contrary to decedent's trust for others as trustee instead of decedent, see Trusts, IV, VIII.

Embezzlement by personal representative refusing to pay over funds, see Crimes § 68.

Rescission and cancellation of unauthorized or fraudulent contracts or transfers of representative, see Rescission and Cancellation, VI.

Liability for embezzlement or disposition of personalty before letters granted, see Jud. Act, chap. LIII, § 9; Comp. L. 1915, § 13827.

§ 270. Dealings of representatives in general.

Purchase of property, see post § 271.
Purchase through agents or intermediaries, see post § 272.
By or for benefit of representative's children, see post § 273.
Lands out of state, see post § 274.
Marketability of title affected by representatives' dealings with sale of the land, see Vendors and Purchasers, III.
Liability of representative for neglect or misconduct in sale proceedings, see Jud. Act, chap. LIX, § 40, Comp. L. 1915, § 14026.
Liability of representative for fraudulent or illegal sale, see Jud. Act, chap. LIX, § 41, Comp. L. 1915, § 14027.

¶ 844. The liability of an administrator to the estate is to be tested by equitable rules, regardless of mere technicalities; and this on appeal as well as in the probate court.—Brown v. Forsche, 43 Mich. 492.

¶ 845. An executor will not be held liable to the heirs or legatees in a court of equity merely because all of his acts in the management and disposition of the estate were not technically legal, where they met with the approval of the probate court at the time, and were apparently for the best interests of the estate.—Owen v. Potter, 115 Mich. 556.

¶ 846. An administrator or executor has no right to speculate with or use the funds of the estate in his own business; and, if he does so, he and his sureties will be liable for any loss, unless such use is with the assent of the parties interested in the estate, and he must show that he has acted in entire good faith, and that he obtained such assent upon full and fair representations and information communicated to his cestuis que trust of all the facts and circumstances attending the risk to the fund and of the proposed investment.—Ward v. Tinkham, 65 Mich. 695.

¶ 847. An agreement by one claiming title to land that the land shall be sold by the administratrix of a former owner in order to clear the title from a claim of the estate, and that the purchaser shall convey the title back to claimant, is not unconscionable. Blount v. Eames, 150 Mich. 35.

¶ 848. An executor on final account cannot claim that lands, conveyed to him and others, in trust, to secure debts to them and to the estate, are a part of the estate where he has treated the land as his own.—Cheever v. Ellis, 134 Mich. 645.

§ 271. ——Purchase of property.

Through agents or intermediaries, see post § 272.
Setting aside sale, see ante § 242.
Purchase of property of estate by person other than representative, see ante § 139.
Intent of representative as affecting validity of sale at which he is purchaser, see also post ¶ 872.
Right of representative to purchase claims of legatees, see also post ¶ 1135.
Disability of representative making sale to purchase realty, see Jud. Act, chap. LIX, § 25, Comp. L. 1915, § 14011.

¶ 849. An administrator occupies such a fiduciary relation towards heirs that he is prohibited from acquiring rights in real estate antagonistic to those whom he represents.—Parks v. Brooks, 188 Mich. 645.

¶ 850. An administrator cannot become the purchaser of the estate or effects of his intestate. And where two administrators made sale of lands of the intestate to one of the two, and executed a deed therefor, the deed was held void, notwithstanding the sale and conveyance were under the order of the probate court. The question of intent or fairness cannot be considered in such a case. —Dwight & Pierce v. Blackmar, 2 Mich. 330.

¶ 851. One of the executors is not prevented by Comp. L. 1897, § 9095, from purchasing land sold by the other executors where testatrix in her will has conferred the power upon such executors to sell to one of their number. Curtis v. Brewer, 140 Mich. 139.

¶ 852. A sale of land by an executor under license from the probate court, made indirectly in his own interest, is voidable only, and not absolutely void, under How. St., § 6042, and will therefore be sustained as to a subsequent purchaser in good faith and for a valuable consideration.—Otis v. Kennedy, 107 Mich. 312.

¶ 853. Fraud does not appear from the fact that on sale the widow, formerly a coexecutor, made an apparently absolute purchase, though she made declarations tending to show she had a life-interest only; or because that after the sale she conveyed the land to her sister without consideration and received back the land by a subsequent reconveyance.—Egan v. Grece, 79 Mich. 629.

§ 272. ——Through agents or intermediaries.

See also ante ¶ 736.

¶ 854. A sale by an administratrix upon an agreement that the purchaser should hold the land in trust, to be conveyed to whomsoever the administratrix should direct, is void under How. St., § 6042, which forbids the purchase by an administrator, directly or indirectly, of the real estate belonging to

the estate, and avoids all sales made contrary to such section.—McGraw v. Daly, 82 Mich. 500.

¶ 855. Whether a sale made by an administrator, with the understanding that the purchaser shall hold for the administrator's benefit, is void under Comp. L. 1871, § 4562, How St., § 6042, and that, too, as against subsequent bona fide purchasers, at least when the administrator's deed has never been recorded, or whether said section is a merely legislative adoption of previous judicial rulings, and subject, like them, to qualifications in favor of bona fide purchasers, quære.—Hoffman v. Harrington, 28 Mich. 90.

¶ 856. There is no rule of law precluding an executor from purchasing land previously sold by him in good faith under license from the probate court. Hence, the fact, as disclosed by the records, that the purchaser at such sale reconveyed to the executor one month thereafter, is insufficient to charge a subsequent purchaser with notice of bad faith on the part of the executor, especially where the consideration recited in the deed to the latter is greater than that named in the first deed; and this is so although the first deed was not recorded until the time of the reconveyance.—Otis v. Kennedy, 107 Mich. 312.

¶ 857. Where an executrix obtains title to a homestead by a deed from the purchaser executed one day after the order confirming the sale of the property, it may be argued that this was notice to subsequent purchasers as to the validity of her title as How. St., § 6042, provides that an executor or administrator selling property shall not be directly or indirectly interested in the sale, and sales contrary to the statute are void.—Litchfield v. Tunnicliff, 118 Mich. 383.

¶ 858. Where an administrator procured his brother-in-law to become the purchaser, and immediately afterwards took a conveyance of the premises so purchased to himself, the court of chancery, on bill filed by the heirs, set aside the sale, ordered the deed delivered up to be canceled, and directed a new sale.—Beaubien v. Poupard, H. 206.

¶ 859. The fact that an administratrix sells to her husband at public sale, for an amount much less than its actual value, land belonging to the estate, and the further fact that the husband, after the lapse of eighteen months, deeds the property to his wife, do not, where all the proceedings to sell were full, fair, and open, and some of the land was subject to homestead rights and incumbrances, invalidate the administratrix's sale, as being indirectly a sale to herself, so as to defeat the title of third parties claiming through a bona fide purchase from the wife taken on advice of counsel four years later, defendant claimants holding for eleven years more.—Louden v. Martindale, 109 Mich. 235.

¶ 860. That an administratrix of her husband's estate joins with her mother to raise money to pay debts of the estate does not show that she was interested in a sale of realty to the mother who reconveyed the same day for an expressed nominal consideration.—Ketchum v. Ketchum, 177 Mich. 100.

¶ 861. Any presumption of fraud arising from C. L. 1897, § 9095, How. 2nd Ed., § 11248, by an administratrix acquiring realty by a sale to her mother and a reconveyance the same day for an expressed nominal consideration is not conclusive and is met by evidence that the sale was made at the fair appraised and inventoried value at that time, that the property in that locality has since increased in value and that the mother had sufficient sentimental reasons for not keeping the property.—Ketchum v. Ketchum, 177 Mich. 100.

¶ 862. An administratrix kept her aged mother's accounts, and by reason of such fact swore to her mother's claim against the estate for money loaned. The realty was sold to the mother under a proper order of court to obtain money to pay debts and was reconveyed to the administratrix the same day for an expressed nominal consideration. Two years later the property was sold at a greatly increased price. Held, there was no fraud or collusion.—Ketchum v. Ketchum, 177 Mich. 100.

§ 273. ——By or for benefit of representatives' children.

¶ 863. An administratrix of her husband sold real estate under an arrangement that the purchaser was to protect the property from trespassers and hold the title until the decedent's children came of age, when he was to reconvey to them. He died before they came of age and his heirs reconveyed to the administratrix for the benefit of the children, but in her own name, in order that she might mortgage the property to pay off certain charges against it. Held, that the administratrix's sale could not be held void on the ground that she was interested in its purchase within the meaning of Comp. L. 1871, § 4562, How. St., § 6042.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 864. Fraud is not to be imputed to an executors' sale under license from the probate court by reason of the purchaser having been a daughter of one of the executors.—Egan v. Grece, 79 Mich. 629.

§ 274. ——Lands out of state.

Jurisdiction over property beyond state, see also ante § 17.

¶ 865. Since letters of administration can have no such extraterritorial force as to give

Michigan administrators control over Illinois lands, an agreement between a Michigan administrator and another party to buy for their joint benefit, and at a price agreed on, the claim of the estate to lands in Illinois, is not, therefore, necessarily fraudulent and void on the ground that it places the administrator in a relation where his self-interest conflicts with his duty.—Sheldon v. Rice, 30 Mich. 296.

B. CLAIMS BY REPRESENTATIVES AS CREDITORS, AND SET-OFF OR RETENTION.

§ 275. In general.

Representative as stockholder in creditor corporation, see post § 276.
Procedure to enforce rights, see post § 277.
Necessity of notice to all persons interested in estate of claim of representative, see ante § 169.
Time for presentment of claim by representative and delay as bar, see ante § 173.
Right of representative to recourse to lands to pay his own claim against estate, see also ante ¶ 701.

§ 276. Representative as stockholder in creditor corporation.

¶ 866. The executor is not culpable in sharing as a stockholder in the proceeds of the sale by his corporation of a claim against the estate, though the corporation's transferee ultimately profited by it.—Owen v. Potter, 115 Mich. 556.

§ 277. Procedure to enforce rights.

¶ 867. An executor cannot use his office to enforce payment of an obligation running to himself.—DeCoo v. Woodworth, 96 Mich. 362.

¶ 868. Where an administratrix promptly paid the debts of the estate out of her own funds and later filed an account which was allowed by the probate court wherein total indebtedness of the estate to her was stated, and no appeal was taken from the order allowing her the amount, and for nearly five years nothing is done to enforce her claim, except to file a petition to sell the real estate, and no more done for more than ten years more, her claim is barred by the statute of limitations.—In re Young's Estate, 144 Mich. 663.

¶ 869. On a bill by an executrix to set aside the assignment of certain mortgages by deceased, a claim by executrix in her individual capacity for an equitable lien on certain real estate claimed to have been purchased by deceased with her money, cannot be litigated, since as executrix she can obtain relief for the grievances of the estate only.—Peirson v. McNeil, 137 Mich. 158.

¶ 870. An executor who, in the lifetime of his decedent, took an equitable assignment of a mortgage owned by the latter, may file a bill in his own name to have the mortgage revived, where, under a mistake of fact as to the existence of another lien on the property, the mortgage was discharged, and replaced by another mortgage, which was recorded subsequent to such lien.—Densmore v. Savage, 110 Mich. 27.

C. ACCOUNTABILITY FOR RENTS, PROFITS AND INTEREST, AND LOSSES OR DEPRECIATION.

§ 278. Rents, issues and profits received.

Liability for losses or depreciation, see post §§ 279-281.
Loss from failure to collect assets, rents or profits, see post §§ 282, 283.
Improper disbursements or interest lost, see post § 284.
Failure to buy in claims at discount, see post § 285.
Liability for interest on money or property held, see post § 286.
Title and rights in property of estate, see ante, IV, C.
Management and custody of assets of estate, see ante, V, E.
Right and title of representative to rents, profits and issues, see ante § 62.
Accountability for corepresentatives, predecessors, and surviving partner's acts or omissions, see post, X, E.
Accountability of representative for rent of property occupied, see also post ¶ 936.
Accountability of intermeddler for rents and profits, see also post ¶ 973.
Accountability of representative for rents and income of realty in his possession, see Jud. Act, chap. LXII, § 6, Comp. L. 1915, § 14109.
Rights and liability of representative for profits and losses, see Jud. Act, chap. LXII, § 3, Comp. L. 1915, § 14106.

¶ 871. An administrator cannot retain any profits made out of assets belonging to his decedent's estate and sold by him, though he may have to account for more than he receives if he sells too low. He must at least account for actual proceeds.—Loomis v. Armtrong, 49 Mich. 521.

¶ 872. Although the intent or fairness of an administratrix who becomes the purchaser of the estate at administratrix's sale is not open to proof or discussion as affecting the validity of the sale, yet, in determining the right of a complaining heir to share in rents and profits, the situation of the estate and of the parties, and the motives, conduct and equities of the purchaser, should be considered.—Benedict v. Beurmann, 90 Mich. 396.

¶ 873. On suit for an accounting against the administrator and heirs of the widow who had wrongfully declared herself the only heir and thus obtained possession of real estate, the complainants, coheirs with the widow, being entitled to one-half, may

recover one-half the rental value of real estate for the time since the suit was begun less the cost of repairs.—Maney v. Casserly, 134 Mich. 252.

§ 279. Liability for losses or depreciation.

See also post ¶ 1057.

Money deposited in bank which fails, see post § 280.

Depreciation in value of securities, see post § 281.

Continuing business, engaging in new enterprises and speculation in management of estate, see ante §§ 119, 120.

Losses incurred in carrying on business with consent of those interested in estate, see also ante ¶ 379.

Liability of representative for funds from sale of partnership property where used to satisfy firm debts, see also ante ¶ 419.

Liability of representative for loss occasioned by neglect, see Jud. Act, chap. LXII, § 7, Comp. L. 1915, § 14110.

¶ 874. Losses arising from an unauthorized sale of land on credit, or from taking insufficient security for part of the purchase price, must be charged to the administrator. —In re Palmer, 1 D. 422.

¶ 875. An administrator or executor has no right to speculate with or use the funds of the estate in his own business; and, if he does so, he and his sureties will be liable for any loss, unless such use is with the assent of the parties interested in the estate, and he must show that he has acted in entire good faith, and that he obtained such assent upon full and fair representations and information communicated to his cestuis que trust of all the facts and circumstances attending the risk to the fund and of the proposed investment.—Ward v. Tinkham, 65 Mich. 695.

¶ 876. Administrators are bound to liquidate estates without undue delay, and they must not leave the estates at the risk of business disaster by continuing without authority to operate business ventures in which the estates are invested when they come into their hands; and executors or administrators who violate the rule, even if acting with the utmost good faith, are held strictly liable for all losses incurred, and are not even permitted to offset the profits against the losses. —Swaine v. Hemphill, 165 Mich. 561.

¶ 877. Where the assets of an estate are hardly sufficient to meet its liabilities, and the administrator continues with the consent of all interested parties a malting business left by the deceased, in the hope of making the business a going one, he is not liable to the estate for losses suffered in the business through mistake in business judgment where he acts in good faith and the losses are due to unfavorable business conditions.—Swaine v. Hemphill, 165 Mich. 561.

¶ 878. When all those interested in an estate agree that a certain business left by the deceased shall be continued, the executor or administrator will be relieved from personal liability if business disaster follows. —Swaine v. Hemphill, 165 Mich. 561.

§ 280. ——Moneys deposited in bank which fails.

¶ 879. An administrator, as such, in the matter of selecting a depository for the funds of an estate, is required to use the care of an ordinarily prudent man, and such funds must be deposited by him in his fiduciary capacity, and not in his individual name without any designation of the trust.—In re Curtis' Estate, 162 Mich. 47.

¶ 880. An administrator who has deposited funds of an estate in a bank that has good credit and standing is not liable for the loss thereof by the subsequent failure of the bank, in the absence of negligence on his part.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 881. An administrator is not liable for the loss of money received by him in payment of a mortgage and which he had deposited in a reputable bank which failed three months and seven days thereafter, where he had the right to retain the funds in his hands for the care of his mother, it being so understood by the heirs, for she might apply at any time for her share.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 882. Where an administrator in remitting funds of the estate to an heir buys a draft in his individual name, and the bank fails, he is liable to the heir for the loss.— In re Curtis' Estate, 162 Mich. 47.

§ 281. ——Depreciation in value of securities.

¶ 883. An executor is not responsible for losses due to financial depression of securities, unless negligent in not collecting before such depression.—Cheever v. Ellis, 134 Mich. 645.

¶ 884. An executor of an estate placed certain stock of the estate in the vault of the bank of which the deceased and himself were partners. The stock had for many years been of good value and there was no evidence that it was necessary for the executor to sell the stock immediately in order to realize its value and to anticipate a possible decline in its value. After a lapse of two years the bank failed and the trustee in bankruptcy seized the stock. By the time the executor got the stock back from the trustee it had declined in value. Held, there was no ground for charging the executor for failure to sell the stock immediately after his appointment.—In re Choate's Estate, 165 Mich. 420; Bonine v. Gage, Id.

§ 282. Loss from failure to collect assets, rents or profits.

From forfeiture of equities in land, see post § 283.

Presumption of prompt collection of assets of estate by representative, see post ¶ 1106.

¶ 885. The contention that an executor was negligent with respect to certain notes, upon the decedent's indorsement of which the estate was held liable, for the reason that they were collectible from the maker, is disproved where it appears that the notes were left unpaid by the maker for several years, and were then disposed of by the holders at a heavy discount.—Owen v. Potter, 115 Mich. 556.

¶ 886. An executor is not responsible for loss in collecting mortgages taken prior to his appointment except in so far as the loss is due to his negligence.—Cheever v. Ellis, 134 Mich. 645.

¶ 887. An executor is negligent and liable for the amount of a mortgage which was foreclosed and purchased by his agent and the proceeds never paid over to the executor. —Cheever v. Ellis, 134 Mich. 645.

¶ 888. An executor is negligent and liable for the amount of a mortgage, a discharge of which he sent to his agent and left unsettled with him for more than a year when the agent became insolvent.—Cheever v. Ellis, 134 Mich. 645.

¶ 889. An administrator who negligently failed to collect rent was properly charged with it in his account and left to suffer the loss personally.—In re Saier's Estate (Appeal of Zimmer), 158 Mich. 170.

§ 283. ——From forfeiture of equities in land.

¶ 890. Where payments fell due on the intestate's executory contract for the purchase of lands, which the administrator had no funds in his hands to pay, but money for that purpose was promised by creditors of the estate, which he neglected to obtain, and the contract became forfeited, it was held that these facts did not render the administrator liable to the heirs for the value of their interest in the land thus forfeited. —Baxter v. Robinson, 11 Mich. 520.

§ 284. Improper disbursements or interest lost.

See also post ¶ 969.

Liability of representative for bequests improperly delivered or paid, see also post § 368.

¶ 891. An administrator negligently allowed interest to run on a claim he should have filed, and interest to accumulate on taxes neglected by him. He also negligently failed to gain interest on semiannual balances. Held, that he was properly charged with these items in his account.—In re Saier's Estate (Appeal of Zimmer), 158 Mich. 170.

§ 285. Failure to buy in claims at discount.

Purchase of claims in general, see ante § 159.

¶ 892. An executor cannot be required to account to the estate for the amount in which the sum awarded to a claimant against it exceeds the sum for which the claim was purchased by the claimant after the death of the deceased, even though the assignor of the claim, being a corporation in which the executor was a stockholder, would have sold it to the estate at the same discount allowed to the claimant.—Owen v. Potter, 115 Mich. 556.

§ 286. Liability for interest on money or property held.

Accountability of representative for interest, see also post ¶ 1088.

¶ 893. It was held no excuse for the neglect of an administrator to charge himself in his administration account with money belonging to the estate, that he supposed it belonged to the widow from whom he received it, and that he gave her security as for an individual loan, which security he had taken up before he had reason to believe that the money belonged to the estate. And where he had held such money for a long time and failed to close up his trust, and it had been found necessary to coerce him by legal proceedings to a settlement of the estate, it was held proper that he should be charged with interest.—Hall v. Grovier, 25 Mich. 428.

¶ 894. An executor is properly chargeable with interest upon the balance of money found in his hands on a final accounting, during the pendency of his appeal from an order disallowing his claim for moneys paid to decedent's husband to reimburse him for the payment of funeral expenses.—Galloway v. McPherson's Estate, 76 Mich. 318.

¶ 895. An administrator who deposits estate money, amounting to $36,000, in his own bank, subject to check instead of upon certificate, and allows it to remain in such account for three months and twelve days, is chargeable with interest thereon at bank rates.—In re Brewster's Estate, 113 Mich. 561.

¶ 896. The administrator is not relieved from liability for interest on a deposit made subject to check instead of on certificate because the question was not raised upon the first accounting after the distribution of the principal among the heirs, but it is a proper charge against him in his final account.—In re Brewster's Estate, 113 Mich. 561.

D. COMPENSATION, ALLOWANCES AND REIMBURSEMENT.

§ 287. Compensation in general.

Measure and amount, see post § 288.

Extra services and allowances, see post § 289.

Services in sale of realty, see post § 290.

Discretion of court, see post § 291.
Compensation of corepresentatives, see post § 292.
Compensation of foreign and domiciliary representatives, see post § 293.
Assignment of compensation claims, see post § 294.
Indemnification and reimbursement, see post §§ 295, 296.
Claim or procedure to obtain allowance, see post §§ 297-299.
Conclusiveness of annual acccount as to representative's compensation, see post ¶ 1125.

¶ 897. Under How. St., §§ 5959, 9015, an executor or administrator is entitled to a commission on the amount of personalty collected and real estate sold, or to $1 per day for actual services, as he may elect; but this is the limit of his right to compensation, except in cases of unusual difficulty or responsibility.—In re King's Estate, 110 Mich. 203.

¶ 898. Heirs cannot find fault with an allowance to the administrator of the statutory fees; and where he collected the funds of the estate, took care of a farm, looked after the care of their mother, and promptly divided among each of the heirs their share, the court might properly have allowed some extra compensation.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 899. An executor's compensation for services in taking an inventory, in another state, of his testator's interest in a mercantile partnership, considered and fixed.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 900. Where decedent's widow and residuary legatee is contesting with the guardian of infant legatees the disposition of certain funds, the executors can claim no compensation for persuading them to consent that pending the litigation the funds be deposited to their joint account.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 901. Where a part of the assets of an estate consists of an interest in a mercantile partnership of which the executor is the managing partner, on a salary, and where the other services of the executor are perfunctory, he is not entitled to an allowance for services.—Gaskill v. Weeks, 154 Mich. 223.

¶ 902. An executor charged with the investment of an estate cannot claim pay for his services and put the entire responsibility of earning on the investment on an agent employed by him.—Cheever v. Ellis, 134 Mich. 645.

§ 288. ——Measure and amount.

¶ 903. Compensation for administration services, though performed by an attorney, should not be gauged by the prices asked by professional men for their services; good business ability, rather than professional skill, is the element required, and should be the test of value except in very unusual cases.—Wisner v. Mabley's Estate, 70 Mich. 271.

¶ 904. Under Comp. L. 1897, § 9438, providing for commissions to an executor "upon the amount of personal estate collected and accounted for by him," an executor is not entitled to commission on the estate as inventoried where many notes held by him have not been as yet collected, his commission being properly based on the amounts actually collected.—Webb v. Peck, 131 Mich. 579.

¶ 905. The allowance to an administrator of $150 as a gross sum, without a particular specification of the items, for time and services, covering a period of over three years, in obtaining possession of real estate, collecting rents, renting farms, etc., is not without precedent.—In re Nuckols' Appeal, 103 Mich. 297.

¶ 906. A charge by an administrator of $5 per day for nine days, for time and expenses, and on some occasions for the use of a horse and buggy, in looking after the estate, which consisted principally of real property situated some miles from his residence, is not an immoderate charge, it appearing that the services charged for covered a period of over ten months.—In re Nuckols' Appeal, 103 Mich. 297.

¶ 907. An allowance of $100 as compensation for administering an estate of $5,000 is justified by How. St., § 5959.—In re Power's Estate, 92 Mich. 106.

§ 289. ——Extra services and allowances.

See also ante ¶¶ 897, 898.
Procedure to obtain extra compensation, see post § 297, ¶¶ 946, 947.
Extra compensation as questions for jury, see post ¶¶ 952, 955.
Evidence on claim for extra compensation, see post ¶¶ 949-951.
Further allowance for extraordinary services and procedure to obtain, see Jud. Act, chap. LXII, § 15; Comp. L. 1915, § 14118.

¶ 908. The case is one of "unusual difficulty," within the meaning of How. St., § 9015, providing for an extra allowance to executors in cases of unusual difficulty or responsibility, in which the executor is obliged to perform services not required of an executor in the ordinary course of his employment.—In re King's Estate, 113 Mich. 606.

¶ 908a. An executor who is an attorney at law is entitled to special compensation for legal services rendered in litigation affecting the estate.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 909. Services rendered by an executor in hunting up witnesses for proponents upon a contest of the will, in bringing them to counsel, and in assuming the responsibility of procuring their attendance at court, may properly be classed as extraordinary.—In re King's Estate, 113 Mich. 606.

¶ 910. Where shares of stock belonging to an estate are held as security by a creditor, and he, on being paid the amount of his debt by one of the executors and trustees, assigns the certificates in blank, and delivers them to said executor, without objection from the coexecutor and trustee, who is a witness to the transaction, the writing by such coexecutor of a letter to the corporation, requesting it to fill in the blanks in the assignments and issue new certificates to both of the executors and trustees, which is done, is not an extraordinary service, within the meaning of How. St., § 5959, which provides for the allowance of extra compensation for any extraordinary services, not required of an executor or administrator in the common course of his duty.—Lindsay v. Richardson's Estate, 98 Mich. 319.

¶ 911. The services of the administrator with the will annexed held to be of such character and extent as not to justify more than the statutory allowance. — In re O'Leary's Estate, 193 Mich. 282; Palmer v. Utica State Hospital, Id.

¶ 912. An executor is entitled to extra compensation for going out of the state to settle a partnership business in which the testator was engaged, and the contract relations between the estate and the surviving partner.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 913. An executor is not entitled to special compensation for services in procuring, to expedite the settlement of the estate, the discount of notes given by a surviving partner for the testator's interest in the partnership.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 914. An allowance of $380 to an administrator for extra services in addition to the statutory fee of $156.80, is proper where there is testimony tending to prove performance of unusual services.—In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

¶ 915. Where a trial court has allowed to an administrator a fee of seventy-five dollars for extra services in the administration of an estate of $1,900, the supreme court will not disturb this allowance on the ground that it is unreasonably small.—In re Crawford's Estate (Sutton's Appeal), 165 Mich. 527.

¶ 916. A promise of a probate judge to allow a person a greater compensation than that fixed by statute if he accepts the administration of an estate, is void.—In r Thompson's Estate, 183 Mich. 618.

§ 290. ——Services in sale of realty.

¶ 917. The compensation allowed b; § 9438, Comp. Laws 1897, How. St., 2nd. Ed § 11149, to administrators for the sale o real estate is the limit of their compensa tion therefor.—In re Thompson s Estate, 18 Mich. 618.

¶ 918. Since § 9438, Comp. Laws 1897 How. St., 2nd Ed., § 11149, limits the com pensation an administrator may receive fo selling real estate, he cannot be allowed i addition commissions or fees paid real estat agents for effecting a sale.—In re Thompson's Estate, 183 Mich. 618.

¶ 919. Where two unsuccessful attempts were made by the special administrator upon petition of the heirs, to sell real estate, and the heirs agreed that he should receive his fees for this service out of the estate, the court properly allowed the item in his final account.—Zimmer v. Saier, 155 Mich. 388.

§ 291. ——Discretion of court.

¶ 920. A claim by an executor or administrator to extra compensation (How. St., § 9015) rests in the discretion of the probate judge, or, on appeal, of the circuit judge.—In re Mower's Appeal, 48 Mich. 441; Loomis v. Armstrong, 49 Mich. 521; Loomis v. Armstrong, 63 Mich. 355; Wisner v. Mabley's Estate, 70 Mich. 271.

¶ 921. The discretion of the probate court under Comp. Laws 1897, § 9438, in fixing additional compensation for extra services by an administrator, will not be reviewed except when abused.—In re Fischer's Estate, (Appeal of Fischer), 158 Mich. 1.

¶ 922. The allowance of extra compensation to the representative cannot be overruled by the supreme court if there were facts which fairly called for the exercise of the discretion.—In re Mower's Appeal, 48 Mich. 441.

¶ 923. The amount of an allowance for extraordinary services is discretionary with the trial judge, if there is evidence to support the claim.—In re King's Estate, 113 Mich. 606.

¶ 924. On an appeal from the allowance of an administrator's account the circuit court cannot grant him compensation for extraordinary service where no order for such an allowance was made in the probate court. —In re Thompson's Estate, 183 Mich. 618.

¶ 925. The discretion to make extra allowances to an executor is a legal one, and must be based on the legal testimony before the court.—Wisner v. Mabley's Estate, 70 Mich. 271.

§ 292. Compensation of corepresentatives, joint representatives and successors.

Authority of joint representatives and mode of action, see ante § 50.

¶ 926. Coexecutors, without regard to the time spent, responsibility assumed, or services rendered, are not entitled to an equal pro rata share of the statutory fees.—Speirs v. Wisner, 88 Mich. 614.

§ 293. Compensation of foreign and domiciliary representatives.

Authority of foreign representatives, see ante § 51.

Jurisdiction of domiciliary and foreign representatives, see ante § 15.

¶ 927. An executor who improperly accounted for assets of a Michigan estate in another state and received larger commissions there than are allowed in this state and subsequently claimed no commission when the estate was closed in this state, was not entitled to any allowance for commissions as executor in this state, in a bill for accounting filed by the heirs.—Porter v. Long, 136 Mich. 150.

§ 294. Assignment or transfer of compensation or claim.

Public policy as to agreement to assign commissions, see Contracts § 60.

¶ 928. An assignment by an executor, to whom letters testamentary have been duly granted, of all claims for compensation to be earned in defending against an appeal from the probate of the will, is void as against public policy.—In re King's Estate, 110 Mich. 203.

§ 295. Indemnification, reimbursement and liens for disbursements.

Expenses of administration and attorney fees, see post § 296.

Disbursements properly included in account, see post § 342.

Reimbursement of representative for expense in preparing records required in probate proceedings to discover assets, see also ante ¶ 279.

¶ 929. An administrator cannot, as matter of law, recover from an estate the sum he has paid the widow to release her right of dower in lands sold by him under a probate license; the statute does not empower him to make any such arrangement, and under the license the purchaser can buy only the interest of the estate.—Needham v. Belote, 39 Mich. 487.

¶ 930. In case an executor has broken in upon one fund for the benefit of another, he will not be charged personally, if from the fund benefited there may be realized enough to restore the sum diverted.—Draper v. Brown, 153 Mich. 120.

¶ 931. Where an executor has diverted money from one fund to pay an incumbrance upon the corpus of another fund, he, upon being compelled to restore the amount diverted, will be given a lien upon the surplus, if any, remaining from the fund benefited, to the discharge of the incumbrance thereon.—Draper v. Brown, 153 Mich. 120.

¶ 932. Where an administrator of an estate pays debts of the estate out of his own funds he stands in the position of an equitable assignee of the creditors.—In re Young's Estate, 144 Mich. 663.

¶ 933. The price paid for a suitable tombstone for his testator is properly charged in an executor's final account.—Jackson v. Leech's Estate, 113 Mich. 391.

¶ 934. An executor who had in good faith advanced money from the funds of the estate in order to enable the widow to put up a suitable monument should have been allowed the amount on settling his accounts.—Pistorius' Appeal, 53 Mich. 350.

¶ 935. The allowance to an administrator of $450 for the construction and repairs of a vault for the deceased is a proper charge against the estate, even though the title to one of the lots whereon it was erected stood in the mother's name and the other in the son's name.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 936. An administratrix who filed no account for 28 years, and during such period occupied rent free the land belonging to the estate, cannot charge for taxes and repairs, nor will she be allowed interest on items which by reason of the delay in the accounting more than doubles the original amount of such items.—In re Graff's Estate, 123 Mich. 456.

¶ 937. A payment by an administrator upon the advice of reputable counsel and the consent of the probate court, to obtain a quitclaim deed in order to remove a tax title acquired prior to the conveyance of land by his intestate, will be sustained, although no claim therefor is presented to or allowed by the commissioners on claims, nor any claim for a breach of warranty made by the grantee.—In re Thompson's Estate, 183 Mich. 618.

¶ 938. Testator gave to his wife a life estate in his real and personal property with instructions to his executors to sell and distribute same after her death. Said executors were given power to provide the wife with additional money out of the estate if the income from said life estate did not prove sufficient for her support. During the lifetime of the wife and with her consent the executors expended a substantial sum in rebuilding a barn badly in need of repairs, and the cost of said improvement was taken out of the corpus of the estate. A grantee

Liability for embezzlement or disposition of personalty before letters granted, see Jud. Act, chap. LIII, § 9; Comp. L. 1915, § 13827.

§ 270. Dealings of representatives in general.

Purchase of property, see post § 271.
Purchase through agents or intermediaries, see post § 272.
By or for benefit of representative's children, see post § 273.
Lands out of state, see post § 274.
Marketability of title affected by representatives' dealings with sale of the land, see Vendors and Purchasers, III.
Liability of representative for neglect or misconduct in sale proceedings, see Jud. Act, chap. LIX, § 40, Comp. L. 1915, § 14026.
Liability of representative for fraudulent or illegal sale, see Jud. Act, chap. LIX, § 41, Comp. L. 1915, § 14027.

¶ 844. The liability of an administrator to the estate is to be tested by equitable rules, regardless of mere technicalities; and this on appeal as well as in the probate court.—Brown v. Forsche, 43 Mich. 492.

¶ 845. An executor will not be held liable to the heirs or legatees in a court of equity merely because all of his acts in the management and disposition of the estate were not technically legal, where they met with the approval of the probate court at the time, and were apparently for the best interests of the estate.—Owen v. Potter, 115 Mich. 556.

¶ 846. An administrator or executor has no right to speculate with or use the funds of the estate in his own business: and, if he does so, he and his sureties will be liable for any loss, unless such use is with the assent of the parties interested in the estate, and he must show that he has acted in entire good faith, and that he obtained such assent upon full and fair representations and information communicated to his cestuis que trust of all the facts and circumstances attending the risk to the fund and of the proposed investment.—Ward v. Tinkham, 65 Mich. 695.

¶ 847. An agreement by one claiming title to land that the land shall be sold by the administratrix of a former owner in order to clear the title from a claim of the estate, and that the purchaser shall convey the title back to claimant, is not unconscionable. Blount v. Eames, 150 Mich. 35.

¶ 848. An executor on final account cannot claim that lands, conveyed to him and others, in trust, to secure debts to them and to the estate, are a part of the estate where he has treated the land as his own.—Cheever v. Ellis, 134 Mich. 645.

§ 271. ——Purchase of property.

Through agents or intermediaries, see post § 272.
Setting aside sale, see ante § 242.
Purchase of property of estate by person other than representative, see ante § 139.
Intent of representative as affecting validity of sale at which he is purchaser, see also post ¶ 872.
Right of representative to purchase claims of legatees, see also post ¶ 1135.
Disability of representative making sale to purchase realty, see Jud. Act, chap. LIX, § 25, Comp. L. 1915, § 14011.

¶ 849. An administrator occupies such a fiduciary relation towards heirs that he is prohibited from acquiring rights in real estate antagonistic to those whom he represents.—Parks v. Brooks, 188 Mich. 645.

¶ 850. An administrator cannot become the purchaser of the estate or effects of his intestate. And where two administrators made sale of lands of the intestate to one of the two, and executed a deed therefor, the deed was held void, notwithstanding the sale and conveyance were under the order of the probate court. The question of intent or fairness cannot be considered in such a case.—Dwight & Pierce v. Blackmar, 2 Mich. 330.

¶ 851. One of the executors is not prevented by Comp. L. 1897, § 9095, from purchasing land sold by the other executors where testatrix in her will has conferred the power upon such executors to sell to one of their number. Curtis v. Brewer, 140 Mich. 139.

¶ 852. A sale of land by an executor under license from the probate court, made indirectly in his own interest, is voidable only, and not absolutely void, under How. St., § 6042, and will therefore be sustained as to a subsequent purchaser in good faith and for a valuable consideration.—Otis v. Kennedy, 107 Mich. 312.

¶ 853. Fraud does not appear from the fact that on sale the widow, formerly a coexecutor, made an apparently absolute purchase, though she made declarations tending to show she had a life-interest only; or because that after the sale she conveyed the land to her sister without consideration and received back the land by a subsequent reconveyance.—Egan v. Grece, 79 Mich. 629.

§ 272. ——Through agents or intermediaries.

See also ante ¶ 736.

¶ 854. A sale by an administratrix upon an agreement that the purchaser should hold the land in trust, to be conveyed to whomsoever the administratrix should direct, is void under How. St., § 6042, which forbids the purchase by an administrator, directly or indirectly, of the real estate belonging to

the estate, and avoids all sales made contrary to such section.—McGraw v. Daly, 82 Mich. 500.

¶ 855. Whether a sale made by an administrator, with the understanding that the purchaser shall hold for the administrator's benefit, is void under Comp. L. 1871, § 4562, How St., § 6042, and that, too, as against subsequent bona fide purchasers, at least when the administrator's deed has never been recorded, or whether said section is a merely legislative adoption of previous judicial rulings, and subject, like them, to qualifications in favor of bona fide purchasers, quære.—Hoffman v. Harrington, 28 Mich. 90.

¶ 856. There is no rule of law precluding an executor from purchasing land previously sold by him in good faith under license from the probate court. Hence, the fact, as disclosed by the records, that the purchaser at such sale reconveyed to the executor one month thereafter, is insufficient to charge a subsequent purchaser with notice of bad faith on the part of the executor, especially where the consideration recited in the deed to the latter is greater than that named in the first deed; and this is so although the first deed was not recorded until the time of the reconveyance.—Otis v. Kennedy, 107 Mich. 312.

¶ 857. Where an executrix obtains title to a homestead by a deed from the purchaser executed one day after the order confirming the sale of the property, it may be argued that this was notice to subsequent purchasers as to the validity of her title as How. St., § 6042, provides that an executor or administrator selling property shall not be directly or indirectly interested in the sale, and sales contrary to the statute are void.—Litchfield v. Tunnicliff, 118 Mich. 383.

¶ 858. Where an administrator procured his brother-in-law to become the purchaser, and immediately afterwards took a conveyance of the premises so purchased to himself, the court of chancery, on bill filed by the heirs, set aside the sale, ordered the deed delivered up to be canceled, and directed a new sale.—Beaubien v. Poupard, H. 206.

¶ 859. The fact that an administratrix sells to her husband at public sale, for an amount much less than its actual value, land belonging to the estate, and the further fact that the husband, after the lapse of eighteen months, deeds the property to his wife, do not, where all the proceedings to sell were full, fair, and open, and some of the land was subject to homestead rights and incumbrances, invalidate the administratrix's sale, as being indirectly a sale to herself, so as to defeat the title of third parties claiming through a bona fide purchase from the wife taken on advice of counsel four years later, defendant claimants holding for eleven years more.—Louden v. Martindale, 109 Mich. 235.

¶ 860. That an administratrix of her husband's estate joins with her mother to raise money to pay debts of the estate does not show that she was interested in a sale of realty to the mother who reconveyed the same day for an expressed nominal consideration.—Ketchum v. Ketchum, 177 Mich. 100.

¶ 861. Any presumption of fraud arising from C. L. 1897, § 9095, How. 2nd Ed., § 11248, by an administratrix acquiring realty by a sale to her mother and a reconveyance the same day for an expressed nominal consideration is not conclusive and is met by evidence that the sale was made at the fair appraised and inventoried value at that time, that the property in that locality has since increased in value and that the mother had sufficient sentimental reasons for not keeping the property.—Ketchum v. Ketchum, 177 Mich. 100.

¶ 862. An administratrix kept her aged mother's accounts, and by reason of such fact swore to her mother's claim against the estate for money loaned. The realty was sold to the mother under a proper order of court to obtain money to pay debts and was reconveyed to the administratrix the same day for an expressed nominal consideration. Two years later the property was sold at a greatly increased price. Held, there was no fraud or collusion.—Ketchum v. Ketchum, 177 Mich. 100.

§ 273. ——By or for benefit of representatives' children.

¶ 863. An administratrix of her husband sold real estate under an arrangement that the purchaser was to protect the property from trespassers and hold the title until the decedent's children came of age, when he was to reconvey to them. He died before they came of age and his heirs reconveyed to the administratrix for the benefit of the children, but in her own name, in order that she might mortgage the property to pay off certain charges against it. Held, that the administratrix's sale could not be held void on the ground that she was interested in its purchase within the meaning of Comp. L. 1871, § 4562, How. St., § 6042.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 864. Fraud is not to be imputed to an executors' sale under license from the probate court by reason of the purchaser having been a daughter of one of the executors.—Egan v. Grece, 79 Mich. 629.

§ 274. ——Lands out of state.

Jurisdiction over property beyond state, see also ante § 17.

¶ 865. Since letters of administration can have no such extraterritorial force as to give

Michigan administrators control over Illinois lands, an agreement between a Michigan administrator and another party to buy for their joint benefit, and at a price agreed on, the claim of the estate to lands in Illinois, is not, therefore, necessarily fraudulent and void on the ground that it places the administrator in a relation where his self-interest conflicts with his duty.—Sheldon v. Rice, 30 Mich. 296.

B. CLAIMS BY REPRESENTATIVES AS CREDITORS, AND SET-OFF OR RETENTION.

§ 275. In general.

Representative as stockholder in creditor corporation, see post § 276.
Procedure to enforce rights, see post § 277.
Necessity of notice to all persons interested in estate of claim of representative, see ante § 169.
Time for presentment of claim by representative and delay as bar, see ante § 173.
Right of representative to recourse to lands to pay his own claim against estate, see also ante ¶ 701.

§ 276. Representative as stockholder in creditor corporation.

¶ 866. The executor is not culpable in sharing as a stockholder in the proceeds of the sale by his corporation of a claim against the estate, though the corporation's transferee ultimately profited by it.—Owen v. Potter, 115 Mich. 556.

§ 277. Procedure to enforce rights.

¶ 867. An executor cannot use his office to enforce payment of an obligation running to himself.—DeCoo v. Woodworth, 96 Mich. 362.

¶ 868. Where an administratrix promptly paid the debts of the estate out of her own funds and later filed an account which was allowed by the probate court wherein total indebtedness of the estate to her was stated, and no appeal was taken from the order allowing her the amount, and for nearly five years nothing is done to enforce her claim, except to file a petition to sell the real estate, and no more done for more than ten years more, her claim is barred by the statute of limitations.—In re Young's Estate, 144 Mich. 663.

¶ 869. On a bill by an executrix to set aside the assignment of certain mortgages by deceased, a claim by executrix in her individual capacity for an equitable lien on certain real estate claimed to have been purchased by deceased with her money, cannot be litigated, since as executrix she can obtain relief for the grievances of the estate only.—Peirson v. McNeil, 137 Mich. 158.

¶ 870. An executor who, in the lifetime of his decedent, took an equitable assignment of a mortgage owned by the latter, may file a bill in his own name to have the mortgage revived, where, under a mistake of fact as to the existence of another lien on the property, the mortgage was discharged, and replaced by another mortgage, which was recorded subsequent to such lien.—Densmore v. Savage, 110 Mich. 27.

C. ACCOUNTABILITY FOR RENTS, PROFITS AND INTEREST, AND LOSSES OR DEPRECIATION.

§ 278. Rents, issues and profits received.

Liability for losses or depreciation, see post §§ 279-281.
Loss from failure to collect assets, rents or profits, see post §§ 282, 283.
Improper disbursements or interest lost, see post § 284.
Failure to buy in claims at discount, see post § 285.
Liability for interest on money or property held, see post § 286.
Title and rights in property of estate, see ante, IV, C.
Management and custody of assets of estate, see ante, V, E.
Right and title of representative to rents, profits and issues, see ante § 62.
Accountability for corepresentatives, predecessors, and surviving partner's acts or omissions, see post, X, E.
Accountability of representative for rent of property occupied, see also post ¶ 936.
Accountability of intermeddler for rents and profits, see also post ¶ 973.
Accountability of representative for rents and income of realty in his possession, see Jud. Act, chap. LXII, § 6, Comp. L. 1915, § 14109.
Rights and liability of representative for profits and losses, see Jud. Act, chap. LXII, § 3, Comp. L. 1915, § 14106.

¶ 871. An administrator cannot retain any profits made out of assets belonging to his decedent's estate and sold by him, though he may have to account for more than he receives if he sells too low. He must at least account for actual proceeds.—Loomis v. Armtrong, 49 Mich. 521.

¶ 872. Although the intent or fairness of an administratrix who becomes the purchaser of the estate at administratrix's sale is not open to proof or discussion as affecting the validity of the sale, yet, in determining the right of a complaining heir to share in rents and profits, the situation of the estate and of the parties, and the motives, conduct and equities of the purchaser, should be considered.—Benedict v. Beurmann, 90 Mich. 396.

¶ 873. On suit for an accounting against the administrator and heirs of the widow who had wrongfully declared herself the only heir and thus obtained possession of real estate, the complainants, coheirs with the widow, being entitled to one-half, may

recover one-half the rental value of real estate for the time since the suit was begun less the cost of repairs.—Maney v. Casserly, 134 Mich. 252.

§ 279. Liability for losses or depreciation.

See also post ¶ 1057.

Money deposited in bank which fails, see post § 280.

Depreciation in value of securities, see post § 281.

Continuing business, engaging in new enterprises and speculation in management of estate, see ante §§ 119, 120.

Losses incurred in carrying on business with consent of those interested in estate, see also ante ¶ 379.

Liability of representative for funds from sale of partnership property where used to satisfy firm debts, see also ante ¶ 419.

Liability of representative for loss occasioned by neglect, see Jud. Act, chap. LXII. § 7, Comp. L. 1915, § 14110.

¶ 874. Losses arising from an unauthorized sale of land on credit, or from taking insufficient security for part of the purchase price, must be charged to the administrator. —In re Palmer, 1 D. 422.

¶ 875. An administrator or executor has no right to speculate with or use the funds of the estate in his own business; and, if he does so, he and his sureties will be liable for any loss, unless such use is with the assent of the parties interested in the estate, and he must show that he has acted in entire good faith, and that he obtained such assent upon full and fair representations and information communicated to his cestuis que trust of all the facts and circumstances attending the risk to the fund and of the proposed investment.—Ward v. Tinkham, 65 Mich. 695.

¶ 876. Administrators are bound to liquidate estates without undue delay, and they must not leave the estates at the risk of business disaster by continuing without authority to operate business ventures in which the estates are invested when they come into their hands; and executors or administrators who violate the rule, even if acting with the utmost good faith, are held strictly liable for all losses incurred, and are not even permitted to offset the profits against the losses. —Swaine v. Hemphill, 165 Mich. 561.

¶ 877. Where the assets of an estate are hardly sufficient to meet its liabilities, and the administrator continues with the consent of all interested parties a malting business left by the deceased, in the hope of making the business a going one, he is not liable to the estate for losses suffered in the business through mistake in business judgment where he acts in good faith and the losses are due to unfavorable business conditions.—Swaine v. Hemphill, 165 Mich. 561.

¶ 878. When all those interested in an estate agree that a certain business left by the deceased shall be continued, the executor or administrator will be relieved from personal liability if business disaster follows. —Swaine v. Hemphill, 165 Mich. 561.

§ 280. ——Moneys deposited in bank which fails.

¶ 879. An administrator, as such, in the matter of selecting a depository for the funds of an estate, is required to use the care of an ordinarily prudent man, and such funds must be deposited by him in his fiduciary capacity, and not in his individual name without any designation of the trust.—In re Curtis' Estate, 162 Mich. 47.

¶ 880. An administrator who has deposited funds of an estate in a bank that has good credit and standing is not liable for the loss thereof by the subsequent failure of the bank, in the absence of negligence on his part.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 881. An administrator is not liable for the loss of money received by him in payment of a mortgage and which he had deposited in a reputable bank which failed three months and seven days thereafter, where he had the right to retain the funds in his hands for the care of his mother, it being so understood by the heirs, for she might apply at any time for her share.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 882. Where an administrator in remitting funds of the estate to an heir buys a draft in his individual name, and the bank fails, he is liable to the heir for the loss.— In re Curtis' Estate, 162 Mich. 47.

§ 281. ——Depreciation in value of securities.

¶ 883. An executor is not responsible for losses due to financial depression of securities, unless negligent in not collecting before such depression.—Cheever v. Ellis, 134 Mich. 645.

¶ 884. An executor of an estate placed certain stock of the estate in the vault of the bank of which the deceased and himself were partners. The stock had for many years been of good value and there was no evidence that it was necessary for the executor to sell the stock immediately in order to realize its value and to anticipate a possible decline in its value. After a lapse of two years the bank failed and the trustee in bankruptcy seized the stock. By the time the executor got the stock back from the trustee it had declined in value. Held, there was no ground for charging the executor for failure to sell the stock immediately after his appointment.—In re Choate's Estate, 165 Mich. 420; Bonine v. Gage, Id.

§ 282. Loss from failure to collect assets, rents or profits.

From forfeiture of equities in land, see post § 283.

Right to sue to annul decedent's fraudulent transfers, see ante §§ 97-101.
Suits against estate for claims, see ante, VI, C, 5.
Right of representative who is sole legatee and devisee to sue in individual capacity, see also ante ¶ 261.
Effect of agreement of settlement on right of representative to bring action, see ante ¶ 14.
Right of representative of obligee's estate to sue on bond drawn to decedent, his heirs or assigns, see also ante ¶ 224.
Bills for construction of wills, occasion for same, and practice thereon, see Wills, VI, J.
Right of representative to appear and answer after default judgment on published service, see Defaults § 29.
Right of representative of grantor to enforce vendor's lien, see Vendor and Purchaser, XI.

¶ 979. Personal actions do not descend to heirs, and they cannot sue on a contract made by their ancestor unless they have a cause of action on covenants running with the land.—Bourget v. Monroe, 58 Mich. 563.

¶ 980. The general administrator only can bring suit for personal property, to wit, choses in action, of which decedent died possessed, until the probate court has determined that the title or possession belongs to some one else.—Palmer v. Palmer, 55 Mich. 293.

¶ 981. Until distribution of the intestate's personalty an heir or next of kin cannot maintain any action in respect to it, unless it be founded upon his own actual possession, and against a mere wrongdoer.—Cullen v. O'Hara, 4 Mich. 132.

¶ 982. Where a bond is drawn to the obligee, "his heirs and assigns," his administrator can bring suit upon it, and the bond need not contain formal words giving him the right to sue.—Rynearson v. Fredenburg, 42 Mich. 412.

¶ 983. While an administrator may not dissipate the assets in litigation, yet injunction will not issue to forbid an administrator with the will annexed from litigating on appeal the right of a residuary legatee's estate to take the residue as against a claim of the heirs at law that the residuary legacy lapsed by reason of the death of the testator and said legatee in a common disaster; for the execution of the administrator's trust requires a correct and proper determination of the question who is entitled to receive the estate, and therefore the administrator has an interest and duty as such to defend such appeal against the heir at law.—Clifton v. Keeler, 158 Mich. 615.

§ 307. ——Replevin.

¶ 984. Replevin lies against an executor or administrator (How. St., § 5902), after the appointment of claims commissioners.—Singer Mfg. Co. v. Benjamin, 55 Mich. 330.

§ 308. ——Ejectment or possessory actions for land.

¶ 985. The heir of a decedent may maintain ejectment against third persons except where possession has been taken or demanded by the personal representative.—Marvin v. Schilling, 12 Mich. 356; and see Stewart v. Bailey, 28 Mich. 251; Ryder v. Flanders, 30 Mich. 336.

¶ 986. An executor by a will was given complete power to handle the property of the estate so as to put into effect the provisions of the will. Held, under section 9354, Comp. Laws 1897, giving an executor the right to possession of all real estate of the testator, the executor might bring an action of ejectment, since in any event the terms of the will were broad enough to put title in him.—Moody v. Macomber, 159 Mich. 657.

¶ 987. Under Comp. Laws 1897, § 9354, How. 2nd Ed., § 11065, providing that an administrator shall have the right of possession of the real estate, as well as the personal estate, but, whenever it appears, on application by the heirs, that there are no debts or liabilities outstanding and unpaid against the estate or that the personal estate is sufficient for the payment of all claims or liabilities, the probate court shall order the real estate delivered unto the possession of the heirs, the administrator has no interest in the real estate and no right of possession thereof so as to maintain an action of ejectment where there is no personal property and there are no debts or liabilities against the estate.—Howes v. Barney, 199 Mich. 569.

¶ 988. Questions of administration have no bearing in an action of ejectment for lands the right to which was in controversy before the passage of the statute which subjected real estate to administration and gave the administrator the right to hold land of which his intestate died seized.—Campau v. Dubois, 39 Mich. 274.

¶ 989. An administrator can bring ejectment for land which he has acquired by the foreclosure of a mortgage left by his intestate.—Kunzie v. Wixom, 39 Mich. 384.

¶ 990. A special administrator is without authority to defend an action for the possession of realty.—McLaulin v. Wayne Circuit Judge, 180 Mich. 96.

¶ 991. Where the statute gave an administrator the right of possession of his intestate's lands, on the death or removal of an administrator, his successor, or the administrator de bonis non, could bring ejectment to recover possession of such lands as against one claiming under the first administrator.—Kline v. Moulton, 11 Mich. 370.

¶ 992. An action of summary proceedings to obtain possession of land may be maintained by an administrator for the purpose of collecting the rents and profits with a view either to pass them over to the executor, if one is appointed, or to adjust and fair distribution of the estate if an executor is not appointed.—Wilmarth v. Reed, 83 Mich. 44.

¶ 993. The executrix and trustee of deceased can maintain summary proceedings for the possession of real property claimed to belong to the estate.—Parker v. Case, 155 Mich. 497.

§ 309. ——Waste and trespass.

¶ 994. The devisee of lands is the only person who has a right of action against a person unlawfully cutting timber therefrom after testator's death.—Newberry v. Chicago Lumbering Co., 154 Mich. 84.

¶ 995. Where timber upon an intestate's land is cut into cordwood under circumstances that made such cutting waste, the administrator cannot sue for the value as though the severance changed the timber into personalty belonging to the estate. The reversioner is the one to sue.—Howard v. Patrick, 38 Mich. 795.

¶ 996. Under a will giving the testator's wife a life estate in all his property and providing for a limitation over to others after her death, it is no concern of the personal representatives, in the absence of creditors, what use the wife makes of the property in her lifetime; that is a matter between her and those entitled to take after her, and if the estate is wasted by her they have their proper remedy.—Sutphen v. Ellis, 35 Mich. 467.

§ 310. ——Suits to remove clouds or perfect title.

Suit to remove clouds by creditor, see also post ¶ 1000.

¶ 997. It is the duty of an administrator, on his own motion, or that of a creditor under the statute, to take proper proceedings to remove a cloud from the title of land belonging to the estate which seriously interferes with its sale to pay the debts of the deceased.—Marshall v. Blass, 82 Mich. 518.

¶ 998. An administrator of a deceased purchaser of lands at tax sale has no authority as such, and without bringing in as parties the heirs on whom the title was cast at decedent's death, to maintain a bill to quiet title to the lands.—Jenkins v. Bacon, 30 Mich. 154.

§ 311. Suits by heirs or creditors on refusal or neglect of representative.

Suits in name of representative, see post § 312.

Authority and right to collect assets on refusal or neglect of representative, see ante § 84.

Suits by creditors to annul fraudulent conveyances, see ante § 98.

Suit by creditor on refusal of representative, see also ante ¶ 295.

¶ 999. If the executor neglects his duty in collecting or obtaining possession of the assets of the estate the law gives the devisees and legatees a remedy, but does not permit a devisee or legatee to represent the estate in the prosecution or defense of suits.—Hillman v. Schwenk, 68 Mich. 297.

¶ 1000. A creditor cannot sue to remove clouds to make land available for payment of debts unless by leave of the court after refusal of the representative to do so.—Marshall v. Blass, 82 Mich. 518.

§ 312. ——Suits in name of representative.

See also ante ¶ 297.

¶ 1001. A court of chancery cannot grant leave to the heirs and legatees of a decedent to use the name of an executor, without his consent, as complainant in a suit against him and a partnership of which the decedent was a member, for an accounting, since the petitioners could file a bill in their own behalf.—In re Sloman's Estate, 186 Mich. 440.

§ 313. Joint and several causes and actions.

Propriety of bringing in representative of deceased coparty to action, see also Abatement ¶ 6.

¶ 1002. Upon the death of one of two persons jointly entitled to sue in the people's name upon a sheriff's bond, action should be brought in such name for the survivor's use without joining the administrator of the deceased.—Jackson v. People, 6 Mich. 154.

¶ 1003. Ejectment cannot be revived against the legal representatives of a deceased defendant, but the action may be carried on against surviving defendants. The death of a sole defendant pending a real action abates it; defendant's right descends to his heirs, against whom a new cause of action arises.—People ex rel. Hoffman v. St. Clair Circuit Judge, 40 Mich. 351; and see Hoffman v. Harrington, 41 Mich. 223.

§ 314. Survival or abatement of cause of action.

See also ante ¶ 1003.

Revivor proceedings, see post § 320.

Actions which survive death of person, see Abatement §§ 16, 17.

Survival of action to personal representative of surviving coparty, see Abatement ¶ 5.

Effect of death on cause of action for ejectment, see Abatement § 16.

Abatement of suit by resignation and appointment of successor, see Abatement § 5.
Survival of attachment lien, see Attachment § 97.
Causes arising out of fatal injury which survive to injured person's administrator, see Death by Wrongful Act §§ 4, 12.
Devolution of cause of action on estate of plaintiff, see also Descent § 9.
Right to revive attachment against administrator of defendant, see Attachment § 90.
Prosecution of action pending against decedent at time of death, see Jud. Act, chap. LV, § 16; Comp. L. 1915, § 13879.

¶ 1004. A statutory provision that a cause of action shall survive is equivalent to declaring that an executor may sue upon it.—Rogers v. Windoes, 48 Mich. 628.

¶ 1005. The administrator of an intestate whose death resulted from injuries sustained from a defective highway may, under the general law (How. St., §§ 8313, 8314), bring an action against the municipality guilty of nonrepair; this is not forbidden by Laws 1887, Act No. 264, § 5 (How. St., § 1446g), relating to "bodily" injuries to the person suing and restricting the right of action.—Racho v. City of Detroit, 90 Mich. 92; Roberts v. City of Detroit, 102 Mich. 64.

¶ 1006. A cause of action against a widow for the destruction of unrecorded deeds of lands to her husband, title to which she subsequently secured in her own name abates at her death, both at common law and under How. St., § 7397, being in substance an action for fraud.—Stebbins v. Dean, 82 Mich. 385.

¶ 1006a. Where the garnishee has died without making disclosure and before being defaulted the proceedings cannot be revived against his administrator since he could make no disclosure.—White v. Ledyard, 48 Mich. 264.

§ 315. Time for suing and effect of delay or vacancy in administration.

Time for presentment of claims against estate, see ante, VI, C, 2.
Delay and laches in suing to restrain dissipation of estate, belated discovery of will as excuse, see Equity ¶ 184.

¶ 1007. An action by an administrator may be maintained though commenced nearly four years after his appointment, there being no plea to the jurisdiction and no showing that the estate was closed or that the administrator had been discharged.—Card v. Fowler, 120 Mich. 646.

¶ 1008. The statute fixing the period in which actions may be maintained by or against the representatives of decedents (section 9737, Comp. Laws 1897) at any time within two years after the granting of letters testamentary or of administration, does not apply to such causes of action as are not barred within two years after the granting of such letters.—Morse v. Hayes, 150 Mich. 597.

§ 316. Set-off and recoupment.

Set-offs against claims in general, see ante § 157.
Presentment of set-offs against claims, see ante § 165.
Necessity for representative to offer set-off to be entitled to costs, see post ¶ 1046.
Right of defendants in action by representative to set-off claims against estate, see Jud. Act, chap. LV, § 18; Comp. L. 1915, § 13881.

¶ 1009. Comp. Laws 1897, § 9375, which provides that the commissioners of an estate shall set-off the claims of the deceased against a creditor presenting his claim, and Comp. Laws 1897, § 9383, providing that nothing in the chapter shall be construed to prevent an action by an executor against any other person for a debt or claim, do not operate to compel the representative of the estate to sever a joint action which he has in order to set off a claim he has against one of the parties.—Graham v. Graham, 171 Mich. 307.

¶ 1010. One who purchases personal property from an administrator under an express warranty as to its quality may recoup damages arising from a breach of the warranty in an action for the purchase price since it is not a claim against decedent to go before commissioners.—Boltwood v. Miller, 112 Mich. 657.

§ 317. Arbitrations, compromises and confessions.

Admissions of rights against estate or stipulation for allowance of claim, see ante § 185.
Compromise, of rights by representative in management, or disposal of personal property, see ante § 123.
Consent to proceedings or action taken or waiver of objections as consideration for compromise, see Contracts § 117, ¶ 511.

¶ 1011. There is no statute expressly or impliedly preventing an administrator from compromising or adjusting a claim of the estate against a third person without suit, or compromising or settling such claim when a suit is pending.—Grece v. Helm, 91 Mich. 450.

¶ 1012. A compromise by a special administrator, under the sanction of the probate court, of the estate's claim against a third person for damages in litigation at the time of intestate's death, may be sustained where such claim is the only property of the estate and where there was no money to meet the expenses of suit.—Grece v. Helm, 91 Mich. 450.

¶ 1013. Where an administrator is empowered by the heirs to settle all claims and accounts, he has authority to compromise all claims for trespass in illegally cutting timber from the land in violation of the terms of a contract, and may waive all rights of forfeiture of the cut timber reserved by the heirs in the contract.—Newberry v. Chicago Lumbering Co., 154 Mich. 84.

¶ 1014. An administrator is not bound to defend against a just claim, and he may bind the estate by consenting to judgment when the suit is already pending.—Shelden v. Warner's Estate, 59 Mich. 444.

¶ 1015. One who has been appointed administrator upon a petition showing that he is a creditor and that the estate's property consists solely of a litigated claim cannot, where he has not objected to a compromise and settlement of such claim by a special administrator under order of probate court and has not made demand for the fund so obtained, contend afterwards that the settlement was fraudulent and proceed with litigation.—Grece v. Helm, 91 Mich. 450.

§ 318. Actions and suits against representative.

Actions against representative on claims, see ante, VI, C, 5.
Suits against representatives on their personal liability to creditors, see ante, IX.
Suits for accounting against representative, see post, XII, B.
Suits against representative for distribution or for shares in estate, see post, XIII, B.
Action against representative on bond, see post §§ 391-393.
Proceedings for removal of representative, see ante §§ 43-45.
Suits against representatives and others to annul decedent's fraudulent transfers, see ante §§ 97-101.
Replevin against representative, see also ante ¶ 984.
Trover against representative for taking crops, see also ante ¶ 207.
Suit of creditor against representative to annul fraudulent conveyance, see also ante ¶ 296.
Trover by devisee against representative for conversion of growing crops, see also ante ¶ 395.
Suits against representatives and others to annul fraudulent transfers to decedent, see Fraudulent Conveyances, V.
Representatives of deceased agent as proper defendants to accounting bill by principal, see Agency ¶ 557.
Actions incident to partnership settlements against representative of deceased partner, see also Partnership, VII.
Right of administrator to maintain interpleader, effect of taking sides, see Interpleader.

¶ 1016. Replevin may be brought against an executor who arbitrarily retakes specific bequests, having assented to the legatee's possession.—Eberstein v. Camp, 37 Mich. 176.

B. PLEADING AND PRACTICE.

§ 319. In general.

Revivor proceedings, see post § 320.
Representative or individual name or capacity as party, see post § 321.
Pleadings and averments, see post §§ 322, 323.
Evidence and burden of proof, see post § 324.
Judgments and decrees, see post § 325.
Necessary parties plaintiff in suit by heirs to annul transfers to an administrator, see also ante ¶ 977.
Enforcement of duty of executor or other person by contempt proceedings, power of probate courts, see Contempt § 19.
Appearance as administrator as waiver of objection that he is not joined as party, see Appearance § 11.

¶ 1017. An administrator is not to be treated as at all times before the court and bound at his peril to know of proceedings affecting him.—Hilton v. Briggs, 54 Mich. 265.

§ 320. Revivor proceedings.

Survival or abatement of cause of action, see ante § 314.
Practice under the statutes to substitute parties in abated suits, see Abatement §§ 19, 20.
Former chancery practice for revivor of suits, see Equity § 233 et seq.
Bills of revivor and supplement after decree in equity, see Equity, XI.
Revival and continuance of action under Survival Act, see Death by Wrongful Act § 16.
Filing proofs of death and appointment of administrator as prerequisite to revival, see Abatement § 19; and see Equity.
Continuation of suit against surviving codefendant without bringing in representative, see Abatement § 19.
Revivor in name of foreign executor, see Abatement ¶ 89.
Substitution of parties on appeal or on remand for revivor, see Appeal §§ 515, 523.
Necessity of additional or new pleadings on revival, see Abatement § 20.
Amendments or new pleadings on revival of suit or decree in equity, see also Equity § 236.
Amendments permissible on revival of suit, see Abatement ¶ 99.
Amendment of specific performance bill by administrator on appeal to substitute heirs of purchaser, see also Equity ¶ 559.
Personal representative as proper party on revival of foreclosure suit, see Abatement ¶ 103.
Revival and new parties on divorce appeal after death of party, see Divorce ¶ 390.
Right to revive garnishment proceedings against personal representative of garnishee, see Garnishment, VII.

¶ 1018. The proceedings for revivor after plaintiff's death are statutory and ex parte;

but proof should be filed of the death and of the administrator's appointment.—Vickery v. Beir, 16 Mich. 50.

¶ 1019. On a nonresident defendant's death after entry of judgment suit may be revived and writ of error sued out in the name of executor appointed on Michigan probate of his will, even though it does not appear that testator had any property in this state.—Hubbell v. Blandy, 87 Mich. 209.

§ 321. Representative or individual name or capacity as party.

Suit for collection of assets in individual or representative capacity, see ante § 87.
Suits by creditors and distributees in name of representative, see ante § 312.
Suing in name of representative without his consent, see ante § 312.
Pleading representative capacity, see post ¶¶ 1024, 1025, 1027, 1028.
Right to sue in individual name for revival of mortgage assigned to representative by decedent, see ante ¶ 870.
Effect of admissions in personal or representative capacity to bind person in other capacity, see Evidence § 372.
Suing or defending in representative and also in individual capacity in same action, see Parties.
Necessity of bond in both capacities where representative appeals as such and as individual, see Appeal § 86, ¶ 382.
Power of executor or administrator to sue in own name without joining persons represented, see Jud. Act, chap. XII, § 2; Comp. L. 1915, § 12352.

¶ 1020. An administrator may sue either in his individual or his representative character for money had and received after the death of his intestate for the use of the estate, but for money received in the intestate's lifetime he must sue in his representative character.—Barnum v. Stone, 27 Mich. 332.

§ 322. Pleadings and averments.

Traverse and admissions of right and capacity, see post § 323.

¶ 1021. Declaration by administratrix counting upon lease by intestate of sheep to defendant, and alleging breach and resultant damage to intestate or his personal representative, and defendant's failure to deliver to plaintiff as such administratrix wool and sheep belonging to intestate, states a cause of action to plaintiff in her representative capacity.—Wolscheid v. Thome, 76 Mich. 265.

¶ 1022. A declaration by executors must allege the promise to have been made to the testator in his lifetime to admit proof of that fact.—Merritt v. Keeler, 75 Mich. 314.

¶ 1023. In assumpsit by executors, evidence of a promise express or implied made to testator in his lifetime is inadmissible unless such promise is alleged in the declaration.—Merritt v. Keeler, 75 Mich. 314.

¶ 1024. The addition "administratrix upon the estate of ——, deceased," to the plaintiff's name in the beginning of a declaration, does not affect the substance of the pleading or the essential rights of the parties unless the representative relation is otherwise set forth in the declaration.—Barnum v. Stone, 27 Mich. 332.

¶ 1025. An averment that A. and B. were appointed and acted as administrators, without alleging that they accepted the trust, is sufficient.—Manning v. Drake, 1 Mich. 34.

¶ 1026. A bill to foreclose a mortgage in which complainants describe themselves as executors of the last will and testament of the mortgagee, but without setting out his death and in no way alluding to the probate of the will, shows no right of action in complainants.—Middlesworth v. Nixon, 2 Mich. 425.

¶ 1027. In a suit for personal injuries, an allegation that defendant is an administrator does not necessarily preclude his personal liability, since such allegation may be treated as descriptio personæ.—Bannigan v. Woodbury, 158 Mich. 206.

¶ 1028. When a plaintiff, as administratrix, declares on the common counts in assumpsit, and states an indebtedness to the plaintiff, without showing any indebtedness to the intestate, and does not, except by the addition of the words "administratrix upon the estate," etc., at the commencement of the declaration, show that the plaintiff brings suit as administratrix, the several counts must be construed as causes of action accruing to the plaintiff in her individual character.—Barnum v. Stone, 27 Mich. 332.

§ 323. ——Traverse or admission of right and capacity.

Plea that plaintiff is not executor, whether in abatement or in bar, see Pleading, III, B.

¶ 1029. Plea of the general issue in an action by an administrator or executor admits plaintiff's representative character.—Vickery v. Beir, 16 Mich. 50; Bachelder v. Brown, 47 Mich. 366.

¶ 1030. The rule that the plea of the general issue admits the representative character of the plaintiff does not apply to a case of the revival of a suit in the name of an administrator after plea filed, and in such a case the representative character is in issue.—Vickery v. Beir, 16 Mich. 50.

¶ 1031. After a plea of the general issue the plaintiff's death was suggested of record and the cause revived in the name of an administrator. Held, that defendant could

show that the administration was granted in another state.—Vickery v. Beir, 16 Mich. 50.

¶ 1032. In a suit for personal injuries against an administrator, a demurrer to the declaration alleging that the administrator was in possession of real estate is held to admit a lawful possession.—Bannigan v. Woodbury, 158 Mich. 206.

§ 324. Evidence and burden of proof.

Evidence and presumptions as to assets and title of decedent in suits to collect assets, see ante § 102.
Necessity and sufficiency of objection to evidence, see Trial, V.
Saving questions for review on admissibility of evidence, see Saving Questions.
General law of evidence, including competency of particular kinds or means of proof, see Evidence.
Best evidence as to matters of administration, probate and settlement, see Evidence §§ 126, 134.
Persons who may waive privilege against testimony about transactions with decedent or against other privileged communications, see Witnesses, IV, V.

¶ 1033. An administrator defending in a suit on a claim against the estate, must regard the rules of law which regulate the practice in court and the burden of proof, though he cannot waive defenses.—Farnsworth v. Fraser, 137 Mich. 296.

¶ 1034. Executors cannot prove their office by general reputation in an action brought by them.—Middlesworth v. Nixon, 2 Mich. 425.

¶ 1035. An administrator suing to collect a claim need not go back of his letters to show his title to the office.—Farrand v. Caton, 69 Mich. 235.

¶ 1036. In a suit by an administratrix upon an oral contract made by her decedent, an objection to the admission in evidence of the letters of administration on the ground that no such facts and circumstances were shown to the probate court as to authorize the appointment of the plaintiff as special administratrix was held untenable; the regularity of the appointment was not open to inquiry on the trial of such an issue. Evidence of the probate order permitting the plaintiff to prosecute the suit being objected to on the ground of irregularity in the probate proceedings, this objection was also held untenable.—Cook v. Stevenson, 30 Mich. 242.

§ 325. Judgments and decrees.

Invalidity against estate of judgment rendered in action against representative for personal liability, see ante ¶ 843.
Effect of judgment for or against personal representative to bar or conclude heirs or distributees, see Former Adjudication, V.
Appeals to circuit court from orders and decrees setting aside fraudulent transfers, see Probate Courts, III.
Writ of error from circuit judgment on appeal to supreme court, see Appeal.

¶ 1037. Where a defendant dies pending the trial, and the suit is revived against his executor, a judgment for plaintiff therein does not, although the executor admits having the funds on hand with which to pay the same, render the executor directly and absolutely accountable to plaintiff for the amount, so as to enable a creditor of the latter to maintain garnishment proceedings against the executor before distribution of the estate is ordered by the probate court. Whether garnishment would lie under such circumstances after an order of distribution, quære.—Hudson v. Saginaw Circuit Judge, 114 Mich. 116.

C. COSTS AND ALLOWANCES.

§ 326. In general.

Contested cases, see post § 327.
Denial to representative for neglect or default, see post § 328.
Needless or forced litigation, see post § 329.
Amount and items allowable, see post § 330.
Award, order and enforcement of cost judgment, see post § 331.
Reimbursement or charge on accounting for expenses of litigation, see ante, X, D.
Costs on bills for construction of wills, see Wills, VI, J.
Costs on probate or contest of will or bill or proceeding to revoke probate, see Wills, V.
Costs on error from allowance or denial of claim, see Costs, V.
Denial of costs in supreme court for mutual errors, see Costs ¶ 377.
Charging appeal or chancery costs on fund involved, see Costs §§ 39, 134.
Costs against administrator individually on appeal in partition suit, see also Costs ¶ 542.
Allowance of costs out of fund in mandamus to compel order of payment of widow's allowance, see Costs § 48.
Costs in contested matters in probate and circuit court, see Jud. Act, chap. LXV, § 20, Comp. L. 1915, § 14164.
Allowance to representative in his account for costs awarded against him in estate litigation, see Jud. Act, chap. LXII, § 12, Comp. L. 1915, § 14115.

¶ 1038. The discretion of the court in allowing costs against an executor personally will not be interfered with on appeal in the absence of a showing of abuse of such discretion.—Webb v. Peck, 131 Mich. 579.

¶ 1039. The heirs of a widow, who through litigation with her administrator, discovers several thousand dollars which augmented her estate, and which she should have included in the estate of the deceased widow's

husband, are entitled to an allowance for the expense of litigation in an accounting between the heirs of the husband and the estate of the widow, the result being that all were enabled to share in the fund ultimately. Maney v. Casserly, 134 Mich. 252.

¶ 1040. On the ground that the mortgagor had fulfilled the conditions of the mortgage costs were allowed against an administratrix on dismissal of her bill to foreclose a mortgage.—Daniels v. Eisenlord, 10 Mich. 454.

¶ 1041. Costs may be paid out of the estate where a finding as to a distribution under a will has been set aside on the appeal of one of the legatees.—McClintock's Appeal, 58 Mich. 152.

¶ 1042. In the case of a bill to establish an equitable title in lands belonging to the estate of a deceased person, it appearing to have been prosecuted in good faith, the taxable costs were decreed to be a charge upon the estate, as part of the necessary expenses in its administration, though the relief asked by the bill was denied.—Van Wert v. Chidester, 31 Mich. 207.

§ 327. Contested cases.

¶ 1043. A case is "contested" within Comp. L. 1897, § 681, giving the circuit court power in its discretion to award costs to either party to be paid by the other or out of the estate, as justice and equity shall require on appeal from probate, where an order to pay over residue was appealed to the circuit, and there reversed, followed by reversal of the judgment of the circuit court in the supreme court and a dismissal of the appeal in the circuit court after remand; it is not necessary that the case go to final determination before it can be regarded as "contested."—Universalist General Convention v. Van Buren Circuit Judge, 141 Mich. 64.

§ 328. Denial to representative for neglect or default.

¶ 1044. Costs were denied to a representative in a foreclosure suit, where he might have set off the mortgage debt against a claim presented by the mortgage debtor as a creditor of decedent and forbore to do so.—George v. Ludlow, 66 Mich. 176.

¶ 1045. Costs were allowed against a mortgagee's executor who unsuccessfully defended on the merits of a bill to compel discharge of an outlawed mortgage.—Kingman v. Sinclair, 80 Mich. 427.

¶ 1046. An administrator failing to offer set-offs should be denied subsequent costs.—George v. Ludlow, 66 Mich. 176.

¶ 1047. Where it is sought to charge an executor for failure properly to retain in his possession and sell certain stock of an estate, and he fails to attempt to get the hearing continued until he can get the stock back from a trustee in bankruptcy who has wrongfully seized it, the executor is not entitled to costs on winning his case on appeal.—In re Choate's Estate, 165 Mich. 420; Bonine v. Gage, Id.

§ 329. Needless or forced litigation.

¶ 1048. Costs are allowed as against an administrator individually where he has vexatiously appealed.—Showers' Estate v. Morrill, 41 Mich. 700.

¶ 1049. Where the administrator of an intestate brought useless litigation in respect to the estate, costs allowed to the opposite party were made a charge against him personally and not against the estate.—Hill v. Mitchell, 40 Mich. 389.

¶ 1050. Where an executor resisted a claim against the testator in the circuit court, and, after decision by the court allowing it, removed the case to the supreme court, and that court was of opinion that there was no reasonable ground for resisting the claim, costs of the supreme court were awarded to the claimant.—Dodge v. Stanton, 12 Mich. 408.

¶ 1051. Where a petition was filed for a writ of possession under the decree in a partition suit, and the persons who were acting as administrators of the common ancestor were made defendants in their individual capacity, and claimed the right to possession only as such administrators, notwithstanding the repeal of the statute conferring that right, it was held that if it appeared that they did not take and hold the possession in good faith, or for any legitimate purpose of administration, costs would be awarded against them individually, and they would not be entitled to charge the same against the estate.—Campau v. Campau, 25 Mich. 127.

¶ 1052. On dismissal of an appeal from an allowance made by the probate court for the support of a widow of a decedent, costs will be granted against the executor who has appealed, personally, and will not be charged to the estate, it having been held repeatedly that such an order is not appealable.—In re Koch's Estate, 121 Mich. 667.

¶ 1053. Costs were denied to defendant on a bill brought by executor as such and also as individual with another to determine who were the heirs of plaintiffs' decedent and for a construction of the will, where the bill was necessitated by defendant's claim, as an adopted child of the sister of decedent, to inherit through said sister a portion alleged to have lapsed into intestacy, and where it was decided that even if it did so lapse defendant could not by adoption inherit from another's estate by representation through the adopting parent.—Van Derlyn v. Mack, 137 Mich. 146.

§ 330. Amount and items allowable.

¶ 1054. Courts of equity have no power to charge decedents' estates with expenses (services of counsel) beyond taxable costs of proceedings for the construction of wills; the making of allowances is the province of the probate court.—Toms v. Williams, 41 Mich. 552; Waldron v. Waldron, 45 Mich. 350.

¶ 1055. The discretion of the circuit judge, in causes contested in the circuit court upon appeal from the probate court, to allow to either or both parties their costs to be paid out of the estate in controversy, is limited to the awarding of taxable costs, and an award to an executor of his actual expenses incurred upon the trial is unauthorized.—Brilliant v. Wayne Circuit Judges, 110 Mich. 68.

§ 331. Award, order and enforcement of cost judgment.

Execution for costs, see Jud. Act, chap. LXV, § 21, Comp. L. 1915, § 14165.

¶ 1056. An execution for costs properly issues against an excutor or administrator where, in the exercise of its discretion, the court makes no special order as to costs.—In re Colburn's Estate, 153 Mich. 206.

XII. ACCOUNTING AND SETTLEMENT OF ESTATE.

A. IN GENERAL; RIGHT, DUTY AND TIME.

§ 332. Nature and scope.

Right and duty in general, see post §§ 333-335.

Time for accounting, delay, laches and estoppel, see post § 336.

Procedure and practice and stating the account, see post, XII, B.

Exceptions, contests, hearings, surcharge and falsification, see post, XII, C.

Decree and its effect and supplemental accounting, see post, XII, D.

Accountability for corepresentatives, predecessors and surviving partner's acts and omissions, see ante, X, E.

Accounting of testamentary trustee, see Trusts, XI.

¶ 1057. Proceedings to obtain and close an administrator's account are for the purpose of placing on record an exact showing of the assets which he has had and of their disposal, and the resulting balance; and the charges against him must include such sums as the estate has lost through his misconduct or default.—Loomis v. Armstrong, 49 Mich. 521.

¶ 1058. The statute relating to the accounting of executors and administrators contemplates two distinct things, the rendering and the settlement of account. The settlement is not merely to ascertain what items should be placed on the debit side of the account, subject to proof, on a subsequent proceeding, that as between him and the estate the administrator ought not to be charged therewith, but rather to judicially liquidate and settle the affairs of the trust and determine the relative rights of the estate and the administrator; and the proceeding involves an adjudication upon each item.—Hall v. Grovier, 25 Mich. 428.

§ 333. Right and duty in general.

Accounting for deceased representative, guardian or trustee, see post § 334.

Accounting between corepresentatives, see post § 335.

Necessity for original administrator filing final account before appointment of administrator de bonis non, see ante ¶¶ 23, 24.

Estoppel to deny necessity for accounting, see ante ¶ 174.

Failure of attorney as executor to account as ground for disbarment, see Attorneys ¶¶ 21-26.

Duty of representative to render annual account, see Jud. Act, chap. LXII, § 8, Comp. L. 1915, § 14111.

¶ 1059. A cestui que trust, who received property on a final settlement with an administrator with the will annexed, is not estopped to require an accounting from the trustee and executor who had resigned.—Wooden v. Kerr, 91 Mich. 188.

¶ 1060. An executor who has in his hands a large fund belonging to the estate, as shown by his last accounting to the probate court, has not "wholly settled" the estate (How. St., § 5957); and therefore may be required by such court, under How. St., § 6809, to render an accurate account of all property in his hands as such executor, although the legatees have made him a trustee of the entire estate for the purpose of carrying out the provisions of the will.—In re Sweetser's Estate, 109 Mich. 198.

¶ 1061. Those who have assumed without authority to administer an estate, and claim to have administered fully, and are called upon in a court of probate or of equity for an accounting, are estopped from denying their representative character and their liability to account accordingly.—Damouth v. Klock, 29 Mich. 289.

¶ 1062. A surety on the bond, given by a residuary legatee, as executor, to secure payment of the testator's debts and legacies, cannot maintain a bill in equity against him and the cosureties for an accounting for assets of the estate, the appointment of a receiver, and an administration of the estate by the chancery court.—McElroy v. Hatheway, 44 Mich. 390.

§ 334. ——Accounting for deceased representative, guardian or trustee.

See also post ¶ 1235.

Liability of sureties of representative respecting duties to estate of which decedent was executor, see post ¶ 1231.

¶ 1063. An executor's obligation to account in the proper court rests, on his decease, upon his personal representative, who should observe the same rules in so doing as the executor, and should be held to the same strictness, so far as he has knowledge, or with a reasonable degree of diligence can obtain the same.—Perrin v. Lepper, 72 Mich. 454.

¶ 1064. The administrator of a deceased guardian may, under How. St., § 6760, be cited to render an account of the guardianship.—Tudhope v. Potts, 91 Mich. 490.

¶ 1064a. Equity has jurisdiction to require the executors of the estate of a deceased guardian to account for funds of the ward fraudulently appropriated by the deceased, and to decree a sale of lands in the possession of his heirs and devisees to satisfy the amount found due, although the period within which the probate court might act in relation to the claim has expired.—Allen v. Conklin, 112 Mich. 74.

§ 335. ——Accounting between corepresentatives.

See also ante ¶ 961.

Accountability for corepresentatives and relative liabilities, see ante, X, E.

¶ 1065. Equity has jurisdiction of a suit by one executor against his coexecutor, who has received all of the statutory commissions, for an accounting and division of such commissions.—Speirs v. Wisner, 88 Mich. 614.

¶ 1066. One of three executors, who managed the business and had the responsibility of administering the estate, received the statutory commissions. One of his coexecutors resided in another state, and the other, the widow, who was absent much of the time during the settlement of the estate, obtained an assignment from the nonresident executor of his claim to such commissions, and filed a bill to compel the managing executor to pay her two-thirds of the commissions he had received, which bill was dismissed.—Speirs v. Wisner, 88 Mich. 614.

§ 336. Time for accounting, delay, laches and estoppel.

Disability of administrator to plead laches against heirs seeking accounting where he has not suffered harm by delay, see also Equity ¶ 210.

Trust relationship as preventing bar of accounting, see also Accounting Suits ¶ 12.

¶ 1067. Where the estate has not been legally closed the probate court has jurisdiction of an heir's petition for an accounting by the administrator, such petition being filed in the first year of his majority and within eight years after the administrator claims to have made distribution.—Loomis v. Armstrong, 63 Mich. 355.

¶ 1068. A settlement by a special guardian with his ward, they also being administrator and heir, after the latter's majority, in which the former's overpayment to the widow during minority is ratified by the heir, estops the latter from contesting the administrator's account because of such overpayment; since the settlement left the heir uninjured by the overpayment.—Loomis v. Armstrong, 63 Mich. 355.

¶ 1069. A suit by the deprived heirs for an accounting against the administrator and heirs of the widow, brought after the closing of the husband's estate and at the time of final accounting of the widow's estate, is not barred by laches on account of the failure of the heirs to discover the death of the husband, in view of the unjust and unlawful claims of the heirs of the widow who had converted her husband's entire estate and taking into consideration that the property is practically all in the control of the court on account of litigation between the heirs of the widow and her administrator.—Maney v. Casserly, 134 Mich. 252.

B. PROCEDURE AND PRACTICE; STATING THE ACCOUNT.

§ 337. Jurisdiction and proceedings in general.

Accounts involving rights of infants, see post § 338.

Accounting suits in equity, see post § 339.

Testamentary trust accounting, see post § 340.

Application, other pleadings and procedure, see post § 341.

Method of stating and items to be included, see post § 342.

Variance from inventory or property receipted for, see post § 343.

Mistakes, amendments and corrections, see post § 344.

Procedure on refusal of representative to account, see post § 345.

Right, duty and time for accounting, see ante, XII, A.

Exceptions, contests, hearings, surcharge and falsification, see post, XII, C.

Decree and its effect and supplemental accounting, see post, XII, D.

Relative jurisdiction of probate and circuit courts in accounting, see ante § 13.

Necessity of making representative party in suit for accounting by testamentary trustee, see Trusts, XI.

Accounting for property returned by representative pursuant to replevin judgment against him, see Jud. Act, chap. LIV, § 19, Comp. L. 1915, § 13863.

Examination by court of accounting representative, see Prob. Ct. Rule 11, § 3.

¶ 1070. Where certain tribunals have acquired jurisdiction over an estate and its representative within their territory, the representative is bound to account to them only for all assets, and the courts of other states cannot interfere.—Woodruff v. Young, 43 Mich. 548.

¶ 1071. Assent on the part of the heirs to the settlement of an estate and the distribution of the funds by the administrator does not relieve him from his duty to file his account and obtain settlement with the probate court.—Nowland v. Rice's Estate, 138 Mich. 146.

¶ 1072. A claim for an accounting against an estate on a contract creating a trust relation between claimant and decedent, where the transactions were all completed during decedent's lifetime, and were of such a character that, had he lived, the entire controversy could have been settled in a court of law, may be presented in probate court, without a resort to equity.—Sullivan v. Ross' Estate, 113 Mich. 311.

¶ 1073. Under How. St., § 6760, providing that the judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of deceased persons, the probate court has authority to determine whether a promissory note given by an executor to a legatee was accepted by the latter in payment of her legacy, upon a petition by the legatee to require the executor to account for her interest in the estate even though the circumstances of the case are such that equity would also have had jurisdiction of the controversy.—Fingleton v. Kent Circuit Judge, 116 Mich. 211.

¶ 1074. Under Comp. Laws 1897, § 9438, allowing extra compensation to an administrator for extraordinary services, the discretion of the probate judge is to control, and the administrator is not entitled to a jury trial in fixing the amount on appeal from the settlement of the account.—In re Mower's Appeal, 48 Mich. 441; Loomis v. Armstrong, 63 Mich. 355; Wisner v. Mabley's Estate, 70 Mich. 271; In re Brewster's Estate, 113 Mich. 561; In re Fischer's Estate, 158 Mich. 1.

§ 338. Accounts involving rights of infants.

See also post ¶ 1108.

¶ 1075. The probate court should carefully scrutinize an executor's accounts where wards are interested, and should not accept without examination a stipulation between guardian and executor.—Sanborn v. St. Clair Circuit Judge, 94 Mich. 519.

§ 339. Accounting suits in equity.

Suit by representative for accounting of money recovered in action for decedent's death, see also ante ¶ 232.

¶ 1076. Equity has jurisdiction of a bill for an accounting against the administrator and the distributees of the estates of a husband and his widow upon the showing of fraud committed by the widow and the administrator as to the listing of the husband's heirs, the final improper payment of the entire estate to the widow and upon her death a conversion by the administrator.—Maney v. Casserly, 134 Mich. 252.

¶ 1077. A bill in equity for an accounting in an estate based on the fraud of the widow and the administrator, is not an appeal from the probate court and is not barred by the statute of limitations applied to such cases.—Maney v. Casserly, 134 Mich. 252.

¶ 1078. A suit by a contract purchaser of land against the executors of the estate of one grantor, who is the wife of the other grantor, and against the special administrator of the estate of the husband to compel a conveyance of the land and to determine in what proportions the respective estates are entitled to the balance due on the contract, which was tendered in court, and in which the representatives of the wife's estate seek an accounting against the husband's estate to determine how much the husband's estate is indebted to the wife's estate for moneys collected on such contract during the lives of the parties, is not a suit commenced by an administrator within Comp. Laws 1897, § 9383, How. 2nd Ed., § 11094, so as to give a chancery court jurisdiction of the suit so far as it relates to the accounting between the estates.—Flammer v. Cullen, 194 Mich. 585.

¶ 1079. Where a bill brought for an accounting against an administrator after the estate is closed does not allege diligence on the part of complainant in protecting her rights; nor that she discovered the frauds complained of too late to have them corrected in the probate court; nor that she was ignorant of their existence; nor that they were passed upon by the probate court; nor that she did not have due notice and opportunity to be heard in the probate court; and there is no explanation as to why she did not appeal to the circuit court or petition the probate court, the bill is properly dismissed.—Davis v. McCamman, 165 Mich. 287.

§ 340. Testamentary trust accountings.

Testamentary trusts not involving executorial matters, see Wills, VI, F.

Accountings by trustees not involving executorial matters, see Trusts, XI.

¶ 1080. A testator left most of his estate in the shape of partnership interests in various businesses. He appointed a son as executor, who carried on the various enterprises for many years. At the end of some thirteen years all the legatees joined in a paper authorizing the said executor to hypothecate the assets of the estate in securing the debts of the enterprises. After some

twenty years longer, the legatees brought a petition for an accounting. The defendant executor demanded that the probate judge first find whether the aforesaid authorization did not terminate the relation of executor and create that of trustee, and if so, to deny an accounting. Held, the probate court acted within its rights in determining both questions at one hearing, and disposing of them in one decree for an accounting. —Stevens v. Ottawa Probate Judge, 156 Mich. 526.

¶ 1081. An administrator of an estate who is appointed a trustee of the estate by a court of chancery, in accordance with proceeding brought by the widow, is required to account as trustee to the court appointing him, and not to the probate court, as the latter court should not require an accounting as if no proceedings were had in the chancery court, but when it appears that the chancery court never had authority to appoint the administrator as trustee because six children to whom the estate belonged, subject to use by the mother, were not made parties to the chancery proceeding, and had no notice of the appointment as trustee, the probate court has jurisdiction of the estate and the administrator, and since such jurisdiction has not been devested, the administrator may be required to settle his account in the probate court.—Look v. Durfer, 121 Mich. 462.

§ 341. Application, other pleadings and procedure.

Accounting bill by administrator of wife against husband in possession of her property, see also Accounting Suits ¶ 13.
Multifariousness of bill for accounting and also to adjust personal equities of complainant with executor, see Equity ¶ 280.
Retention of suit to annul deed in order to require accounting of personal representative because land has passed into bona fide purchaser's hands frustrating rescission, see also Equity ¶ 874.

¶ 1082. In proceedings for the settlement of an administrator's account no technical rules of pleading should be enforced and the rules of evidence should be liberally construed in the reception of testimony.—Loomis v. Armstrong, 63 Mich. 355.

¶ 1083. An application to a probate court to call an administrator to account, averring that the applicant is heir of the deceased, and showing the proper facts entitling her to an account if she is such heir, is sufficient to justify action by the probate court thereon, though verified only by the oath of the applicant's attorney, who swears to the facts averred on information and belief, and without giving any reason why the oath is not made by the applicant himself.—In re Robinson's Estate, 6 Mich. 137.

¶ 1084. Though the probate judge may properly require an absolute verification of anything whereon his action is required upon the merits, yet when the party complained of is cited to appear, and has an opportunity to controvert the facts, there is no rule which renders it imperative on the probate court to decline receiving an unsworn petition—e. g., one to compel an account from an administrator.—In re Robinson's Estate, 6 Mich. 137.

¶ 1085. Where, in the case of a petition for an accounting verified only by the petitioner's attorney the respondent opposes the relief asked on the ground that the petition is not properly verified, and makes no issue of fact, there is nothing for the court to pass upon but the sufficiency of the allegations in the petition.—In re Robinson's Estate, 6 Mich. 137.

¶ 1086. A bill by a decedent's heirs to vacate orders allowing his administrator's final account and discharging such administrator, and to compel him to account,—such bill being based on fraudulent management of the estate,—requires an answer from the administrator; but it is demurrable as to his sureties, who, though made parties, are not alleged to have been conversant with the fraud or to have been bound to know of it.—Grady v. Hughes, 80 Mich. 184.

§ 342. Method of stating and items to be included.

Disbursement items to be included in account, see also ante ¶¶ 395, 396.
Necessity of accounting for proceeds of sale of partnership property where needed to satisfy firm debts, see also ante ¶ 419.
Costs and allowances in actions and suits, see ante, XI, C.
With what representative is chargeable in his accounts, see Jud. Act, chap. LXII, § 1; Comp. L. 1915, § 14104.
Accountability of representative for proceeds of sale of personalty, see Jud. Act, chap. LXII, § 4; Comp. L. 1915, § 14107.
For what debts due estate representative not accountable, see Jud. Act, chap. LXII, § 5; Comp. L. 1915, § 14108.
Form for representative's accounts, see Prob. Ct. Rule 11, § 1.

¶ 1087. An administrator, in accounting, should give, as far as possible, all the separate items of his disbursements.—Loomis v. Armstrong, 49 Mich. 521.

¶ 1088. An executor charged with the investment of an estate cannot render an account for the principal and disregard the interest that should have been earned.—Cheever v. Ellis, 134 Mich. 645.

¶ 1089. Where, before the time for appeal expired, an executor, without consulting his coexecutors or the residuary legatee, and without ascertaining whether an appeal was intended, paid over a claim allowed by the probate court, the amount cannot be allowed

on his account while the appeal is pending.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 1090. A receipt running from a supposed distributee to an administrator does not bind him to account for the money represented but not in fact turned over, where it rested on no consideration and where such person was not in law entitled to share in the estate.—In re Doyle's Estate, 147 Mich. 544.

§ 343. Variance from inventory or property receipted for.

Variance between assets stated in account and amount realized thereon by representative, see post ¶ 1127.

Variance in account as to receipt for share of estate given to representative by one not entitled to share, see ante ¶ 1090.

Accounting by representative for personalty as same is appraised, see Jud. Act, chap. LXII, § 2; Comp. L. 1915, § 14105.

¶ 1091. Where the assets of an estate consist in part of an interest in a mercantile business carried on by a surviving partner, and it appears that the executors have administered the estate with care and economy, they cannot, on a bill for an accounting filed by the heirs, be held accountable at the inventory figure, for the assets received.—Gaskill v. Weeks, 154 Mich. 223.

¶ 1092. The action of a special administrator in receipting as such special administrator for the funds in dispute was not conclusive that such funds were the property of the estate; where, in appeal from the settlement of the final account of such administrator, it appears that the decedent, shortly before his death, indorsed certain certificates of deposit and a bank book, of which he was the owner, for the purpose of making a gift causa mortis, and that when such administrator attempted to collect them, the bank, having been notified by the heirs not to pay them except to the properly authorized representative of the decedent, refused, as a precautionary measure, to pay such funds unless such special administrator should receipt for them as such.—Reed v. Whipple, 140 Mich. 7.

§ 344. Mistakes, amendments and corrections.

¶ 1093. The omission of an item of payment in an administrator's account is of no more importance than in any other, where the payment is satisfactorily shown.—Loomis v. Armstrong, 63 Mich. 355.

¶ 1094. It is proper to allow amendments and additions to an administrator's account in proceedings for the settlement thereof.—Loomis v. Armstrong, 63 Mich. 355.

¶ 1095. On final accounting of an administratrix, it is not error in the circuit court to permit an amendment of the account by striking out an item of rents and profits wrongly included by the administratrix's attorney under the impression that the administratrix was liable therefor.—Russell v. Wheeler, 129 Mich. 41.

§ 345. Procedure on refusal of representative to account.

¶¶ 1096-1097. If an executor or administrator refuses to file an account, it is proper for those interested to ascertain, so far as they can, the amount of property that came into his hands, and to state an account for him.—Stevens v. Ottawa Probate Judge, 156 Mich. 526.

C. EXCEPTIONS, CONTESTS AND HEARINGS; SURCHARGE AND FALSIFICATION.

§ 346. Practice and procedure on hearing.

Issues and questions open on appeal, see post § 347.

Evidence and presumptions, see post § 348.

Instructions, see post § 349.

Issues to jury and findings on same, see post § 350.

Right, duty and time for accounting, see ante, XII, A.

Procedure and practice in stating the account, see ante, XII, B.

Decree and its effect and supplemental accounting, see post, XII, D.

Persons to whom notice of examination and allowance of representative's account to be given, see Jud. Act, chap. LXII, § 13; Comp. L. 1915, § 14116.

Notice of hearing for examination of account, see Jud. Act, chap. LXII, § 9; Comp. L. 1915, § 14112.

Procedure to contest representative's account, see Prob. Ct. Rule 11, § 3.

Notice of hearing on representative's account, see Prob. Ct. Rule 11, § 2.

¶ 1098. The probate court may require executors whose accounts are under investigation to submit to oral examination under oath by counsel for heirs and legatees of the estate.—In re Rathbone's Estate, 44 Mich. 57.

¶ 1099. The party contesting an administrator's account in the probate court may do so either by disputing items of disbursements, or by adding charges, or by showing larger assets. And when the case is closed it should show not only the result, but a detailed statement on both sides of the account as settled, and the controversy on appeal will then be confined to such parts as are disputed, with the right to either party to correct errors or omissions. The practice should conform as nearly as possible to the equity practice of pointing out the real issues.—Loomis v. Armstrong, 49 Mich. 521.

¶ 1100. Upon objection to an allowance of compensation to the administrator at the hearing upon his final account, on the ground

that he agreed to act without compensation, the contestant is concluded as to an item for services in the annual account, where no fraud is shown and there is no claim that contestant was not notified of the hearing of such account.—Morton v. Johnston, 124 Mich. 561.

¶ 1101. Where a special administrator upon turning over the estate to the general administrator puts in a claim for attorney's fees rendered to it, and such claim is allowed, an objector to such claim must appeal from the order allowing said petition and cannot raise the question in proceedings by the general administrator for the settlement of its account.—In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

¶ 1102. An objection to the allowance of the final account of an administrator will not be sustained on the ground that said administrator in its capacity of special and general administrator has filed so many petitions in the probate court for the allowance of claims and charges of administration that parties in interest might have been oppressed in being compelled to perfect a multitude of appeals, where there is no claim that the services rendered were not valuable or the amounts for them as charged reasonable.—In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

§ 347. Issues and questions open on appeal.

¶ 1103. Where on the hearing of the final account of an executor, in which he credits himself with the amount of a government bond delivered to the testator in his lifetime, the heirs join in a request for a finding of fact that the testator did not owe the executor, at the time of his death, any amount whatever except the amount of the bond, with interest, and one other item, such request amounts to an admission by the heirs that the estate was indebted to the executor in the amount of the bond, and the heirs are estopped from objecting to such credit on the trial of an appeal from the allowance of the account.—In re Hopkins' Estate, 99 Mich. 57.

§ 348. Evidence and presumptions.

Evidence as to compensation of representative, see ante § 298.

Admissibility of parol evidence to affect character of administrator's dealings evidenced by deeds and contracts for purposes of accounting, see also Evidence ¶ 820.

¶ 1104. Upon final accounting where the administratrix who was the wife of the decedent, claimed the balance unexpended of the proceeds of a check payable to her order, given as part payment of a house and lot deeded by her and confirmed by a later deed from both deceased and herself, the presumption would be that it was the wife's money, as the check was payable to her.—Hall *v.* Wortman, 123 Mich. 304.

¶ 1105. In a final accounting by an administratrix who was the wife of the deceased, where there was dispute as to the ownership of notes and a check given as part payment of a house and lot deeded by the wife and later confirmed by a deed from both husband and wife, it was proper to admit in evidence a deed from the husband to the wife to show who had the title as bearing on ownership of the check and notes.—Hall v. Wortman, 123 Mich. 304.

¶ 1106. Where one of the assets of the estate was a mortgage found among the papers of the deceased and on which the administrator in good faith commenced suit to foreclose, but the suit was dismissed because it was found that it had been paid, it not appearing when, he could only be charged with interest up to the time of appraisal, there being a presumption, in the absence of proof, that past due debts were promptly collected by the administrator.—In re Fishbeck's Estate, 146 Mich. 348.

¶ 1107. In a proceeding by an heir against his father's administrator for an accounting, an inquiry into the widow's pecuniary condition at the time of trial in the circuit court is irrelevant and improper, especially if it tends to injure the heir by raising the inference that he has been benefited out of property to which the widow was entitled.—Loomis v. Armstrong, 49 Mich. 521.

¶ 1108. An administrator's final account showed the amount received and paid out on account of the estate, and stated that the debit balance had been turned over by the administrator to himself, as guardian of the minor children of the deceased, and accounted for by him as such guardian, and the account as thus balanced was allowed by the probate court. On the trial of an appeal from the order of allowance, testimony was received tending to show that the personal property of the deceased had all been applied to the payment of his debts: that the only remaining property consisted of a lot, on which was a store building with tenements above; that, during all of the time since the death of their father, four of the minor children had occupied one of the tenements; that the debit balance referred to in the account was never in fact paid to the administrator, but that one of the daughters of the decedent had received the rents, and receipted for them in the name of the administrator, and applied them from time to time to the support of the family, consisting at first of all of the children, including the appellant, and, after her marriage, of the remaining children. The testimony was objected to as in contradiction of the charge which the administrator had made against himself. Held, that such was not the import of the testimony, but that it was offered for the purpose of

showing a disbursement of the fund under such circumstances as, it was claimed, would relieve the administrator from accounting further to the estate, his theory being that this method of dealing with the estate had the approval of all the adult children, and that he, as guardian, had properly accounted for the funds received on account of his wards.—In re Buchan's Estate, 100 Mich. 219.

¶ 1109. On accounting evidence, that the executor paid dividends from time to time on past due notes on which the testator was liable as indorser and that these payments were allowed to him in his various accounts, sufficiently shows that the notes were allowed as an absolute and not as a contingent claim. —Owen v. Potter, 115 Mich. 556.

§ 349. Instructions.

Issues to jury and findings on same, see post § 350.

¶ 1110. In the absence of evidence showing that money found in a crock was given to an administrator, an instruction that such administrator should be charged therewith in his account, as money so found could not be the subject of any gift, was not error.—Casserly v. Casserly, 123 Mich. 44.

¶ 1111. On appeal from a final account, where the administrator claimed the personalty as a gift, but where the testimony of certain witnesses did not conclusively show an intention to make a present gift, an instruction was properly refused which told the jury, in referring to the testimony of such witnesses, that if their statements were true, they showed a clear intention to make a gift and that their legal effect was to make a valid gift.—Casserly v. Casserly, 123 Mich. 44.

§ 350. ——Issues to jury and findings on same.

See also post ¶ 1117.

¶ 1112. Under the express provisions of Comp. L. 1897, § 673, it is proper to submit to a jury questions of fact (such as whether the administrator agreed to act without compensation and whether or not a tax title was purchased for the benefit of the estate) arising upon an appeal from an allowance of an administrator's final account.—Morton v. Johnston, 124 Mich. 561.

¶ 1113. On the trial of an appeal from an allowance of an administrator's final account, the jury should pass on each separate item, but in the absence of showing that an injustice has been done in taking a general verdict, the error in practice will not cause a reversal.—Casserly v. Casserly, 123 Mich. 44.

¶ 1114. The findings of a jury in matters of probate accounting are not conclusive but advisory, being closely analogous to those of juries called in chancery cases.—Ward v. Tinkham, 65 Mich. 695.

D. DECREE AND ITS EFFECT; SUPPLEMENTAL ACCOUNTING.

§ 351. In general.

Rights and facts concluded, see post § 352.
Conclusiveness and finality of annual or intermediate accounting, see post § 353.
Collateral attack and impeachment, see post § 354.
Reopening, rehearing and supplemental accountings, see post § 355.
Appeal to circuit court from decree on accounting, see Probate Courts, III; and see also note, ante § 197.
Writ of error from circuit court judgment on appeal to supreme court, see Appeal.
Proper court for accounting after circuit court on appeal reverses order of probate court refusing accounting, see Probate Courts, III.
Writ of error to circuit judgment on motion for new bond and accounting, see Appeal § 28, ¶ 94.
Review of discretion of circuit court as to allowances to representative, see Appeal § 418.

¶ 1115. After the probate court has passed upon the merits, and has put into the form of a decree its final adjudication upon an administrator's account, it has no jurisdiction to review or set aside such decree.—Grady v. Hughes, 64 Mich. 540; Holden v. Lathrop, 65 Mich. 652.

¶ 1116. A probate court in passing upon an executor's account can decree that all debts and claims and administration charges on the estate have been satisfied, and determine the executor's liability to the estate and the amount left to a specified devisee. Such a decree, if no appeal is taken, is binding upon the executor, the devisee and all parties in interest, and cannot be attacked collaterally; and under it the executor must pay over to the devisee the legacy with accumulated interest, and if he does not the sureties become liable on the executor's bond. —Clark v. Fredenburg, 43 Mich. 263; Holden v. Lathrop, 65 Mich. 652.

¶ 1117. The fact that the circuit court on appeal submitted to the jury the value of the administrator's attorney's services, treating it as advisory will not work a reversal if there is nothing to show that the allowance finally made was not a judicial finding.—In re Pfeffer's Estate, 117 Mich. 207.

§ 352. Rights and facts concluded.

¶ 1118. Under a will giving the net income of the estate to the widow, payments shown by the final account to have been made to the widow for her support were considered as having been made out of the personal estate and not out of the income, although such payments were made pursuant

to an entry which never assumed to be an order.—Dickinson v. Henderson, 122 Mich. 583.

¶ 1119. In an account of the executor in a will giving the possession and control of personal property to the widow during her widowhood, the failure to credit a debtor in full for payments on his note to the widow is unimportant where the debtor is not a party and not bound by the finding.—Gee v. Hasbrouck, 128 Mich. 509.

¶ 1120. The final account of an administrator is binding and conclusive only as to property mentioned in it and which came into his hands, and does not preclude a suit in chancery by the heirs at law, although they have receipted for the distributive shares, to require an accounting for money fraudulently obtained from a decedent in his lifetime and secretly withheld from his administrator.—Powell v. Pennock, 181 Mich. 588.

¶ 1121. Where an executor and trustee under a will has resigned both capacities, his settlement with the administrator with the will annexed will not bind the trust estate or the cestui que trust.—Wooden v. Kerr, 91 Mich. 188.

§ 353. Conclusiveness and finality of annual or intermediate accounts.

Conclusiveness of finding of jury in matters of probate accounting, see also ante ¶ 1114.

Right of appeal to circuit court, see Probate Courts, III.

¶ 1122. Annual accounts filed by an executor, where there is no omission of credit or concealment of assets, and where lack of notice of application for approval is not claimed, are conclusive as to all matters contained therein.—Porter v. Long, 124 Mich. 584.

¶ 1123. Items of an administrator's annual account are not open to attack on the presentation of the final account, in the absence of any claim that the parties were not notified as required by Comp. L. 1897, § 9441, or that they were misled by fraud.—Morton v. Johnston, 124 Mich. 561.

¶ 1124. An order of the probate court allowing an administrator's first account is conclusive as to all items therein unless appealed from and a second account should begin with the balance due from the first.—Nowland v. Rice's Estate, 138 Mich. 146.

¶ 1125. The rule that annual accounts are conclusive does not apply to amounts claimed as compensation by an executor as surviving partner for managing the partnership business, where such charges do not appear in the accounts and the amount withheld for such compensation never passed into the possession of the surviving partner as executor.—Porter v. Long, 124 Mich. 584.

¶ 1126. The allowance of items of disbursements in an executor's annual accounts is binding upon the estate.—Cheever v. Ellis, 134 Mich. 645.

¶ 1127. The statements of assets of an estate in the annual accounts of the executor are not binding upon the estate so far as they prove worthless or not collectible on account of the executor's negligence.—Cheever v. Ellis, 134 Mich. 645.

§ 354. Collateral attack and impeachment.

Validity of decree for allowance of attorney fees where advisory verdict of jury received, see ante ¶ 1117.

¶ 1128. A decree against an executor on his accounting, where nothing appears to put in question the jurisdiction of the probate court, cannot be attacked collaterally on the merits in a suit on the executor's bond.—Holden v. Lathrop, 65 Mich. 652.

¶ 1129. Where an administrator had, with the assets of the estate, purchased claims against the estate and assigned them to his sister, the decedent's widow, and a judge of probate, acting as commissioner, had allowed the claims, and had afterwards ordered the allowance of the administrator's final account, it was held that in an appeal from this order by one of the next of kin and heirs at law, evidence of the purchase and assignment could not be excluded as impeaching the award of the judge of probate, as commissioner. Such evidence would have tended to show fraud and collusion in the administrator in permitting the allowance of the claims in favor of the widow, and he cannot claim that a decision thus obtained is unimpeachable and a defense.—Grovier v. Hall, 23 Mich. 7.

§ 355. Reopening, rehearing and supplemental accountings.

¶ 1130. The probate court has authority to order a rehearing of an administrator's account, on a showing of mistake or fraud, under the provisions of Act No. 271, Pub. Acts 1905.—Davis v. McCamman, 165 Mich. 287.

¶ 1131. A petition to reopen the settlement of an estate so as to charge the administrator with certain assets, which, it was alleged, he had omitted to charge to himself, is properly denied, when filed twelve years after the parties in interest had attained majority, and in a case where there could have been no fraudulent concealment by the administrator, as the files and records of the probate court showed the nature of the decedent's interest in such assets.—Duryea v. Granger's Estate, 66 Mich. 593.

¶ 1132. Where an executor refuses to turn over the residue to residuary legatees because of certain equities he himself claims and a settlement is finally made which is free from fraud, a subsequent reopening of the estate for accounting cannot be had.—In re Kilbourne's Estate, 173 Mich. 258.

¶ 1133. Where a hearing on the allowance of an administrator's account is reopened for the purpose of pursuing a single inquiry, it is not error for the probate court to refuse to admit evidence not pertinent to said inquiry, although said evidence might have been competent if offered at the original hearing.—In re Norton's Estate, 169 Mich. 531.

¶ 1134. Under Comp. L. 1871, § 4496, authorizing the probate court, after payment of debts and certain other charges and expenses, to assign the residue of the estate to such other persons as are entitled by law to the same, and section 4497, providing that in such decree the court shall name the persons, and the proportions to which each may be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same, where executors have received their discharge, without fraud or collusion, and have never had possession of the balance of the purchase price of the interest of deceased in his partnership business, which was sold to the partner, and the order of distribution stated that the distributees should look to such partner for the balance of the purchase price, the executors cannot be compelled to render an accounting to the next of kin for such uncollected portion of the purchase price, the remedy being against the partner.—McDermott v. Copeland, 9 Fed. 536.

XIII. SHARES IN THE ESTATE; DISTRIBUTION, PAYMENT AND DELIVERY.

A. IN GENERAL; DUTY, TIME AND MANNER OF PAYMENT OR DELIVERY.

§ 356. Shares and interests in estates in general.

Assignability of shares or expectancies, see post § 357.

Rights or title of assignee or transferee, see post § 358.

Adultery as bar to right of surviving spouse, see post § 359.

Prerequisites to distribution, see post § 360.

Devises and specific bequests, see post § 362.

Mode and medium of payment, see post §§ 363-367.

Liability for bequest improperly delivered or paid, see post § 368.

Recalling payment or delivery, see post § 369.

Disposal of assets of foreign estates, see post § 370.

Liability of heirs, devisees and distributees for debts, see ante, VIII.

Sale or subjection of lands to pay legacies charged under will, see ante §§ 260, 261

Distribution by agreement and rights of distributees thereunder, see ante, I.

Right to possession of property of estate by person other than representative, see ante, V, F.

Right to possession of realty of heirs and devisees, see ante ¶¶ 428, 429.

Rights of heirs and distributees to follow property for debts, see ante § 138.

Right of heirs in contracts drawn payable "to heirs," see also ante § 71.

Title of heirs and persons entitled to distributive shares, see also ante ¶¶ 183, 186, 187.

Statutory provision as to lands devised or assigned to heirs for payment of debts, see ante § 225.

Right and title of heirs in mortgages, see also ante § 60, ¶¶ 193-196.

Right and interest of heirs in realty, see also ante ¶¶ 199, 203.

Rights of legatees to award in condemnation proceedings, see also ante ¶ 271.

Effect of devise or grant subject to mortgage, see ante § 148.

Payment and satisfaction of claims and distribution among creditors, see ante, VI, D.

Necessity of distribution before discharge, see post ¶¶ 1204, 1205.

Partition by probate court, see post §§ 394-396.

Probate proceedings for determination of heirship, see post §§ 397, 398.

General substantive law of intestate devolution and shares and persons entitled thereon, see Descent and Distribution.

Persons entitled to distribution and order and degrees and shares to which they succeed, see Descent, II-VI.

Wills and shares under wills, including construction of wills and implications from disposal by will, see Wills.

Abatement and ademption of legacies, see Wills, VI, H, I.

Construction of and implications from will as to adjustment of advancements, see Wills, VI, G.

Lapse of legacies and substitution or disposal as residue, see Wills, VI, E.

Words in will designating the persons to take and their respective shares, and construction and implications of will, see Wills, VI.

Rights of devisee under foreign probate to be heard in administration proceedings, see Wills, V.

Rights of devisee of life estate, see Life Estates, II.

Distributee of note which was portion of estate as "creditor" protected against unfiled mortgage, see Chattel Mortgages § 45, ¶ 192.

Effect of antenuptial agreement releasing share as widow, see Husband and Wife, I.

Statutory provisions as to distribution of personalty, see Jud. Act, chap. LVII, § 1 et seq., Comp. L. 1915, § 13913 et seq.

Disposition of proceeds of sale of realty remaining as surplus on final settlement of accounts, see Jud. Act, chap. LIX, § 36, Comp. L. 1915, § 14022.
Liability of property given to legatees and devisees for payment of debts and exemption of specific devises and legacies, see Jud. Act, chap. LII, §§ 25-29, Comp. L. 1915, §§ 13797-13801.
Deposit with county treasurer of money belonging to unknown or nonresident distributees and procedure to obtain, see Jud. Act, chap. LVII, §§ 34-37, Comp. L. 1915, §§ 13946-13949.

§ 357. Assignability of shares or expectancies.

Right of heirs to transfer or assign mortgages, see also ante ¶¶ 194-196.
Bargains between heir and attorney, see also Attorneys ¶ 95.

¶ 1135. Any one but the executor may purchase the claims of legatees.—Owen v. Potter, 115 Mich. 556.

¶ 1136. An heir's agreement to sell his expectant interest in his ancestor's estate is unenforceable either at law or in equity.—Stevens v. Stevens, 181 Mich. 438.

§ 358. Rights or title of assignee or transferee.

Procedure against heirs' grantees on recourse to lands for payment of claims, see ante § 228.
Lands in hands of heirs' grantees as assets for payment of debts, see ante § 215.
Remedy and procedure by assignees, see post § 380.
Right of representative to sell personalty after disposal of it by distributees, see also ante ¶ 386.
Right of grantee of heir to restrain representative from disposing of his lands for payment of debts, see ante ¶ 679.

¶ 1137. Where one who bargains for the interest of an heir agrees also to pay the debts of the estate he gets the full interest of such heir, whatever it may be.—Kennedy v. Shaw, 43 Mich. 359.

¶ 1138. The grantee of a residuary legatee may defend his title without showing the payment of the antecedent bequests.—Chapman v. Craig, 37 Mich. 370.

¶ 1139. An assignment, by the other heirs, to H., of "all their right and interest in and to the share of the whole of the estate remaining as is hereinafter specified" followed by a paragraph assigning the remaining estate to the parties giving to H. four-fifteenths thereof, entitles him to the four-fifteenths only, since the assignment referred to the estate "hereinafter specified" and hence conveyed only the assignor's rights in the share allotted to him.—Lasley v. Preston, 132 Mich. 208.

¶ 1140. One of several heirs filed a bill to set aside a sale made by him of his interest in the surplus of the estate after the payment of certain legacies, on the ground of alleged false representations made to him as to the purchase of the interest of others of the heirs, including the one who made such representations, and as to his probable interest in such surplus. On the hearing it was established by a fair preponderance of the evidence that complainant was not induced to sell his interest by any false representations, but that he was anxious to sell, and sold voluntarily fearing pending litigation, and with full knowledge of the condition of the estate. Held, that this is not a case where relief can be granted upon the ground of inadequacy of consideration; that complainant preferred to take the sum received rather than incur the expense of litigation in which the estate was involved, the result of which was uncertain; that it is of no consequence, therefore, whether the purchasers of his interest made much or little, nor can the rights of either party be affected in this regard by considering the total amount of profits made from the entire purchases by the defendants.—Dakin v. Rumsey, 104 Mich. 636.

§ 359. Bigamy or adultery as bar to right of surviving spouse.

Bigamy as bar to right of surviving spouse, see Comp. L. 1915, §§ 14618, 14619.

¶ 1141. A widow is not barred from her rights in her husband's estate by living in a state of adultery with another man without any form of marriage ceremony under Comp. L. 1915, §§ 14618, 14619, providing that no surviving spouse who at the time of the death was living with another person in a bigamous relation shall take any interest in the property of the deceased.—In re Dettman's Estate, 195 Mich. 231.

§ 360. Prerequisites to distribution.

¶ 1142. When commissioners have made their report upon claims against an estate, and the administrator has paid all that was allowed, and the time has expired for presenting more, except upon special application to the probate court on cause shown, it is the duty of the administrator to turn over the property to the heirs and distributees, and he may do so without waiting for an order of the probate court requiring him to do so.—Brown v. Forsche, 43 Mich. 492.

¶ 1143. It is necessary, before an estate is distributed, that debts payable shall be computed and paid and that taxes exacted by the state shall be computed and paid.—Colvin v. Jones, 194 Mich. 670.

¶ 1144. Distribution of a decedent's estate may be made by an executor or administrator before and even without the issue of an order therefor.—Willard v. Van Leeuwen, 56 Mich. 15.

§ 361. Time for distribution.

Priority of legacy over claims of creditors where legatee is widow accepting legacy in lieu of dower, see ante ¶ 669.

Time for payment of legacies, see Wills, VI.

Time for payment of legacies by representative, see Jud. Act, chap. LVI, § 1, Comp. L. 1915, § 13883.

Extension of time for payment of legacies and procedure to obtain, see Jud. Act, chap. LVI, §§ 2-4, Comp. L. 1915, §§ 13884-13886.

¶ 1145. The statute contemplates that an administrator in ordinary cases will collect the assets, pay the debts, and close the estate within eighteen months. The parties interested have a right to have their shares distributed at that time, and if there is sufficient money on hand to pay the debts, the administrator is not justified in delaying distribution for the purpose merely of collecting money securely invested.—Ward v. Tinkham, 65 Mich. 695.

¶ 1146. There is nothing in the statute that requires an administrator to delay the distribution of an estate under an order of the probate court until the expiration of the time for an appeal; and the administrator who in good faith distributes the estate in accord with such an order is not liable for the loss sustained by one distributee through an erroneous order of the probate court.—Ernst v. Freeman's Estate, 129 Mich. 271.

¶ 1147. The probate court cannot extend the time within which a residuary legatee, who is also executor, is required by the will to pay legacies.—Durfee v. Abbott, 50 Mich. 479.

§ 362. Devises and specific bequests.

¶ 1148. An executor has no right to withhold his assent to the legatee's immediate possession of specific bequests, unless there is a deficiency of assets; such assent is presumed from his leaving the legatee in possession, and cannot be revoked arbitrarily.—Eberstein v. Camp, 37 Mich. 176; Atwood v. Frost, 51 Mich. 360.

¶ 1149. Specific bequests vest at the testator's death and are not dependent upon any order of distribution or allotment by the probate court; the identical thing given is severed from the bulk of the testator's property by the operation of the will from his death.—Proctor v. Robinson, 35 Mich. 284.

¶ 1150. Specific bequests, especially if needed for household or husbandry purposes, should be delivered at once to the legatee, unless likely to be needed to satisfy claims on the estate.—Eberstein v. Camp, 37 Mich. 176.

¶ 1151. A residuary devisee of lands takes the title thereto subject to the payment of debts and legacies, and unless the land is taken by the executors for the purposes of administration he may take and defend possession from the time the will is probated.—Chapman v. Craig, 37 Mich. 370.

¶ 1152. The consent of the executor to the devisees' taking possession of the devised estate before determination of their liability to contribute towards the debts of the estate is unnecessary.—Atwood v. Frost, 59 Mich. 409.

§ 363. Mode and medium of payment.

Set-off or application against debts owing, see post § 364.

Deduction and adjustment of advancements and hotchpot, see post § 365.

Payment or delivery into trust for heir, see post § 366.

Showing and record to support payment to guardian or representative of heir, see post § 367.

Payment of legacy by promissory note of representative, see also ante ¶ 1073.

¶ 1153. The probate court can properly make no order requiring a legatee of money to accept anything but money in satisfaction of the legacy.—Michigan Home Missionary Society v. Corning, 164 Mich. 395.

¶ 1154. Where a will bequeaths $5,000 in trust, both the trustees and the beneficiary have a right to require the executors to pay over that sum in cash.—Michigan Home Missionary Society v. Corning, 164 Mich. 395.

¶ 1155. Where a mortgage was given by will to the testator's wife for life and the remainder over to his son, and the two were appointed executors, it is entirely competent for them to hold the mortgage as a legacy instead of assets, and their possible liability to be called on to contribute as legatees in the event of failure of assets would not prevent this.—Proctor v. Robinson, 35 Mich. 284.

¶ 1156. Where a probate court enters an order approving the turning over by the executors of a note to trustees in discharge of a trust fund created by the will, such order rests upon the consent of the trustees.—Michigan Home Missionary Society v. Corning, 164 Mich. 395.

§ 364. ——Set-off or application against debts owing.

Right to cast descent of land from one to other to offset debts, see Descent § 27, ¶ 61.

¶ 1157. The distributive share due an heir from personal estate may be applied by an administrator in payment of a debt due the estate by the heir.—Marvin v. Bowlby, 142 Mich. 245.

§ 365. ——Deduction and adjustment of advancements; hotchpot.

Jurisdiction of probate court to determine advancement, see post ¶ 1174.

What are loans and what advancements, see Descent § 27.

Interpretation and construction of will respecting advancements, see Wills, VI, G.

Best and secondary evidence as to advancements, see Evidence § 136.

Rule for bringing advancements into hotchpot, see Comp. L. 1915, §§ 11800-11805.

¶ 1158. Advancements are not matters of contract but are exclusively within the ancestor's control.—Power v. Power's Estate, 91 Mich. 587.

¶ 1159. Advancements in a proceeding to determine the rights of legatees are not to be treated as debts, but as gifts to apply as legacies.—McClintock's Appeal, 58 Mich. 152.

¶ 1160. Money paid to a child for which a promissory note is taken, while presumed to be a loan, may be given the character of an advancement by provision in a trust deed if such intention clearly appears in the deed. —Sprague v. Moore, 130 Mich. 92.

¶ 1161. Moneys paid to a child for which promissory notes are taken and moneys paid on paper indorsed for the benefit of beneficiaries, are not to be considered as advancements under a trust deed which provides that all debts due from the beneficiaries to the grantor shall be part of the estate and further that obligations entered into for the benefit of any beneficiary shall bear interest and be charged to such beneficiary's share.—Sprague v. Moore, 130 Mich. 92.

¶ 1162. An intestate executed for the consideration of $1 a deed to his son of valuable property, and on the same day, in a separate paper, certified that he executed such deed as a portion of his son's patrimony, giving also the value of the property conveyed. Held, that this was an advancement, within How. St., §§ 5780, 5781, and that the grantee's knowledge that his father gave him the land as an advancement was not essential. —Power v. Power's Estate, 91 Mich. 587.

¶ 1163. A nephew who has a one-third interest in a remainder, after a life estate in the widow with power to use so much as she shall need, may, on distribution after the widow's death, properly be charged with a payment of $1000 made to him by the widow who was also executrix, where the evidence shows that the amount was charged against the estate and the jury find it was intended by the widow as a gift to be paid out of the estate.—In re Mallary's Estate, 127 Mich. 119.

§ 366. ——Payment or delivery into trust for heir.

¶ 1164. The executors of a will by a written instrument acknowledged and recorded set aside a past-due bond and mortgage to be held by them in trust to meet a legacy. There was no evidence of consent on the part of the legatees, or any order of court on the subject. Held, not be an irrevocable act such as was necessary to transmute the property.—Sherman v. Jerome, 120 U. S. 319, 30 L. ed. 680, 7 Sup. Ct. Rep. 577.

§ 367. ——Showing and record to support payment to guardian or representative of heir.

¶ 1165. Where an election to take under the statute rather than under the will of her deceased husband is filed for a widow by her guardian within six months after an order adjudging the widow incompetent, there is sufficient before the court to satisfy the probate judge of her incapacity to act for herself.—In re Andrew's Estate, 92 Mich. 449.

¶ 1166. An administrator's petition that an order be entered nunc pro tunc confirming an election by his decedent's guardian to take under the statute for his ward, instead of under her husband's will, was denied by the court, which, however, found that "said guardian had declared in open court that he would elect for his ward to take under the statute instead of the will," and that such election "was made and filed with the court's knowledge and consent." Held, that the finding was sufficient record of such election, and had the same effect as if the record of election had been on the day of the filing.—Bassett v. Durfee, 87 Mich. 167.

§ 368. Liability for bequest improperly delivered or paid.

Liability of representative for surrender of estate to one of several claimants, see also post ¶ 1179.

¶ 1167. An executor intrusted with the duty of keeping a legacy for a minor heir until she was of age paid it over to her guardian while she was still a minor. Held, that the payment did not discharge the executor, and that if the guardian did not pay the legacy to his ward when she became of age, the executor still remained liable.—Hinckley v. Washtenaw Probate Judge, 45 Mich. 343.

§ 369. Recalling payment or delivery.

¶ 1168. When an administrator assents to the possession of assets by distributees who are entitled thereto, he cannot reclaim the property unless it is needed for the payment of debts.—Kennedy v. Shaw, 43 Mich. 359.

§ 370. Disposal of assets of foreign estates.

Wills probated abroad and foreign wills, see ante § 16.

¶ 1169. Under Comp. Laws 1897, § 9284, relating to ancillary administration in Michigan, the estate must be disposed of in ac-

cordance with the directions contained in the will of the deceased having her domicile in another state.—In re Steven's Estate, 171 Mich. 486.

¶ 1170. Where the will of a person dying and domiciled in another state makes property located in Michigan subject to all debts of the estate, and all the property of the deceased in the other state is specifically devised and bequeathed, the Michigan court is authorized to order the transmission of funds derived in ancillary administration to the court of the other state.—In re Steven's Estate, 171 Mich. 486.

B. REMEDIES AND PROCEDURE; ENFORCEMENT OF ORDER TO PAY.

§ 371. Jurisdiction and procedure in general.

Conflicting claims and contests, see post § 372.
Construction of will incident to distribution, see post § 373.
Remission of ancillary estate to domicile, see post § 374.
Petition, procedure, decree and its effect, see post §§ 375-377.
Enforcing decree or agreement for distribution, see post §§ 378-379.
Remedy and procedure by assignees, see post § 380.
Equitable remedies and relief, see post § 381.
Garnishment, bill, or other remedy to reach shares for creditors, see post § 382.
Relative jurisdiction of probate and circuit courts in general, see ante § 9.
Right of heirs to maintain ejectment, see also ante ¶ 985.
Jurisdiction of chancery to restrain representative from making distribution, see ante ¶ 44.
Jurisdiction over distribution of property beyond state, see ante ¶ 78.

¶ 1171. When all the debts of an intestate have been paid, and the administrator is discharged, the assignment of the property to the heirs and next of kin, required by statute, is a mere formality, which it is the duty of the court to make and which nobody can contest.—Dickison v. Reynolds, 48 Mich. 158.

¶ 1172. The probate court has jurisdiction of a petition by a legatee and devisee to order the executor to turn over possession of the property.—Langrick v. Gospel, 48 Mich. 185.

¶ 1173. The probate court has jurisdiction to direct the payment of a specific legacy if such payment is withheld.—Byrne v. Hume, 86 Mich. 546.

¶ 1174. Under Comp. Laws 1897, § 9457, the probate court is expressly authorized to determine all questions as to advancements made or alleged to have been made by the deceased.—In re Simon's Estate (Appeal of Simon), 158 Mich. 256.

¶ 1175. Under Comp. Laws 1897, § 9443, the administrator has authority prior to the closing of the estate to initiate proceedings for the determination of heirship and partial distribution, and the probate court has jurisdiction to authorize the administrator to make a partial distribution of the estate after reserving sufficient assets to satisfy creditors' claims and necessary expenses of administration.—Michigan Trust Co. v. McNamara, 167 Mich. 406; In re McNamara's Estate, Id.

¶ 1176. If an executor appointed by the probate court of the state, but who has left the state, is properly charged in his account with all that came into his hands and which was not distributed according to law, it is within the power of the probate court to order him to distribute that amount or to pay it to his successor in trust.—Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550; reversing 175 Fed. 667, 681.

§ 372. ——Conflicting claims and contests.

¶ 1177. The authority given by How. St., § 5964, to probate courts to make decrees assigning estates to those by law entitled to receive them confers, it seems, the power to adjudicate between contesting claimants.—Knapp v. Knapp, 95 Mich. 474.

¶ 1178. Where two parties claim the right to the proceeds of sale of an estate after final distribution, the administrator should collect the property, and then proceed in the usual course to have the question of distribution properly determined.—Crane v. Beedle, 95 Mich. 524.

¶ 1179. In the absence of an agreement between contesting claimants, or an adjustment of differences between heirs, the administrator is not authorized to surrender the estate to one claimant, or close it up, except in the usual course.—Crane v. Beedle, 95 Mich. 524.

§ 373. ——Construction of will incident to distribution.

Bills for construction of wills in general, see Wills, VI, J.

¶ 1180. How. St., §§ 5964, 5965, providing that after the payment of debts, expenses of administration, etc., the probate court shall assign the residue of the estate to those entitled, gives probate courts jurisdiction in the settlement of estates to construe wills.—In re Reid's Estate (Glover v. Reid), 80 Mich. 228; Byrne v. Hume, 84 Mich. 185, affirmed on rehearing, 86 Mich. 546.

¶ 1181. After an estate is settled and is before the probate court for distribution, that court has jurisdiction to interpret the

various provisions of a will, but not otherwise.—Dudley v. Gates, 124 Mich. 440.

¶ 1182. The probate court has power to construe wills for certain purposes, and must necessarily do so in distributing estates.—Parkinson v. Parkinson, 139 Mich. 530.

§ 374. Remission of ancillary estate to domicile.

Domiciliary, ancillary and foreign administration in general, see ante §§ 15-17.

¶ 1183. It is entirely within the discretion of the probate court granting ancillary administration to determine whether the residue of the estate shall be distributed among heirs there or remitted to the principal administration for distribution.—In re Steven's Estate, 171 Mich. 486.

§ 375. Petition, parties, notice, and hearing for distribution.

Evidence and procedure in general, see post § 376.

Decree, effect and conclusiveness, see post § 377.

Pleadings in proceedings by assignee, see post ¶ 1196.

¶ 1184. How. St., §§ 5964, 5965, giving the probate court the jurisdiction and power to construe wills in determining the distribution of estates in the hands of executors, contemplate notice in some way to persons interested.—Canfield v. Canfield, 118 Fed. 1.

¶ 1185. Under Comp. L. 1897, § 9448, How. St., 2nd ed., § 11149, requiring notice of a hearing upon a petition for distribution of property of an intestate, an order of the probate judge, upon petition by an administratrix, assigning the widow the property, is void where no order appointing a time for a hearing was made, and no notice of the application was given.—Rich v. Victoria Copper Mining Co., 147 Fed. 380.

¶ 1186. Where there is a will duly allowed and probated, disposing of the entire estate of a decedent, the heirs at law, as such, have no interest in any further proceedings in the settlement of the estate.—Labar v. Nichols, 23 Mich. 310.

¶ 1187. Where a legatee's legacy is directed to be paid, and there is a surplus for distribution beyond what is necessary to meet it, and there is no reason to suppose there can be contingent claims which will reduce the assets so as to affect his legacy, he has no right to interfere with the distribution. And where the legal presumptions are all against the existence of any contingent liability, one seeking to intermeddle with the settlement must show affirmatively such facts as will overcome the presumption, and show that he is likely to be injuriously affected, before he be permitted a standing in court.—Labar v. Nichols, 23 Mich. 310.

§ 376. ——Evidence and procedure in general.

Evidence in ejectment by heir for lands disposed of by representative, see ante ¶ 814.

Presumptions and evidence of completion of distribution, see also post ¶¶ 1210, 1211.

Action on bond of representative after refusal to make distribution as ordered, see post ¶ 1221.

Relation of coheirs as authority to make binding admissions for each other, see Evidence §§ 407, 408.

¶ 1188. Money paid to a son for which he gives a promissory note is presumed to be a loan rather than an advancement.—Sprague v. Moore, 130 Mich. 92.

¶ 1189. Circumstantial evidence is proper in determining whether advancements were made under a will; the omission of a precise man to enter a charge against his estate can be shown for what it is worth.—McClintock's Appeal, 58 Mich. 152.

¶ 1190. A testator's certificate that he has advanced to an heir a specified sum over and above all offsets to date is not admissible in evidence that such an advancement was made. But if the payment is otherwise proved the certificate is admissible to show the testator's purpose to treat it as an advancement.—McClintock's Appeal, 58 Mich. 152.

§ 377. Decree, effect and conclusiveness.

Procedure to enforce decree and recover shares, see post § 378.

Conclusiveness of probate court partition proceedings, see post § 395.

Effect of order of distribution on the continuance of widow's allowance, see ante ¶¶ 357-358.

Conclusiveness of decree in suit on representative's bond against sureties, see also post ¶ 1234.

Appeals from decree, see Probate Courts, III; and see also note, ante § 197.

Review of circuit order respecting distribution or payment of money to distributees, see Appeal § 28.

¶ 1191. Where it appears that after due notice an estate has been distributed and the administrators discharged in accordance with a decree, an amendment to such decree where a demurrer has been sustained on appeal will not be given, as sec. 549, subsec. 143, Comp. Laws of 1897 as amended by Public Act No. 299 of 1909, which apparently gives such right in all cases, is merely declaratory of the pre-existing practice in the circuit courts.—Macomber v. Cottrell, 171 Mich. 371. (Bird, J., dissenting.)

¶ 1192. The widow and heirs of a decedent entered into an agreement in the probate court for the division of the property.

Later, the probate court, by order, allowed the administrator's account assigning the personal property professedly in accordance with the agreement. Held, that the agreement was not a mere stipulation authorizing further proceedings in the probate court, but was a complete agreement, fixing the rights of the parties, and the order allowing the administrator's account did not bar a subsequent action on the agreement.—Garvin v. Stone, 152 Mich. 594.

§ 378. Procedure to enforce decree and recover shares.

Trover by devisee against representative to recover value of growing crops, see also ante ¶ 395.

¶ 1193. Where several heirs are jointly interested in a note which belonged to the testator, one of the heirs may not bring and maintain an action of assumpsit for his share of the note, as adjudged by a decree of the probate court, under Comp. Laws 1897, § 9444, as amended by Pub. Acts 1903, No. 177, How. 2nd ed., § 11155, providing that in the decree shall be designated the persons and proportions to which each shall be entitled, and that such persons shall have the right to recover their respective shares from the executor and administrator or any other person having the same or any part thereof, as but one suit should be maintained to avoid splitting the cause of action.—Jensen v. Gamble, 191 Mich. 233.

§ 379. Enforcement of agreements as to distribution.

¶ 1194. The probate court is not the tribunal to adjudicate specific performance or other relief upon a wife's failure, after her husband's death, to carry out her contract to receive a conveyance, mortgage and bequest in lieu of claims against his estate.—Dakin v. Dakin, 97 Mich. 284.

¶ 1195. The probate court has not power to decree specific performance of an agreement by heirs for the settlement of an estate, if such agreement is valid, nor can it cancel the agreement if invalid.—Shurte v. Fletcher, 111 Mich. 84.

§ 380. Remedy and procedure by assignees.

Rights and titles of assignees and grantees, see ante § 358.

¶ 1196. A declaration by the assignee of an heir's share of an estate against an administrator for his distributive share of the assets must allege facts showing that defendant has been acting as administrator and has thus become liable.—Basom v. Taylor, 39 Mich. 682.

§ 381. Equitable remedies and relief.

¶ 1197. Where the plaintiff's claim can be sued at law, or is within the jurisdiction of the probate court in the settlement of an estate, equity will not take jurisdiction thereof.—Cole v. McFall, 48 Mich. 227.

¶ 1198. There is no adequate remedy at law either to set aside an order of distribution of a probate court procured by the fraudulent suppression of a will, or to protect the fund.—Ewing v. Lamphere, 147 Mich. 659.

¶ 1199. A court of equity has jurisdiction of a suit by the administrator and heirs of an insane decedent against the wife and children of a deceased guardian of decedent to marshal the assets of the estate and to bring such assets into the probate court to be distributed according to law, the theory of the bill involving an intricate and complex accounting covering a long period of years.—Elwell v. Pierce, 200 Mich. 479.

¶ 1200. In a suit to enjoin foreclosure of a mortgage held by the defendant under an order of distribution the fact that the mortgage note was not inventoried with the mortgage is immaterial, for its production by the legatee at the hearing leads to the presumption that it was among the assets of the estate, and was, with the mortgage, transferred to the legatee.—Crow v. Conant, 90 Mich. 247.

§ 382. Garnishment, bill or other remedy to reach shares for creditors.

Liability of heirs, devisees and distributees for debts, see ante, VIII.

Persons and property subject to garnishment in general, see Garnishment, II.

Staying bill by legatee's creditor to reach legacy, where legatee is indebted to estate and administration still pends, see Creditors' Suits, ¶ 135.

¶ 1201. An administrator cannot be garnished, but he may be made defendant to a bill filed by an heir's judgment creditors to prevent paying over to an heir his portion of the estate until complainants' debt is satisfied.—Earle v. Kent Circuit Judge, 92 Mich. 285.

¶ 1202. In a suit by a judgment creditor to reach property alleged to be equitably subject to his claim, it was contended by the complainant that defendant's wife was the owner of a certain mortgage at the time of her death, and that defendant and his two children should share equally therein. It did not appear that the wife's estate had been administered, and testimony that, during her lifetime, she had turned the mortgage over to her son, was not contradicted. Held, that it could not be said that the husband was entitled to a distributive share of the mortgage.—Shelden v. Shattuck, 108 Mich. 344.

XIV. DISCHARGE; LIABILITIES ON BONDS.

§ 383. Discharge in general.

Validity and effect of discharge order, see post § 384.

Presumptions and evidence, see post § 385.
Liability on bonds, see post §§ 386-393.
Liability of representative to account after having been made trustee to carry out provisions of will, see also ante ¶ 1060.
Necessity for representative to account after discharge, see also ante ¶ 1058.
Right to administration de bonis non after discharge of original representative, see ante ¶¶ 26, 27.
Liability to account after discharge received without fraud or collusion, see ante ¶ 1134.
Completion of administration by filing an executor's bond as residuary legatee, see also post ¶¶ 1222, 1223.
Appeals to circuit court from order of discharge, see Probate Courts, III.
Writ of error from circuit court judgment on appeal to supreme court, see Appeal.
Discharge of administrator where estate consists of personalty of less than five hundred dollars in value, see Jud. Act, chap. LIII, § 26, Comp. L. 1915, § 13844.
Filing of papers and certificate of enrollment on completion of estate proceedings, see Prob. Ct. Rule 17.

¶ 1203. The duties of an executor or administrator do not necessarily cease upon the final settlement and approval of his accounts unless the record shows his formal discharge from his trust.—Root v. Beymer, 146 Mich. 692.

¶ 1204. An estate cannot be held to be fully settled, and the executor's or administrator's duties as such closed, until the executor has paid the debts of the estate and the legacies provided for in the will, and filed with the judge of probate evidence in some form of such facts.—Buss v. Buss' Estate, 75 Mich. 163.

¶ 1205. Executors are not discharged from their bond by an order of distribution until the estate is distributed.—Cranson v. Wilsey, 71 Mich. 356.

¶ 1206. Before an executor is entitled to a discharge from official responsibility as such, on the ground that the fund coming into his hands as executor has, pursuant to the terms of the will, become converted into a trust fund, for which he is only liable as trustee to account in a court of equity, he must show some act done to change the character of his holding, and that the fund is properly placed.—In re Sanborn's Estate, 109 Mich. 191.

¶ 1207. The final account of an executrix, who was also life tenant, with limited powers over the corpus of the estate, was stated in 1872, showing a balance in her favor. She died eight years later without having asserted any claim for payment and a year before death applied for a discharge stating that nothing remained to be settled. Held, that the claim was barred on the ground of laches for such balance.—Smith v. Blindbury, 66 Mich. 319.

¶ 1207a. An estate is properly assigned to the sole devisee, and the executors discharged, where the latter have refused to file their account, in obedience to an order of court, after the parties in interest have adjusted the affairs of the estate to their satisfaction.—In re Lambie's Estate, 112 Mich. 118.

§ 384. ——Validity and effect of order.

Appeals from probate court, see note, ante § 197.

¶ 1208. Where an administratrix with the will annexed filed her first account showing that she had paid out considerably more money than she had received, a part of the order of the court in allowing the account which recites that the administratrix was discharged is a nullity because without jurisdiction, no petition for discharge being filed.—In re Young's Estate, 144 Mich. 663.

¶ 1209. An order of probate court discharging an executrix and canceling her bond does not bar a legatee who was not a party from the right to have an administrator de bonis non to protect her legacy.—Cole v. Shaw, 134 Mich. 499.

§ 385. Presumptions and evidence.

Presumption of due and legal performance of official duties by probate court and representatives in settling estate, see also Evidence § 38, ¶ 228.

¶ 1210. After a lapse of long time, to wit, thirty years, it is presumed that the executrix who received the proceeds of land has fully settled with the heirs for their shares.—Barlage v. Detroit, G. H. & M. R. Co., 54 Mich. 564.

¶ 1211. Where a widow as executrix receives money belonging to the estate as land, being an award for condemnation, it is presumed that she accounts for it, and if she does, the heirs, in receiving it, waive all errors. And it is the same in legal effect if the heirs do not receive the money specifically awarded to them, but on final settlement are paid their equivalent shares.—Barlage v. Detroit, G. H. & M. R. Co., 54 Mich. 564.

§ 386. Obligation, breach and liability on bonds.

On special bonds for real estate sale, see post § 387.
On bonds of residuary legatees to dispense with further administration, see post § 388.
Liability of sureties, see post § 389.
Defenses open to sureties, see post § 390.
Remedies and procedure on bonds, see post §§ 391-393.

Necessity and sufficiency of bond for issuance of letters, see ante §§ 35, 36.
Liability of representative on bond for failure to pay allowed claims, see ante ¶ 595.
Effect on liability of order permitting bond to be prosecuted for default of representative, see ante ¶ 839.
Liability on bond of representative where order of settlement is disregarded, see ante ¶ 1116.
Probate bonds and prosecution thereof, see Jud. Act, chap. LXIII, §§ 1-19, Comp. L. 1915, §§ 14119-14137.
Liability of representative on bond for failure to account, see Jud. Act, chap. LXII, § 11, Comp. L. 1915, § 14114.
Liability of representative on bond for failure to pay debts after order of distribution to creditors, see Jud. Act, chap. LVI, § 12, Comp. L. 1915, § 13894.
Liability on bond to pay all debts given to prevent sale of realty by person interested in estate, see Jud. Act, chap. LIX, § 11, Comp. L. 1915, § 13997.

¶ 1212. The condition in an administrator's bond that he shall perform all orders and decrees of the probate court by the said administrator to be performed "in the premises," has relation only to the estate of which he is administrator and does not extend to an order, though in terms addressed to him, which relates to another estate.—Robbins v. Burridge, 128 Mich. 25.

¶ 1213. An administrator is not liable on his bond for the amount owed by him to his intestate when at the time of his appointment he was insolvent and remained insolvent during the period of his administration, under Comp. L. 1897, § 9433, which exempts administrators from liability for uncollectible debts of the estate.—Sanders v. Dodge, 140 Mich. 236.

¶ 1214. Where executors ordered to distribute wrongfully convert property to the use of one of their number, action lies on their bond until they have assumed the character of trustees.—Cranson v. Wilsey, 71 Mich. 356.

¶ 1215. Under a will containing a bequest to two infants to vest at majority and meanwhile directing the executors to invest the fund and interest thereon in real estate mortgages, an order for distribution was made, but the executors instead of investing the fund converted it to the use of one of their number. Held, that an action for such conversion would lie on their bond. The order, not having been obeyed, did not change the character of their possession from that of executors to that of trustees.—Cranson v. Wilsey, 71 Mich. 356.

¶ 1216. An administrator's bond has no independent force apart from the administration proceedings, and if a liability is barred which it was meant to secure, action on the bond to enforce that liability is barred also.—Biddle v. Wendell, 37 Mich. 452.

¶ 1217. Where suit on an executor's bond was brought at the instance of a minor's guardian to recover what the minor was entitled to from the testator's estate, it is a complete defense that the minor on his majority settled the whole claim with the executor, receiving payment partly in cash and partly by note; and it makes no difference that when such settlement was made the guardian had not settled his trust account.—Cheever v. Congdon, 34 Mich. 296.

§ 387. ——On special bonds for real estate sale.

Necessity and sufficiency of special sale bond, see ante § 232.

¶ 1218. Suit on administrator's bond given on sale of real estate is not barred by insufficient recovery on general bond.—Durfee v. Joslyn, 92 Mich. 211.

¶ 1219. The bond given by an administrator on sale of real estate is only an additional security for the moneys that came into his hands and does not supersede or affect the general bond.—Durfee v. Joslyn, 92 Mich. 211.

¶ 1220. An action on the general bond of an executor is not prerequisite to a suit on a bond given by him on a sale of real estate.—White v. Schaberg, 131 Mich. 319.

¶ 1221. After an executor's sale of realty, made by order of the probate court, has been confirmed without opposition, the executor cannot refuse to obey its order to distribute the proceeds to the devisees on the ground that the sale was irregular; and in an action on his bond for such refusal this defense is not open to the executor or to his securities.—Clark v. Fredenburg, 43 Mich. 263.

§ 388. ——On bonds of residuary legatees to dispense with further administration.

Title of residuary legatee as executor, see ante § 66.
Effect of bond by residuary legatee as executor, see ante § 220.
Effect of bond of residuary legatee as executor on rights and lien of creditors, see ante § 220.
Necessity for inventory or account by residuary legatee as executor, see ante ¶ 330.
Bond when executor is residuary legatee, see Jud. Act, chap. LII, § 37, Comp. L. 1915, § 13809.

¶ 1222. An executor's bond as residuary legatee ends the ordinary course of administration.—Durfee v. Abbott, 50 Mich. 479; Wheeler v. Hatheway, 54 Mich. 547.

¶ 1223. Giving bond as executor and residuary legatee substantially completes adminis-

tration; and the intervention of the judge of probate afterwards, if admissible at all, is never essential unless, perhaps, where the executor disputes a claim.—Durfee v. Abbott, 50 Mich. 278.

¶ 1224. When the executor is also residuary legatee, it is optional with him to give the usual executor's bond, or the bond prescribed by statute, conditioned to pay all the testator's debts and legacies; if the latter is given, he becomes at once the absolute owner of all the estate, both real and personal, with all the rights and remedies of an absolute owner, and subject to none of the restrictions and accountabilities of an ordinary executor. But he and his sureties are personally bound to pay all the debts and legacies whether there are sufficient assets or not.—Hatheway v. Weeks, 34 Mich. 237; McElroy v. Hatheway, 44 Mich. 399; Durfee v. Abbott, 50 Mich. 278.

¶ 1225. An executor who has given bond as residuary legatee cannot be sued on such bond by a creditor until the expiration of the time fixed by the probate court for the presentation of claims against the estate; he being chargeable only with such claims as that court has approved and allowed.—Blackmore v. Kent Probate Judge, 95 Mich. 446.

¶ 1226. An executor and residuary legatee, who has given the bond prescribed by statute conditioned to pay all the debts and legacies, cannot refuse to pay the debts and legacies on the ground that the assets are worth less than he supposed; and equity cannot relieve him from the risk he took, nor can he be released from his bond on surrendering the assets for ordinary administration.—Hatheway v. Weeks, 34 Mich. 237.

¶ 1227. An order by the probate court exacting of an executor a bond in a penal sum specified, with sufficient sureties, "as required by the statute in such cases made and provided," is a sufficiently definite requirement of a residuary legatee's bond as distinguished from any other, for the purposes of a suit on it.—Hatheway v. Sackett, 32 Mich. 97.

§ 389. Liability of sureties.

Defenses open to sureties, see post § 390.
Necessity and sufficiency of justification on bond, see ante § 37.
Liability of sureties on bond of residuary legatee as executor, see also ante ¶ 1224.
Defenses open to sureties, see post § 390.
Right of surety to subrogation, see Subrogation, I.
Right of surety to discharge, see Jud. Act, chap. LXIII, § 17, Comp. L. 1915, § 14135.

¶ 1228. The liability of the sureties on an administrator's bond is coextensive with that of their principal and extends no further than his.—Ward v. Tinkham, 65 Mich. 695.

¶ 1229. The liability of sureties in an administrator's bond arises only after the default of their principal is fixed, and then only under the terms of the obligation entered into by them.—Grady v. Hughes, 80 Mich. 184.

¶ 1230. It is in all cases the duty of the bondsmen to see that their principal fulfils the obligation of the bond, and the creditors of an estate are not obliged to sue sooner than within the time set by the statute of limitations.—Avery v. Miller, 81 Mich. 85.

¶ 1231. Under Comp. L. 1897, § 9320, which provides that the executor of an executor shall not as such have any authority over the first estate but on the death of the first executor further administration may be granted to such person as the probate court may judge proper, the sureties on the bond of an administrator are not liable for his default in regard to the prior estate notwithstanding the bond is conditioned on his performance of all orders and decrees of the probate court in the premises, and the probate court has ordered payment by him of a given sum to the administrator de bonis non of the previous estate.—Robbins v. Burridge, 128 Mich. 25.

¶ 1232. A petition by an administrator stating that his intestate was executor in another estate and that he desired to file the final account of his intestate in that estate, which account is filed and approved, and the administrator ordered to pay a given sum to an administrator de bonis non of the former estate and a subsequent order granting leave to the administrator de bonis non to sue and prosecute upon the bond of the later administrator for his failure to pay the given sum granted over the objections of the sureties who appeared in court, is not res adjudicata on the right of recovery against the sureties.—Robbins v. Burridge, 128 Mich. 25.

§ 390. Defenses open to sureties.

Liability of estate for obligation of decedent as surety, see ante ¶ 514.

¶ 1233. A surety for an executor is not, it seems, precluded, by his failure to resist the application for leave to sue on the bond, from resorting to any legal defense against a probate decree against his principal for payment of which the bond is sued.—Holden v. Lathrop, 65 Mich. 652.

¶ 1234. An executor's sureties, notified to show cause why his bond should not be sued, cannot, in suit thereon, assail on the merits a decree jurisdictionally passed on his accounting.—Clark v. Fredenburg, 43 Mich. 263; Holden v. Lathrop, 65 Mich. 652.

¶ 1235. A petition by an administrator stating that his intestate was executor in another estate and that he desired to file the

final account of his intestate in that estate which account is filed and approved and the administrator ordered to pay a given sum to an administrator de bonis non, does not estop the sureties on the administrator's bond who were not parties to the proceedings from asserting that the rendering of the account and the payment to the administrator de bonis non are not part of the administrator's duties.—Robbins v. Burridge, 128 Mich. 25.

§ 391. Remedies and procedure on bonds.

On residuary legatee's bonds, see post § 392.
On predecessor's bond, see post § 393.
Necessity and sufficiency of bond for issuance of letters, see ante §§ 35, 36.
Necessity and sufficiency of special bond for sale of realty, see ante § 232.
Right of representative of obligee's estate to sue on bond drawn to decedent, his heirs or assigns, see also ante ¶ 224.
Procedure on bonds drawn to decedent as obligee, see ante ¶ 270.
What determined by order of court permitting bond to be prosecuted, see ante ¶ 839.
Objection that second suit on bond was brought instead of scire facias on judgment rendered on former suit, see Appeal ¶ 1259.
When suit may be brought on bond, see Jud. Act, chap. LXIII, §§ 3-6, Comp. L. 1915, §§ 14121-14124.
In whose name suit on bond to be brought, see Jud. Act, chap. LXIII, § 7, Comp. L. 1915, § 14125.
Permission of court to prosecute suit on bond, see Jud. Act, chap. LXIII, § 8, Comp. L. 1915, § 14126.
Judgment, execution and disposition of moneys recovered in action on bond, see Jud. Act, chap. LXIII, §§ 9-11, Comp. L. 1915, §§ 14127-14129.

¶ 1236. One whose claim against an estate has been allowed but has not been paid within the time limited makes a prima facie case in an action on the administrator's bond if he shows an inventory of assets exceeding the debts and an order for the payment of the debts; but defendants may rebut this by showing a deficiency of assets.—Hilton v. Briggs, 54 Mich. 265.

¶ 1237. Where, in a suit upon an administrator's bond, defendants' testimony shows that the administrator received certain sums of money belonging to the estate, and there is no evidence to the contrary, it is proper for the court to find the fact established.—Wayne Probate Judge v. Joslyn, 101 Mich. 551.

¶ 1238. In an action on the special bond of an administrator given for the sale of real estate, where the law of the case permits admission of evidence that the final accounting included money received from such sale and also permits a recovery of such amount, it is not proper to regard the order on final accounting as "the sole and conclusive evidence" of the rights of the estate against the administrator.—Wayne Probate Judge v. Joslyn, 101 Mich. 551.

¶ 1239. Where a bequest was "to the corporation of the village of A.," and the order of the probate court giving permission to sue on the executor's bond, for its nonpayment, was "to the common council of the village of A," and the declaration on the bond was "for the use and benefit of the village of A," it was held that there was no variance that would prevent the admission of the order in evidence. The common council of the village is, for the purpose of the suit, identical with the village or the corporation of the village.—Hatheway v. Sackett, 32 Mich. 97.

§ 392. ——On residuary legatee's bond.

Effect of bond of residuary legatee as executor on rights and lien of creditors for payment of claims, see ante § 220.
Suit against residuary legatee by one surety on his bond for accounting and administration of estate in equity, see ante ¶ 1062.
Bond when executor is residuary legatee, see Jud. Act, chap. LII, § 37, Comp. L. 1915, § 13809.

¶ 1240. The rule that proceedings at law to enforce payment of a deficiency on foreclosure cannot be taken without leave of the court in which the foreclosure was had (How. St., § 6703), does not apply to an action begun by leave of the probate court upon the bond of the mortgagor's residuary legatee.—Culver v. Detroit Superior Court Judge, 57 Mich. 25.

¶ 1241. Whether or not good pleading requires the declaration on a residuary legatee's bond to aver the granting of an order of the probate court, giving permission to sue on the bond, the omission to do so is not available by way of objection to the proof of such permission; the defect, if it is so, is technical, and advantage can be taken of it only by demurrer.—Hatheway v. Sackett, 32 Mich. 97.

¶ 1242. An action at law for the nonpayment of a legacy may be brought upon the bond given under Comp. L. 1871, § 4366, How. St., § 5836, by an executor who is also residuary legatee. It is not an action on the bequest itself, nor specifically and strictly for the legacy. The giving of the bond is a prima facie admission of sufficient assets, and is an express undertaking to pay the legacies, and an order by the probate court for payment is not necessary as a precedent to suit upon it.—Hatheway v. Sackett, 32 Mich. 97.

¶ 1243. The residuary legatee, in a proceeding against him by a general legatee

upon his bond, has a right to examine the plaintiff fully as to what the latter has received from the testator's estate.—Wheeler v. Hatheway, 54 Mich. 547.

¶ 1244. If a mortgage upon the estate of a testator is a bona fide indebtedness which the residuary legatee is bound to pay, it cannot be deducted from the amount of a general legacy in an action on the residuary legatee's bond.—Wheeler v. Hatheway, 54 Mich. 547.

§ 393. ——On predecessor's bond.

Accountability for representative and predecessor, see ante, X, E.

¶ 1245. Where leave has been granted to an administrator with the will annexed to sue upon his predecessor's bond, and suit is brought in the name of the probate judge for the use of a legatee who has no definite vested interest, the record may be amended so as to show the administrator as the party in interest for whose use it is sued.—Cranson v. Wilsey, 71 Mich. 356.

XV. PARTITION BY PROBATE COURT AND DETERMINATION OF HEIRSHIP.

§ 394. Partition by probate court.

Conclusiveness of findings, see post § 395.
Collateral attack and impeachment, see post § 396.
Probate proceedings for determination of heirship, see post §§ 397, 398.
Proceedings by representative to partition as surrender of possession of realty, see ante ¶ 399.
Distribution of shares in estate, see ante, XIII.
Appeals to circuit court from partition orders of probate court, see Probate Courts, III.
Writ of error from circuit judgment on appeal to supreme court, see Appeal.
Right and propriety of partition in equity, see Partition, I.
Proceedings in probate court for assignment of dower, see Dower §§ 40, 41.
Necessity and sufficiency of notice of proceedings to assign dower, see Dower § 40.
Partition by probate court, see Jud. Act, chap. LVII, §§ 6-24, Comp. L. 1915, §§ 13918-13936.

¶ 1246. Partition in the probate court is restricted to the lands to be assigned to the heirs or devisees after the payment of debts. —Campau v. Campau, 19 Mich. 116.

¶ 1247. The probate court may be required to make partition of lands devised by a will dividing the real estate among the heirs; but the partition does not change the nature of the title to each share.—Haddon v. Hemingway, 39 Mich. 615.

¶ 1248. Partition before expiration of a dower interest is not forbidden by Comp. L., § 4515 (How. St., § 5983); that statute only provides for making partition afterwards.—Persinger v. Jubb, 52 Mich. 304.

¶ 1249. Proceedings for partition need not be held invalid on review merely because the petition therefor was made by an administratrix, as such, so long as it appeared that she had a dower interest and was guardian for minor heirs; the misdescription could have been amended at any stage by leave of the judge of probate.—Persinger v. Jubb, 52 Mich. 304.

¶ 1249a. The register of probate, in 1817, had authority under the territorial act of January 19, 1811 (Ter. Laws, p. 160), to make partition of real estate among tenants in common.—Willetts v. Mandlebaum, 28 Mich. 521.

§ 395. ——Conclusiveness of findings.

Appeals from probate courts, see note, ante § 197.
Conclusiveness of decree of distribution, see ante § 377.

¶ 1250. On an issue of title by virtue of an assignment to heirs and a partition in probate court, slight showing that an assignment has been made to the heirs to support a partition among them will be sufficient to support a finding of title by partition, where it appears that the probate court has proceeded to partition the lands among the heirs.—Dickison v. Reynolds, 48 Mich. 158.

¶ 1250a. Partition by the probate court under a will and determination by it of the estate taken by each devisee is as final as though made by a court of equity.—Parkinson v. Parkinson, 139 Mich. 530.

§ 396. ——Collateral attack and impeachment.

¶ 1251. A recital in a decree for partition that a specified party is entitled to share cannot be collaterally attacked even though it be an adjudication that ought properly to have preceded the decree, and though the person named be illegitimate and therefore precluded by statute from claiming any part of the estate.—Persinger v. Jubb, 52 Mich. 304.

¶ 1252. A decree of the probate court making partition among the devisees under a will and assigning to one a life estate, consented to by the devisee and not appealed from, cannot be questioned in a proceeding in chancery by alleging that the will was void and that therefore title in fee was taken under the statute.—Parkinson v. Parkinson, 139 Mich. 530.

¶ 1253. A probate partition assigning a life estate to testator's daughter with remainder to her children, yet unborn, according to invalid provisions of the will, cannot be attacked collaterally by such children in

ejectment for the land claiming as heirs of the testator on the theory that because of the invalidity the devise lapsed to the heirs; since when it lapsed at testator's death they were not his heirs, being yet unborn, and therefore were not necessary or proper parties to the probate partition.—James E. Scripps Corporation v. Parkinson, 186 Mich. 663.

§ 397. Probate proceedings for determination of heirship.

Effect and conclusiveness of finding, see post § 398.

Authority of representative to initiate proceedings for determination of heirship, see also ante ¶ 1175.

Presumption as to testacy and heirs, see also Descent § 5.

Deed as evidence of heirship, see Evidence ¶¶ 2580-2582.

Determination of heirship by probate court, see Jud. Act, chap. LVII, §§ 25-29, Comp. L. 1915, §§ 13937-13941.

Right of spouse living in bigamous relations on proceedings for determination of heirship, see Comp. L. 1915, §§ 14618, 14619.

¶ 1254. It seems that the probate court in a proceeding under Laws 1887, Act No. 278, providing for adjudication by the probate court who are the legal heirs and representatives, "and entitled to (decedent's) lands" on application by "any person claiming an interest in the lands," has no jurisdiction to determine the rights of one adopted by proceedings under an unconstitutional statute on the understanding and promise that he would receive the property as decedent's son, which understanding was adhered to and lived up to.—Wright v. Wright, 99 Mich. 170, per Long, J., court being divided.

¶ 1255. How. St., § 5990 et seq., providing that, "when any person shall have deceased having title to any lands in this state," specified proceedings may be had to determine "who are or were the legal heirs of said deceased person," is not limited to cases where the ancestor died after the passage of the act.—Miller v. Davis, 106 Mich. 300.

¶ 1256. The orders of the probate court in proceedings for the determination of heirship under How. St., § 5992c, are not appealable.—Lorimer v. Wayne Circuit Judge, 116 Mich. 682.

¶ 1256a. The proper remedy of any heir whose interest was injured by the partition of an estate by the register of probate under the territorial statute of January 19, 1811 (1 Ter. Laws, p. 168), was an appeal under the statute.—Willetts v. Mandlebaum, 28 Mich. 521.

§ 398. ——Effect and conclusiveness of finding.

See note, ante § 197.

¶ 1257. Where one dies intestate, leaving no issue, but a widow and a father, the title of the widow to a life estate and that of the father to the remainder after the death of the widow vested immediately upon the death of the intestate, and the only effect of an order of the probate judge, at the close of administration, reciting that intestate had left no father and assigning the lands of decedent to the widow, was to award the widow the possession of the property.—Rich v. Victoria Copper Mining Co., 147 Fed. 380.

¶ 1258. The finding of the circuit court on appeal from the probate court in the proceedings under Act No. 278, Laws of 1887, for the determination of heirship is not conclusive and is but prima facie evidence of the facts found.—Wright v. Wright, 99 Mich. 170.

¶ 1259. The findings of the probate court in proceedings on heirship under How. St., § 5992c, are not conclusive on anybody and are merely prima facie evidence of the facts found which may be ignored by resort to original evidence in later proceedings.—Lorimer v. Wayne Circuit Judge, 116 Mich. 682.

¶ 1260. The findings of the probate court in proceedings for the determination of heirship under Comp. L. 1897, §§ 9469-9471, are binding on no one and are merely evidence of the facts found which may be ignored by resort to original evidence in any subsequent proceedings.—Fisher v. Gardnier, 183 Mich. 660.

¶ 1261. A determination by the probate court under §§ 9469-9471, Comp. Laws 1897, §§ 11180-11182, How. St., 2nd ed., as to who are the heirs of a deceased person is not res adjudicata, but merely prima facie evidence of the facts found.—Hawley v. Dibble, 184 Mich. 298.

ESTIMATES.

Cross-References.

Estimates—

Under terms of contracts as basis for performance or payment, see Building Contracts, II, VI; Contracts, VI, VII; Public Contracts, IV; Sales.

As basis for local improvements, see Local Improvements, III; Drains, II.

As opinion evidence, see Evidence, VI; Indictment, VIII.

ESTOPPEL.

TREATS of the preclusion of a person to assert facts by previous solemn writings establishing the fact, which he cannot question, or by previous representations and conduct on his part contrary to or inconsistent with the attempted assertion. It excludes estoppels by judgment (see Former Adjudication) and also excludes equitable estoppels and laches as applied specifically to the particular matters involved in the various specific topics. Only the general principles of equitable estoppel are treated in this topic. See division III.

Analysis.

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C. Operation, Scope and Effect; Pleading, Proof and Practice.

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§ 60. Court and jury questions.
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I. IN GENERAL.

§ 1. Definition and distinctions.

[Note. There are numerous doctrines and rules of preclusion which are sometimes called estoppels or in respect to which the word "estoppel" is sometimes used. It is not the province of a digest to go into juristic distinctions, but for the purpose of compilation the doctrine that one is precluded by an Election and Waiver of one right in favor of another has been treated in the topic so named, which see.

The conclusion of questions between parties by being merged or embodied into a contract or settlement is treated in Accord and Satisfaction; Account Stated; Releases; Contracts, VIII.

The exclusion of parol or extraneous evidence as to what was meant or intended by terms of a contract or conveyance is a doctrine of evidence and is treated in Evidence, V.

The exclusion as against bona fide takers of claims and defenses whereof they had no notice or of defenses in favor of persons taking with notice is treated in Notice and Record of Title, I; Negotiable Instruments, XIII.]

Nonoperation to conclude matters of law, see post § 4.

(3 Mich. Dig. 22)

Conclusiveness of accord, see Accord and Satisfaction §§ 13, 14.

Conclusiveness of certificate of architect as to performance, see Building Contracts § 10.

Ratification of acts of agents, see Agency, II, C.

¶ 1. Estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the act of the party himself, express or implied.—Detroit Sav. Bank v. Loveland, 168 Mich. 163.

§ 2. Policy and grounds of estoppel.

Equitable basis of estoppels in pais or equitable estoppels, see post § 24.

Necessity that estoppels be mutual, see post §§ 7, 25.

¶ 2. Estoppels arise upon equities and are enforced for their protection.—Ferguson v. Millikin, 42 Mich. 441; De Mill v. Moffat, 49 Mich. 125; Bell v. Todd, 51 Mich. 21.

¶ 3. The doctrine of estoppel is applied to prevent injustice, not to relieve parties from the obligations of their contracts.—Ladd v. Brown, 94 Mich. 136.

§ 3. Capacity or disability to be estopped.

Effect of officials' acts and doings to estop government, see also post ¶ 209.

Estoppels by or against counties, municipalities or the state, see Counties; Municipal Corporations, III; State of Michigan, I.

Estoppel of the public to make constitutional question, see Constitutional Law § 29, ¶¶ 145-147.

Immunity of county from plea of estoppel in action on officer's bond, see Officers VII.

Disability of state to prosecute authorized acts as nuisances, see Nuisances, I.

Capacity of married women generally and in respect to their separate estates, see Husband and Wife, IV.

Disabilities of infants and incompetents, see Infants, I, III; Insane Persons, II-IV.

§ 4. Matters of law or questioned facts.

Invalid contract as estoppel, see post § 42.

¶ 4. A married woman who, to protect her separate property from her husband's creditors, voluntarily includes it in a bill of sale by him to a third person, is not estopped from claiming it as against the vendee, who knew her object; the mistake being one of law.—Bloomingdale v. Chittenden, 75 Mich. 305.

¶ 5. Where, because of an erroneous assumption of law on all sides, a corporation had mistakenly listed its property for taxation in a township where it was not legally taxable, it is not thereby estopped from contesting the validity of the tax.—Township of Portsmouth v. Cranage Steamship Co., 148 Mich. 230.

II. BY RECORD OR DEED; AND EFFECT ON AFTER-ACQUIRED TITLES.

Inconclusiveness of recitals of amount of consideration to exclude evidence thereof, see also Evidence § 161.

Statements and recitals in deeds and grants as admissions against interest, see Evidence § 383.

§ 5. By records and judgments in general.

[Note. The conclusiveness of judgments and decrees to settle the facts involved and passed on is fully treated in Former Adjudication, which see.]

Estoppel to make collateral attack on judgment otherwise open to it, see Judgments, VII.

Conclusiveness of bankruptcy decree and discharge, see Bankruptcy § 13.

Conclusiveness of return to writs, see Attachment § 75; Executions, IX; Process, II, D; Certiorari §§ 56-61; Mandamus, V.

Effect of audit of claim by county or municipal auditing board, see Counties, VI; Municipal Corporations, XIV.

Audit and allowance of claim by county as estoppel of claimant to make additional claim, see Counties § 47.

¶ 6. The certificate of the county clerk to the acknowledgment of a recognizance of bail is not a record made in open court, so as to be unimpeachable.—Spencer v. Fish, 43 Mich. 226.

§ 6. Nature and requisites of estoppel by deed.

[Note. Estoppel by act or representation in which the deed is a part of the appearance created is an equitable estoppel rather than one by deed. See post, III, B. The estoppel by deed is a "preclusion to deny that which has been asserted by an agreement or conveyance under seal," and when the assertion is not made or implied from the deed the estoppel is treated as one in pais.]

Various kinds of deeds, see post §§ 8-12.

Sufficiency of deeds and mortgages to carry after-acquired titles, see post § 19.

¶ 7. A grantor is concluded by the terms of his deed whether he understands them or not.—White v. Smith, 37 Mich. 291.

¶ 8. A grantor and those claiming under him are estopped as against his grantee from disputing the description in the deed on the ground of a supposed mistake by the grantor as to his boundary.—Fahey v. Marsh, 40 Mich. 236.

§ 7. ——Mutuality.

See also post ¶ 20.

Mutuality in estoppels in pais, see post § 25.

¶ 9. A lease with a reservation which afterwards becomes the subject of an agreement between the lessor and a third party, in which the lessee has no interest, may be admissible in evidence to show the character of that agreement, but it will not operate to bind the lessor by way of estoppel in favor of the third party; estoppel must be mutual.—Chope v. Lorman, 20 Mich. 327.

§ 8. Quitclaim deeds.

Matters precluded against grantee, see post § 16.

Persons estopped, see post ¶ 20.

Inefficacy of quitclaim deeds to support doctrine of inurement of after-acquired title, see post § 19.

Inurement of title coming by quitclaim deed to grantee under earlier warranty deed, see post § 21, ¶ 54.

Effect of recital in quitclaim as an admission by grantee against his interest, see Evidence § 383.

¶ 10. A quitclaim deed does not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title, in an action in ejectment, since it is not an assertion of any particular, or of any title.—Olmstead v. Tracy, 145 Mich. 299.

§ 9. Partition deeds.

Inapplicability of doctrine of inurement of after-acquired title, see post § 19, ¶ 40.

¶ 11. Where some of several tenants in common have attempted a voluntary partition among themselves, their deeds to each other, though void as to the tenants not concerned, are valid among themselves, operating by way of estoppel.—Campau v. Campau, 19 Mich. 116.

§ 10. Deeds and grants by public or public officers.

¶ 12. The plan on which Detroit was originally laid out left many triangular parcels of land which the "governor and judges" set aside for public purposes to be thereafter declared by the city council. In 1834 the governor and judges granted unreservedly to Ste. Anne's Church the use of a particular triangle for religious purposes. In 1837 the city, acting under a power conferred by its charter, exchanged certain lands with the church, and in doing so gave it the triangle. Held that, whether the city had any title to the triangle at that time or not, it is estopped from denying its conveyance, because in 1842 it was given full legal title to the lands covered by the old plan; and after the lapse of forty years, during which the city made no adverse claim, a quitclaim of the property by the church should be sustained.—Cicotte v. Anciaux, 53 Mich. 227.

§ 11. Deeds by representatives, trustees, etc.

Right to question capacity and status as personal representative and collateral questions of capacity, see Estates of Decedents §§ 32, 33-53.

¶ 13. The deed of an administratrix, containing a covenant to warrant the title against any one claiming under the grantor, does not estop her from claiming dower in the premises as widow of the deceased.—Wright v. De Groff, 14 Mich. 164.

¶ 14. A covenant by an administratrix against her own acts, in a deed made by her in her representative capacity, of the lands of her husband's estate, bars or estops her from claiming dower therein.—Wright v. De Groff, 14 Mich. 164.

¶ 15. A widow who as administrator in name but without lawful appointment made a conveyance of property under a supposed administration is estopped from afterwards asserting rights as widow contrary to such conveyance; though subsequently she came back into the title by reconveyance to her but under another who was also estopped.—Damouth v. Klock, 29 Mich. 289.

¶ 16. Where a widow as administratrix and guardian of her three children conveys by warranty deed a part of her husband's estate and in her report to the probate court of the property left for distribution does not mention any outstanding estate nor in the final account claim that any interest in it belongs to her, she is estopped in a suit by the grantee to quiet title to claim that she did not convey her dower interest.—Hunt v. Stevens, 174 Mich. 501.

§ 12. Mortgages.

¶ 17. Where a mortgage is expressly made subject to prior mortgages, their validity cannot be denied by the mortgagor or his assignee in bankruptcy.—Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

§ 13. Persons estopped; parties and privies.

See also ante ¶ 8.

Effect of deed in representative capacity, see ante § 11.

Coming back into title by different right, see ante § 11, ¶ 15.

Persons concluded by judgments, see Former Adjudication, V.

¶ 18. Where a party to a deed is estopped, all other persons claiming under or through him are equally bound by the estoppel.—Lee v. Payne, 4 Mich. 106.

¶ 19. Where a grantor on giving a warranty deed delivers to the grantee an outstanding life-lease held by him, he is estopped from claiming afterwards that the deed did not convey the interest held under the lease; and so are all who claim in privity with the grantor.—Case v. Green, 53 Mich. 615.

¶ 20. Between a quitclaim grantee and a minor grantor, who joined with other common tenants in a quitclaim deed, there exists no relation by which tax titles, outstanding without fault of the grantee and bought in by him, inure to the minor's benefit as common tenant with the minor, treating his quitclaim deed as void because of minority; since the quitclaim deed asserted no title and could be the basis of no estoppel nor of any obligation on the part of the grantee towards the minor to buy in or pay taxes. Accordingly one holding by warranty deed from the grantee is not estopped as defendant in ejectment to set up such tax titles against the minor suing after majority for possession on the theory that his quitclaim deed was invalid.—Olmstead v. Tracy, 145 Mich. 299.

¶ 21. Where, prior to the consolidation of two railroad companies, one of them conveys certain lands by warranty deed with mineral reservations, after which the lands are certified to the state of Michigan in aid of the construction of the road of the other company, and the two companies are consolidated under a new name pursuant to the statute, and the state patents the lands to the new company, which conveys the mineral reservations, the patentee and its grantees are bound by the deed given by the first company.—Deer Lake Co. v. Michigan Land & Iron Co., 89 Mich. 180.

§ 14. Facts concluded by deeds, mortgages and bonds.

As to entire estate passing, see also ante ¶ 19.
As to unreserved minerals, see ante ¶ 21.
Effect of deeds by persons in representative capacity, see ante § 11.
By recitals, see post § 15.
Conclusion of grantees and mortgagees, see post § 16.
Inurement of after-acquired title by estoppel of grantor to assert it contrary to his deed, see post §§ 18-22.
Estoppel by deed to dispute boundaries, see Boundaries § 9.
Release bond in attachment as estoppel to attack attachment or levy, see Attachment § 147.
Admission by giving release bond in attachment, see Attachment ¶ 166.
Preclusion of mortgagor to set up outstanding title as defense to foreclosure, see also Foreclosure, III, A.
To affirm or deny execution and delivery of instrument, see Execution of Instruments, I, III.
Right of purchaser accepting deed under contract to object later to its sufficiency to meet terms of contract, see Vendors and Purchasers, III, VIII.

¶ 22. Where, upon the transfer to defendant partner of firm goods which plaintiff seized under a security bill of sale, defendant has executed a bond conditioned to sell such goods as described in the attached inventory, and to pay the proceeds to plaintiffs up to a certain sum, he is estopped in an action on the bond from saying that certain of the property transferred to him by plaintiffs belonged in fact to others, or that all of the property seized by plaintiffs under the bill of sale was not transferred to him; but if by fraud or mistake articles are included in the inventory which were not in the bill of sale, and which did not come into plaintiff's possession, and which were not transferred to defendant, he and his surety are not estopped from denying that the inventory contained such articles, and they cannot be charged therewith.—Wheeler v. Meyer, 95 Mich. 36.

¶ 23. A mortgagor cannot deny he held the title to the mortgaged premises at the time the same was executed.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

§ 15. ——Recitals.

See also post ¶ 28.
Recitals in simple contracts as estoppels, see post § 42.

¶ 24. A recital which is an essential basis of the contract, such as an enumeration of patents owned for the purpose of fixing the duration of a licensing agreement by their duration, is an estoppel; otherwise where the recital is not material.—Thomson Elec. Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496.

¶ 25. Where an action is not founded upon a mining option and lease, but is collateral to it, facts recited or admitted in such instrument do not operate by way of estoppel.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 26. A recital in a deed by the auditor general that a former deed was erroneously released, is no more than evidence of such fact and is not conclusive against the landowner.—Hoffman v. Silverthorn, 137 Mich. 60.

§ 16. ——Upon grantees and mortgagees.

Facts conclusive on mortgagor, see ante § 14.
Estoppel to deny validity of mortgages described as prior, see ante ¶ 17.
Preclusion of grantee to question mortgage to which deed is subject or which he assumes, see Mortgages, VII.

¶ 27. A foreclosure purchaser who claims title under the sheriff's deed is estopped from denying an erroneous recital therein as to the rate of interest borne by the mortgage.—Dodge v. Kennedy, 93 Mich. 547.

¶ 28. The grantee in a quitclaim deed which recites that a contract to him for the sale of the land has been assigned by him is estopped from bringing an action to support which title under such contract would be requisite.—Smith v. Ryerson, 98 Mich. 588.

§ 17. ——Upon sureties.

[Note. The topic Suretyship treats of the obligations of sureties in general, and should be consulted in this connection, since the measure and conditions of the surety's liability, i. e., the binding effect of the bond, is intimately involved and is the more frequent subject of inquiry.]

¶ 29. Sureties are estopped to deny the facts recited in their obligations, whether true or false.—Brockway v. Petted, 79 Mich. 620.

§ 18. Inurement of grantor's after-acquired title to grantee.

Sufficiency of the deed to invoke the doctrine, see post § 19.
Titles which will inure, see post §§ 21, 22.
Inurement under mortgage, see post § 20.
Deeds and mortgages in terms applying to described property and any to be acquired thereafter by grantor, see Deeds, III, C; Mortgages, III; Railroads, VI.
Effect of after-acquired title in dedicator of land, see Dedication § 3.
Right to assert title previously parted with as ground for recovery in ejectment, see Ejectment ¶ 29.

¶ 30. Where a grantor assumes by his deed to convey a title, and by any form of

assurance, whether it be by covenant of seizin and title or by that of quiet enjoyment, obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he is estopped from afterwards acquiring or asserting a title and leaving the grantee to sue upon the covenants for redress.—Smith v. Williams, 44 Mich. 240.

¶ 31. A warranty deed from a patentee of the United States, dated and purporting to be executed long before the issuing of the patent, effects an estoppel as against the grantor therein and all persons afterwards claiming title through him, to transmit the title to the grantee therein.—Shotwell v. Harrison, 22 Mich. 410.

¶ 32. One who by his deed has assumed to convey a title and has obligated himself therein to protect the grantee in his enjoyment of it is estopped from asserting as against his grantee an after-acquired title.—Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

¶ 33. One who contracts to sell land that he does not own, but title to which he subsequently acquires and conveys by general warranty, cannot in an action of ejectment be heard to say that he had no title when he agreed to sell.—Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

¶ 34. Title subsequently acquired by the grantor of a warranty deed inures to the benefit of the grantee.—Dye v. Thompson, 126 Mich. 597.

¶ 35. A grantor who assumes to convey property by a warranty deed when the title is in a third person, will, together with his subsequent grantees, be estopped from setting up against the first grantee, who has been evicted, an after-acquired title, and the after-acquired estate will pass by operation of law to the first grantee.—Donahue v. Vosper, 189 Mich. 78.

¶ 19. ——Sufficiency of the deed; quitclaims.

Warranty deed by entryman before patent, see also ante ¶ 31.

Wife's joinder in deed as affecting her separate rights, see post ¶ 61.

¶ 36. A deed containing covenants of warranty is effective to convey a title subsequently acquired.—Duffy v. White, 115 Mich. 264.

¶ 37. Where a deed, though lacking a covenant of warranty, imports the conveyance of a fee, the doctrine of estoppel permits the grantee to have the benefit of titles subsequently acquired by the grantor.—Pendill v. Marquette County Agric. Soc., 95 Mich. 491.

¶ 38. Where the deed of land purchased from an administrator by a wife with her own money is taken in the name of her husband, who conveys to her by warranty deed, a second deed executed to the husband by the administrator to cure a defect arising out of the proceedings upon which the first one was based enures to the wife's benefit, and a further conveyance from the husband is unnecessary.—Morris v. Jansen, 99 Mich. 436.

¶ 39. A deed in which the covenants of warranty except the acts of the United States, then the fee owner, suffices to draw to the grantee the after-acquired title when the United States confirms title in the grantor, and the fact that after such confirmation the same grantor makes a full covenant deed to another person, is immaterial.—Chapman v. City of Sault Ste. Marie, 146 Mich. 23.

¶ 40. A deed reciting that the parties "have by amicable arrangement divided among themselves the property of the estate of" their ancestor, and that in consideration of one dollar to each in hand paid, they "have granted, sold and conveyed all their right, title and interest" in the land mentioned, does not carry on its face, either expressly or by necessary implication, the statement that the grantors or their ancestor were seized of a title in fee in the premises, and therefore the doctrine of estoppel to assert an after-acquired title against one who claims under the grantee is inapplicable.—Pendill v. Marquette County Agric. Soc., 95 Mich. 491.

¶ 41. A deed made in an exchange of properties will not be set aside because of a tax title outstanding in a third person where the grantor subsequently obtained a quitclaim deed from the tax claimant and he had previously conveyed to the complainant by warranty deed.—Pirgandi v. Fay, 128 Mich. 630.

¶ 42. A quitclaim deed does not operate to convey a title subsequently acquired.—Gadsby v. Monroe, 115 Mich. 282.

¶ 43. A quitclaim deed can never inure to convey any subsequently acquired title not actually owned in equity at the time of the deed.—Frost v. Methodist Episcopal Missionary Soc., 56 Mich. 62; Fay v. Wood, 65 Mich. 390.

¶ 44. A quitclaim deed can never inure to convey any subsequently acquired title which was not actually owned in equity at the time of the deed, but it will convey land thereafter patented if the grantor has already bought and paid for it, and obtained a land-office certificate that passes everything but the formal title.—Frost v. Methodist Episcopal Church Missionary Soc., 56 Mich. 62.

¶ 45. A quitclaim deed does not inure to convey any subsequently acquired title which

was not actually owned in equity at the time of the deed.—Fay v. Wood, 65 Mich. 390; People v. Miller, 79 Mich. 93.

¶ 46. The owners of a lot who had joined with owners of adjoining lots in quitclaiming a strip of land off the ends of the lots "for the purpose of a public street" in order to widen the street afterwards acquired title to the adjoining lots by warranty deed. Held, in an action against them for obstructing the street, that they cannot be said to be estopped, through the operation of their quitclaim deed, from claiming the full length of the acquired lots.—People v. Miller, 79 Mich. 93.

¶ 47. A quitclaim deed creates no relation between the grantor and grantee which requires either, as to the other, to pay the taxes on the property included in the deed, though the grantor of such deed claimed that his deed was void for minority and valid as to cograntors who were his tenants in common, and therefore that purchase by the grantee inured to his benefit as tenant in common.—Olmstead v. Tracy, 145 Mich. 299.

§ 20. ——Of mortgagor's after-acquired title to mortgagee.

What titles will inure, see post § 21.

¶ 48. Where plaintiff has no title to land at the time of giving a mortgage containing a warranty of title, and subsequently acquires title, the subsequently acquired title redounds, under the warranty, to the benefit of the mortgagee.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

¶ 49. Where one has gone into possession of land under an oral agreement of purchase which included the payment of a mortgage as part of the price, mortgages the land to a third person, pays the prior mortgage, and subsequently takes a quitclaim deed, before any rights of vendee's creditors had attached to the land, such deed inures to the mortgagee's benefit as against the vendee's creditors, as fully as if the mortgage had contained covenants of warranty of title.—Clark v. Daniels, 77 Mich. 26.

¶ 50. Where a railroad company has mortgaged, before acquiring the title thereto, lands granted in aid thereof, it is afterwards estopped from setting up an after-acquired title against those who claim under the mortgagees.—Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805.

¶ 51. One who gives a purchase-money mortgage that includes lands not granted to him is not estopped as against the grantors and mortgagees from denying that it covers those lands, if he acquire them afterwards.—Brown v. Phillips, 40 Mich. 264.

¶ 52. A wife's mortgage for her husband's debt of land owned by both in the entirety, being void in its inception, does not estop her or her heirs from asserting the title afterwards vested in her on her husband's death; and How. St., § 8506, relating to foreclosure deed's passing after-acquired title, does not apply.—Naylor v. Minock, 96 Mich. 182.

¶ 53. Under the warranty contained in a mortgage covering a tract of land, with the exception of that part assigned to a widow as dower, the after-acquired title of the mortgagor in the part assigned to the widow inured to the benefit of the mortgagee and his grantees after foreclosure sale, although the question as to whether the expression in the mortgage relating to dower lands excepted the fee or only the life estate, was doubtful.—Caple v. Switzer, 122 Mich. 636.

§ 21. ——Titles which will inure.

Tax titles to other common undivided shares, see ante ¶ 20.

¶ 54. A quitclaim deed, perfecting a mortgagor's title, inures to the mortgagee's benefit under his mortgage.—Gray v. Franks, 86 Mich. 382.

¶ 55. A title subsequently acquired by inheritance held to inure to the benefit of a mortgage made by the owner of a life estate in the land.—Brayton v. Merithew, 56 Mich. 166.

¶ 56. A patent obtained by a mortgagor and vendee in possession inures to the benefit of his mortgagee and vendor.—Haney v. Roy, 54 Mich. 635.

¶ 57. Title obtained by foreclosure will inure to the benefit of the purchaser's grantee by estoppel under his warranty.—Lee v. Clary, 38 Mich. 223.

¶ 58. Where both parties to a conveyance of land that is mortgaged suppose that a title in fee is being transferred, though in fact it is not, and the grantor afterwards purchases the land at the foreclosure sale, he is bound in equity to recognize the grantee's right to a perfected title. And if he further becomes a party to an arrangement whereby a third person takes a deed from the grantee and gives back a mortgage that he, the grantor, disposes of for his own purposes, he is then estopped from disputing that his original deed conveyed title and that his foreclosure purchase related back to it.—La Coss v. Wadsworth, 56 Mich. 421.

¶ 59. Where one who has conveyed land with covenants of warranty acquires at guardian's sale an adverse interest of minor heirs, the title thus acquired inures to the benefit of his grantee.—Pfirrman v. Wattles, 86 Mich. 254.

¶ 60. Plaintiff, a summer resort association organized under Act No. 51, Public Acts 1859, and claiming existence under Act No. 230, Public Acts 1897, gave a mortgage to land in 1889. Foreclosure was had in 1895 followed by a sheriff's deed on execution under a deficiency decree dated February 1, 1897. Since the latter date defendants took plaintiff's place in the control and development of the premises, openly and notoriously under a claim of ownership. Nineteen years after the giving of the mortgage plaintiff sued in ejectment on the ground that the giving of the mortgage was not authorized by a vote of the stockholders as provided for by statute but was made in pursuance of a resolution of the board of directors, and that it had since acquired title. Held, plaintiff could not raise this question in the ejectment suit since the estoppel to claim the after-acquired title prevented.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

§ 22. ——Title accruing to grantor's wife.

Burden of proving that consideration moved to married woman joining in deed, see post § 23.

Title subsequently coming to husband grantor to wife, see ante ¶ 38.

¶ 61. The future interest of a married woman in land held by her husband under a devise for life with remainder to his surviving heirs, does not pass by estoppel by reason of her joinder with her husband in the conveyance of his life interest, where neither her purpose in doing so or that she was benefited by the consideration is shown. —Menard v. Campbell, 180 Mich. 583.

§ 23. Pleading or urging and proof of estoppel.

Pleading and proof of estoppel in pais, see post § 56 et seq.

Pleading estoppel by judgment, see Former Adjudication, VII.

¶ 62. In order to show that the estate of a married woman as remainderman was transferred by estoppel by her joinder with her husband in conveying his life estate, the burden rests on those claiming under the conveyance to show the purpose of the wife in joining therein, and that she was benefited by the consideration.—Menard v. Campbell, 180 Mich. 583.

III. EQUITABLE ESTOPPEL AND ESTOPPEL IN PAIS.

A. GENERAL PRINCIPLES AND ELEMENTS.

§ 24. Nature and policy of doctrine.

See also post ¶ 224.

Equitable basis, see also ante § 2.

Representations and appearances held out creative of estoppel, see post, III, B.

Necessity of mutuality, see post § 25.

Ambiguous or equivocal representations or appearances, necessity that estoppel be certain, see post § 26.

Elements of falsity, mistake or deception, knowledge or intent, reliance, and action to prejudice, see post §§ 27-29.

Necessity of reliance making denial of appearance or representation inequitable, see post § 29.

Doctrine that of two equally innocent parties loss will fall on one making it possible, see Equity § 9.

¶ 63. The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe do not exist.—Hubbard v. Shepard, 117 Mich. 25.

¶ 64. An estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist and such other person rightfully relies and sets on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.—Kole v. Lampen, 191 Mich. 156.

§ 25. Mutuality.

See also post ¶ 101.

Mutuality in record or deed estoppels, see ante § 7.

¶ 65. Estoppels must be mutual.—Chope v. Lorman, 20 Mich. 327.

¶ 66. There can be no estoppel in favor of those who are not themselves estopped.—Baker v. Johnston, 21 Mich. 319.

¶ 67. The general rule is that, to constitute an estoppel, the statement which is alleged to work the estoppel must have been made to the party who was expected to act upon it, or to his agent, or other person in privity with him.—Palmer v. Sharp, 112 Mich. 420.

¶ 68. A paper signed by a judgment debtor and delivered to the attorney of his creditors, agreeing to compromise the judgment in a certain way, or in default thereof to deliver certain property levied upon in payment, cannot estop him from claiming the levy to be invalid, where it appears that the attorney had no authority to enter into such an agreement, or to compromise the judgment in any manner.—Hickey v. Hinsdale, 12 Mich. 99.

¶ 69. An attorney's suit against a railroad company of which he was a director to recover for professional services cannot be defended on the ground that his claim, by reason of his position and his representations, is inequitable as against an investment company which is the real owner of the road; the investment company not being a party.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226.

¶ 70. One cannot repudiate a contract and base an estoppel on it as against the other party any more than he can rely upon the promise while withholding the consideration for it.—Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

§ 26. Certainty and ambiguity.

Words of agent referring to article as "mine" where not used in connection with any question of his ownership as distinguished from the principal's, see post ¶ 218.

¶ 71. Estoppels never arise from ambiguous facts, but must be established by such as are unequivocal and not susceptible of two constructions. — Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476.

¶ 72. The doctrine of estoppel, based upon direct or indirect assertions, promises or assurances on which another has acted to his prejudice, should be applied only where the facts calling for it are unquestionable, and the wrong to be prevented undoubted.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 73. The act of the buyer of logs in reporting the quantity determined by the scaler to the seller for the purpose of fixing the amount due for stumpage does not estop the buyer to question the correctness of the scale on making a claim subsequently for loss of part of the logs by reason of the seller's negligence in handling them under a subsequent contract, where at the time of the earlier transactions the buyer did state that the scale was too low and asked that a new scale be required.—Sullivan v. Ross' Estate, 124 Mich. 287.

¶ 74. Plaintiffs in replevin of property taken under attachment against W, who claimed title until the property was paid for by W, were not estopped to claim such title because one of the plaintiffs stated to the attaching creditor, prior to the attachment, that good title could be obtained from W by a purchaser; as a purchaser could in fact have obtained good title after plaintiffs had been paid.—Schoolcraft v. Simpson, 123 Mich. 215.

§ 27. Element of falsity, mistake or deception.

See also post ¶ 98.

Necessity of misleading influence, see post § 29.

Analogous doctrines of fraud as to elements of falsity and deception, see Fraud, I.

¶ 75. A transaction in which there was no concealment or misunderstanding of facts will not furnish grounds for an estoppel in pais.—Gorham v. Arnold, 22 Mich. 247.

§ 28. Element of knowledge or intent.

See also post ¶¶ 110-156.

Deed made without understanding, see ante § 6.

Equal knowledge or notice as preventing reliance and estoppel, see post § 30.

Acquiescence or inaction evincive of intent without regard to actual intent, see post ¶ 150.

Analogous elements in fraud, see Fraud, I.

¶ 76. To constitute one's statements and acts an estoppel they must have been said and done with full knowledge of the facts.—Going v. Oakland County Agric. Soc., 117 Mich. 230.

¶ 77. In order to create an estoppel in pais, it must appear that the party making the representations knew or was informed that the party to whom they were made intended to rely upon them.—First Nat. Bank v. Marshall & I. Bank, 108 Mich. 114.

¶ 78. A wife is not estopped by inaction from claiming title to her cow as against the vendee of one to whom her husband had without her assent sold it, where, although there was evidence that she learned immediately of the sale made by her husband, it appeared that she was misinformed as to its whereabouts and did not then know where the cow was, nor that the person who afterwards bought from her husband's vendee was contemplating purchase.—Anderson v. Crowley, 96 Mich. 457.

¶ 79. Defendant, having purchased certain exempt property from his debtor, told plaintiff, another creditor, upon inquiry, that he had taken the goods on attachment, but he had no wilful intent to induce plaintiff to act to his detriment. Plaintiff thereupon went to the town where the debtor was engaged in business, several miles distant, and procured from him an assignment of his right of exemption in the goods. Held, in trover for the property, that, as defendant's statement was not of a nature to induce plaintiff to go to such place, and as plaintiff parted with no new consideration and lost no rights after reaching there, and was advised of defendant's claim before bringing suit, defendant was not estopped to claim title under his purchase.—Meisel v. Wells, 107 Mich. 453.

§ 29. Element of reliance and misleading.

See also post ¶¶ 111-115.

Knowledge or reason to expect reliance on statements, see ante § 28.

Equal knowledge or exercise of independent judgment as preventing estoppel, see post § 30.

What amounts to disadvantage or detriment suffered by relying, see post § 31.

Resolution of council rescinded before action on it, see post ¶ 212.

Analogous elements in fraud, see Fraud, I.

¶ 80. There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up, and does material acts relying upon conduct well calculated to

mislead him.—Palmer v. Williams, 24 Mich. 328; De Mill v. Moffat, 49 Mich. 125; Meisel v. Wells, 107 Mich. 453; Murray v. Rugg, 116 Mich. 519.

¶ 81. To entitle a party to insist upon an estoppel he must be able to show that the other party has done something, or represented something, which has had the effect to deceive and mislead him, and which would render it inequitable for the right of such other party to be enforced against him.—Crane v. Reeder, 25 Mich. 303.

¶ 82. There can be no estoppel unless a party is misled to his injury.—Plumb v. City of Grand Rapids, 81 Mich. 381; Fletcher v. Kalkaska Circuit Judge, 81 Mich. 186; Tower v. Township of Somerset, 143 Mich. 195.

¶ 83. An owner of property is not estopped from asserting his ownership in a case where the evidence fails to show that his silence or conduct has misled others to their prejudice, or induced them to do what they would not have done if informed of his rights.—Burdick v. Michael, 32 Mich. 246.

¶ 84. In order to entitle a party to insist upon an estoppel he must be able to show that the other party has done or represented something which has had the effect to deceive and mislead him, and which renders it inequitable for the right of such other party to be enforced against him.—Fletcher v. Kalkaska Circuit Judge, 81 Mich. 186.

¶ 85. There can be no estoppel unless a party is misled to his prejudice by the conduct of the person against whom it is set up, and unless acts are done in reliance upon conduct calculated to mislead.—Thirlby v. Rainbow, 93 Mich. 164.

¶ 86. To raise an estoppel in pais the party must have been induced to act to his disadvantage, so that his situation has been changed in consequence thereof.—Gooding v. Underwood, 89 Mich. 187.

¶ 87. The conduct of the party claimed to have been estopped must have been such as to have misled the party setting up the estoppel into a course prejudicing him or inducing him to do what he otherwise would not have done.—Ladd v. Brown, 94 Mich. 136.

¶ 88. One cannot be estopped from asserting a title against one who has always recognized it.—White v. Hapeman, 43 Mich. 267.

¶ 89. The element of injury must be present where one is misled by reliance on the representations of another against whom an estoppel is urged.—Dean v. Crall, 98 Mich. 591.

¶ 90. An estoppel does not arise where the situation of the person in whose favor the estoppel is claimed to have operated, is no different than it would otherwise have been.—Harlow v. Jaseph, 133 Mich. 500.

¶ 91. Reliance upon the acts and conduct of a grantor and lessor to the injury of the party complaining is an essential element to work an estoppel against the grantee and tenant.—Weller v. Harrison Land Co., 195 Mich. 624.

¶ 92. An estoppel does not arise as a result of statements by a person where the person to whom they are made is not in any way influenced or injured by such statements.—New Era Ass'n v. Kuyat, 191 Mich. 646.

¶ 93. One who has put another into possession of property, together with the muniments of title or indicia of ownership, is not estopped from setting up title in himself as against a purchaser unless it appears that the purchaser relied upon and was misled by such possession, etc.—Stanton v. Estey Mfg. Co., 90 Mich. 12.

¶ 94. The defendant in a chancery suit conceded by his answer that a certain note belonged to a third party. This party afterwards sold it to one who was aware of his concession. But the defendant claimed to have bought it first. Held, that his concession in the suit was no estoppel as against the claim.—Church v. Clapp, 47 Mich. 257.

¶ 95. The omission of claimants of land to put into a case an instrument not in their possession which tended to qualify the estate they claimed, and which the other side ought properly to have produced and had construed, instead of relying on claimants' oral construction, was held not to estop them from urging their claim to the land in a later action.—Thayer v. Arnold, 32 Mich. 336.

¶ 96. A dock owner whose property is injured by the proximity of a bridge is not estopped from claiming damages by the mere fact that his grantor had petitioned fhat the bridge be located in its present position if the bridge company's action was not determined by the acts of the grantor.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 97. A man bitten by a dog asked a woman who owned it, and she said it belonged to her. He accordingly sued her. Held, that she would be estopped from denying ownership on the trial if she knew that the inquiry was made for the purpose of finding out who was liable for the injury.—Robb v. Shephard, 50 Mich. 189.

¶ 98. To constitute an estoppel in favor of the tenant and his vendee against a landlord asserting title to personal property after having, in ignorance of his rights, levied upon it as the property of his tenant, there must have been some degree of turpitude in his conduct, which misled the tenant and his

vendee to their injury.—Smith v. Sprague, 119 Mich. 148.

¶ 99. A patentee of land adjoining an unmeandered lake containing an unsurveyed island, who applied to the government for a survey and sale of the island, was not estopped by such application from asserting his title to the island, as against a purchaser to whom he had given notice of his ownership and that he would contest the sale.—Church v. Case, 122 Mich. 554.

¶ 100. Where an administrator presented a claim against an estate for services performed by his intestate, and the defendant estate claimed that the claimant was estopped on the ground that the wife of claimant's intestate presented a claim to the commissioners for the same services and testified that her husband had assigned the claim to her, and where claimant administrator was present during that hearing and heard the wife make such claim without entering objection, the claimant was not estopped, the wife having testified on trial at bar that her claim included services performed by her, and where it also appeared that a duplicate of the present claim was filed before the commissioners before the determination of the wife's claim, so that they were not misled.—Bates v. Kuney's Estate, 124 Mich. 596.

¶ 101. Where one of two joint owners of undivided shares in land offers, for himself and his co-owner, to sell their interests, and represents them as estimated to cover a specified acreage, and his offer is not accepted, but an offer made by his co-owner is, his statement as to quantity will not conclusively bind him in a subsequent litigation begun by the purchaser for the partition of the lands, any more than if it had been casually made in oral conversation; and he will not be estopped from denying that his co-owner had the quantity stated, especially if the estimate given by the latter was lower. The purchaser cannot take advantage of the first offer while expressly denying that he claims anything under it.—Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

¶ 102. A wife who did not mislead a creditor and was not responsible for any thing misleading is not estopped to assert her separate rights in property hypothecated for a debt by a conveyance with a reconveyance to her husband under which the creditor levied.—Huot v. Reeder Brothers Shoe Co., 140 Mich. 162.

¶ 103. There is no estoppel to claim a debt from a decedent's estate from the failure of the executrix of the creditor's estate to inventory such claim as assets, where neither the debtor nor his executors were misled by such omission.—Ewers v. White's Estate, 114 Mich. 266.

¶ 104. A letter from a first mortgagee to a second mortgagee stating in effect that unless the second mortgagee pays interest to a specified amount the first mortgagee will foreclose cannot be made the basis of an estoppel, as such letter could not alter the legal rights of a second mortgagee.—First State Bank of Decatur v. Day, 188 Mich. 228; O'Dell v. First State Bank of Decatur, Id.

§ 30. Equal knowledge or independent judgment.

See also ante ¶¶ 92-96, 100, 101.

Knowledge of impossibility of corporate existence as preventing estoppel to deny it, see also Corporations § 12.

Knowledge of want of power rebutting estoppel of corporation to plead ultra vires, see Corporations § 96, ¶ 347.

¶ 105. There can be no estoppel where one is not deceived or misled, but acts upon his own judgment and with knowledge of the facts.—Northern Michigan Lumber Co. v. Lyon, 95 Mich. 584.

¶ 106. A party cannot invoke the aid of the doctrine of equitable estoppel where it appears that the facts were known by both, or that both had the same means of ascertaining the truth.—Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423.

¶ 107. No estoppel against complainants in a bill to set aside a guardian's deed can be made out by defendants, who have all along dealt with complainants with a full knowledge of the facts in the case.—Houlihan v. Fogarty, 162 Mich. 492.

¶ 108. No estoppel to insist on one's right to cut and remove timber under a contract expressly giving it, if the owner should fail to furnish it according to agreement, can exist in favor of a purchaser of the land whose agent in the purchase had actual notice of the contract and where the other party was in possession of a mill on the land insisting on his rights.—Carey v. Leonard, 141 Mich. 273.

¶ 109. A cobeneficiary under a trust of land is not estopped to say that her conveyance during minority to the other cobeneficiary and a mortgage by such grantee while the trust continued were void because of minority and of the lack of title in the mortgagor, where the opposite party was legally chargeable with notice of the trust and that it was yet in course of execution, and consequently of their lack of title.—Weaver v. Van Akin, 71 Mich. 69.

¶ 110. The seller who has treated title as having passed cannot avoid the estoppel on the ground that the goods were shipped by an agent, and that the latter had made the election to treat the consignment as a sale while in poor health only a short time before his death, and that the theory had been maintained for several months by the principal because he had no knowledge of the

terms of the transaction, where the correspondence relating thereto was under the principal's control, and the precise terms might have been promptly ascertained.—McDonald v. Preston Nat. Bank, 111 Mich. 649.

§ 31. Disadvantage, detriment or change suffered.

See also post ¶¶ 125-212.

Avowal of ownership causing suit to be brought accordingly, see also ante ¶ 97.

Necessity of reliance to disadvantage or detriment, see ante § 29.

Indorsee's change of position or parting with value as estopping bank to deny certification of check, see Banking II, D.

¶ 111. To constitute an estoppel in pais the conduct complained of must have induced another to act to his disadvantage, and his situation in consequence thereof must have changed.—Lilly v. Townsend, 110 Mich. 253.

¶ 112. Defendant cannot set up any equitable estoppel to urge infancy against plaintiffs arising from their acceptance, after coming of age, of proceeds of a guardian's unauthorized sale of their lands with no new act by the purchaser on the faith of it.—Ryder v. Flanders, 30 Mich. 336.

¶ 113. If the plaintiff has been induced to incur the expense of litigation in reliance on an apparently legal and valid promise by defendant to pay, and upon a statement by defendant establishing his liability, which, though untrue, plaintiff had reason to believe and to rely upon, the defendant is estopped from denying its truth. Expenditures in litigation may as reasonably constitute the basis of an estoppel as any other expenditures.—Meister v. Birney, 24 Mich. 435.

¶ 114. A representation by M. to B. that certain lumber is the property of a firm, thereby inducing B. to bring an action for conversion against the firm instead of M. will not estop M. from thereafter asserting title to the lumber, upon which B. has levied under his judgment against the firm, where B. had no valid claim against either M. or the firm.—McRae v. Bennett, 113 Mich. 47.

¶ 115. A party will not be estopped to seek correction of a mistake in a party wall agreement whereby a wall already constructed pursuant to a parol agreement was mistakenly granted away, the defendant having parted with nothing on the strength of complainant's mistake.—Eberle v. Heaton, 124 Mich. 205.

¶ 116. An owner who bought land at a time when water flowed in a channel forced by obstruction of the original natural drainway and who knew that the natural servitude was in the original way, cannot claim an estoppel against the highway commissioner to restore the flow in protecting the highway from the diverted flow.—Tower v. Township of Somerset, 143 Mich. 195.

¶ 117. A bank is not estopped from enforcing by attachment its claim against a corporation, merely because such claim is included in a trust mortgage executed by the corporation to secure all of its creditors, where the terms of the mortgage have not been accepted by the bank, and where the execution of the mortgage was not authorized by a majority of the directors or stockholders of the corporation.—Murray v. Rugg, 116 Mich. 519.

¶ 118. A mortgagor was not estopped from foreclosing his mortgage as against a subsequent purchaser of the land to whom he honestly asserted that the land was clear of taxes, and where such purchaser thereafter purchased a tax title obtained upon a sale for taxes which were unpaid at the time of such representation by the mortgagor.—Brown v. Avery, 119 Mich. 384.

¶ 119. A corporation, the successor of a partnership limited, is not estopped to claim that a contract between an officer of the partnership and a salesman representing a third person for the issue of a certain amount of stock in the partnership in alleged consideration for services in procuring the sale of certain patents by such third person to the partnership, pursuant to an arrangement with such third person, is invalid within How. Ann. St., § 2369, because not reduced to writing, where such salesman had no interest in the patents and hence, when the patents were taken over, nothing was retained to the detriment of the salesman.—Dickinson v. Matheson Motor Car Co., 161 Fed. 874.

B. REPRESENTATIONS AND APPEARANCES CREATING ESTOPPEL.

§ 32. Actual or constructive representations; silence.

General elements of representation coupled with reliance, action thereon, and detriment ensuing therefrom, see ante, III, A.

Uncertain, equivocal or ambiguous representations, see also ante § 26.

Representations made in ignorance or without intent that action thereon should be taken, see ante § 28.

Necessity that silence should have induced prejudicial change in position, see ante § 29.

Clothing another with apparent title, right or authority, see post § 33.

Drafting or attesting instruments affecting one's own title without protest, see post § 34.

Inconsistent claims, disclaimers, disavowals, receipts, releases, or acknowledgments, see post §§ 37-41.

Contracts, promises or rendition of services as estoppels, see post §§ 42, 43.
Corporate or official acts, see post § 44.
Acts done as or by or through agents or intermediaries, see post §§ 45-47.
Acquiescence, inaction and nonclaim, see post § 35.
Silence sufficient to raise estoppel, see also ante ¶ 64.
Evidence of representations and action thereon, see post § 59.
Court and jury questions, see post § 60.
Instructions on estoppel, see post § 61.
Estoppel of dowress by acts or conduct to claim dower, see Dower § 27.
Sworn answer in equity as estoppel to assert different facts, see also Equity ¶ 681.
Silence in face of assertions against interest as an admission, see Evidence § 386.
Nonestoppel of taxpayer by return as against state, see Taxes, V, VI.
Representation of boundary line as estoppel between vendor and purchaser, see Boundaries § 9.

¶ 120. A person who keeps silent when he should have spoken will not in a court of equity be heard to speak when he should keep silent.—Peters v. Canfield, 74 Mich. 498.

¶ 121. One who was silent as to his rights when he should have spoken is thereafter estopped from speaking.—Bartlett v. Grand Rapids Street R. Co., 82 Mich. 658; Condon v. Hughes, 92 Mich. 367.

¶ 122. An estoppel arises from silence as well as from statements when there is a duty and an opportunity to speak.—Inglis v. Millersburg Driving Ass'n, 169 Mich. 311.

¶ 123. When a party relies on equitable estoppel in pais, he must show that the person against whom it is claimed had an opportunity to speak, a duty to speak, that he failed to speak, and a reliance in good faith upon such failure.—Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423.

¶ 124. Estoppel does not generally arise from one's silence or inaction, unless he knows that there is occasion to speak or act.—Griffin v. Nichols, 51 Mich. 575.

¶ 125. An equitable estoppel may arise where one person has induced another to act upon the supposition that a certain state of facts exists which does not exist in fact, or has pursued a course of conduct in respect to his own property or rights which has led another into expenditures which are to be lost, or into action which will prove detrimental if the party so misleading is allowed afterwards to assert rights inconsistent with such course of conduct.—Morrill v. Mackman, 24 Mich. 279.

¶ 126. The doctrine of estoppel in pais, which once presupposed a wilful misrepresentation of fact, has been extended to cover false appearances produced in other ways tantamount to a misrepresentation, and even to silence under circumstances amounting to it.—Pearson v. Hardin, 95 Mich. 360.

¶ 127. He who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.—Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

¶ 128. One cannot be charged with another's debt or be made responsible for the goods another may afterwards obtain, by his mere silence, or by his failure to object when notified that such goods will be charged to him.—Grice v. Noble, 59 Mich. 515.

¶ 129. A lessee under a 99-year mining lease granting it the right to take minerals for its own manufacture is estopped to deny the right to subsequent grantees of the lessor, who have entered upon the land, spent large amounts in its development and erected valuable improvements, where the original lessee has been silent and claimed no right whatever for more than forty years.—Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264. Writ of error dismissed in 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474.

¶ 130. Plaintiff suffered a loss by fire. He thereafter directed his agent to effect a settlement with defendants and other creditors at ninety cents on the dollar. During the negotiations for such settlement plaintiff secretly intended, after the settlement should be concluded, to institute a suit against defendants, claiming that the latter had misappropriated certain proceeds of fire insurance policies belonging to plaintiff. The settlement was effected, no disclosure being made by plaintiff of said secret intent. Held, he was estopped from prosecuting his suit against defendants.—Dillon v. Craig, 168 Mich. 216.

§ 33. ——Appearance of title or right in third person.

Evidence of holding out, see post ¶ 269.
Holding out agency, see Agency § 19.

¶ 131. A person who stands by and permits another to deal with his property as his own, the purchaser relying upon appearances, will not be permitted, after the transaction is closed, without objection from him, to question it.—Peters v. Canfield, 74 Mich. 498.

¶ 132. If one who has a title to an estate offered for sale knowingly allows another to sell it to a purchaser who supposes the title to be good, without at the time asserting his title, he is bound by the sale. This is especially true where the silent party has himself received the benefit of such sale, and where the purchaser has made improvements.—Moran v. Palmer, 13 Mich. 367.

¶ 133. A person having a title to an estate offered for sale knowingly allowed another to sell it to a purchaser who supposed the title to be good, without, at any time, asserting his title. Held, both the person and his privies were estopped to contest the validity of the sale.—Johnson v. Hogan, 158 Mich. 635; Cleveland Cliffs Iron Co. v. Hull, Id.

¶ 134. Where the husband of a woman sold a horse belonging to her, without her authority, and she was informed of the sale before payment had been made, and had ample opportunity afterwards to inform the purchaser of her rights, but neglected to do so and remained silent until he had made payment to the husband, it was held that she was thereafter estopped from asserting title to the horse against the purchaser or those claiming under him.—Dann v. Cudney, 13 Mich. 239.

¶ 135. One who neglects to assert his rights in property when he sees others dealing with it as if no such rights existed is estopped by his silence from afterwards asserting a lien; so held where the holder of a vessel mortgage treated it as worthless for seven years, and permitted a sale to innocent purchasers.—Harkness v. Toulmin, 25 Mich. 80.

¶ 136. The bare fact that the owner of property intrusts its custody to another, does not give that other any apparent authority to sell to a third party and pass title.—Ball-Barnhart-Putnam Co. v. Lane, 135 Mich. 275.

¶ 137. An apparent title to certain land by transfer to a third person's name cannot be assailed by the parol evidence of one who has caused its transfer, that he has an elder title not recorded.—First Nat. Bank v. McAllister, 46 Mich. 397.

¶ 138. Both the trustee in a trust-deed and the creditors for whose benefit it was executed are estopped from setting up a claim against one to whom the grantor, left in possession of the whole property, had sublet a privilege.—Cunning v. Tittabawassee Boom Co., 88 Mich. 237.

¶ 139. A. conveyed land to B., taking from him a mortgage for the purchase money, and assigned the mortgage to C., who conveyed the premises with warranty to D. B. never took possession, and, though living near the premises for years, and knowing that C. and others were in adverse possession, claiming title, never claimed any title in himself, but drew the conveyance from C. to D. and took the acknowledgment of it, keeping silent as to any defect in the title. Held, that B. and one to whom he subsequently quitclaimed were estopped from claiming any title to the premises.—Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

¶ 140. Where a mortgagee, after assigning the mortgage to his father, of like name, dealt with the mortgagor and his grantees as though he still held the mortgage, and the father gave no notice of the assignment and so conducted himself as to authorize the mortgagor and his grantees to believe that the son was the real owner of the mortgage, the father is estopped from denying it, whether the money for which the mortgage was originally given was his or not.—McCabe v. Farnsworth, 27 Mich. 52.

¶ 141. The purchaser of lumber from one having a lien thereon is not liable to the owner, in trover for a conversion, where, in objecting to payment being made to the lienor, the former did not disapprove of the sale itself nor deny the lienor's right to sell.—Wannebo v. Stone, 181 Mich. 581.

¶ 142. On dissolution of a partnership between plaintiff and defendant, where defendant assigned to plaintiff all the assets, including a government claim which was afterwards paid by a draft, receipted by defendant in the firm name and so disposed of by him as to enable another to collect it and withhold the avails from the plaintiff, plaintiff in an action for money had and received need not prove that defendant had actually received the money for he is estopped from denying it; by his conduct he cut off plaintiff's remedy against the government and also wrongfully enabled another party to obtain the money.—Bullard v. Hascall, 25 Mich. 132.

¶ 143. A firm of commission brokers, having settled with a grain dealer with whom they had dealt, solicited his further shipments. He replied he did not know when he would resume business, but suggested they correspond with his brother, whose initials he said were the same as his own. The brokers understood this to mean that he intended to remain out of business for a time, and they wrote informing him how they understood his letter, and further stating that they had solicited his brother's consignments, but he made no reply. He soon resumed control of the business, but kept his brother in his employ without notifying the brokers of the new arrangement. His own name was Oramel and his brother's Osmyn. The brokers having entered upon the suggested correspondence transacted considerable business with Osmyn, in whose charge the business had been left, and who was acting, as they supposed, as a principal, but really as an agent. In the course of these dealings they realized certain profits on a carload of wheat received from him and they bought a quantity of wheat at his request. They also lent him a large sum of money, and later discovered that he had never been the principal in the business, and before borrowing the money had left his brother's employment. Oramel offered to take the wheat they had bought off their hands, but they refused, expressing a willingness to hold it until it should rise in value. They also re-

tained the profit on the carload they had sold to apply on the account of the money lent to Osmyn, and Oramel sued them for it. Held, as his own course had misled the brokers into supposing that they were dealing with Osmyn as a principal, and he had neglected to inform them differently, he was estopped by his own negligence from objecting to applying the proceeds of the sale upon Osmyn's debt, and from claiming the proceeds on the ground that the carload belonged to himself. —Stebbins v. Walker, 46 Mich. 5.

¶ 144. Where, on the trial of an action of trespass to lands, it appears that defendant, before committing the alleged trespass, applied to plaintiff to ascertain whether or not he had any claim upon the land, and was informed by plaintiff that he did not know who was boss, but that he rather thought a certain third person (with whom plaintiff had been in litigation over the title to the land) was, and, if he should change his opinion about the matter, he would let defendant know, and give him the first chance to rent the land; and where defendant, after waiting a reasonable time, and receiving no information from plaintiff of any claim on his part to the land, or change of intention or mind upon the subject, and in reliance upon said statements, applied to the adverse claimant to rent the land of him, and entered thereon and did the acts complained of under his authority, plaintiff is estopped from denying that such entry was lawful, and cannot maintain said action.—Kinney v. Service, 101 Mich. 185.

§ 34. ——Drafting or witnessing another's deed or will.

¶ 145. Where the holder of the legal title to land acts as the scrivener and acknowledging officer in a transfer thereof made by an adverse claimant, he acquiesces in such transfer to the extent, at least, of recognizing the grantee's rights to whatever interest his grantor had; and so long as such interest is outstanding he cannot bring ejectment against such grantee.—Morse v. Byam, 55 Mich. 594.

¶ 146. One who witnessed and took the acknowledgment of his wife's mortgage of land upon which he has placed machinery in such a manner as not to be a part of the realty, is not estopped from asserting title to such machinery as against the mortgagee's assignment.—Bartlett v. Haviland, 92 Mich. 552.

¶ 147. Where a devisee acts as witness to a deed conveying land of the estate to complainant, and said deed is void for lack of authority in the executors under the will, said devisee is not estopped to deny the validity of complainant's title in a bill to enjoin the ejectment suit and to quiet title.—Vincent v. Evans, 165 Mich. 695.

§ 35. Acquiescence or inaction or nonclaim.

See also ante ¶ 129.

Silence as a holding out of appearances, see ante § 32.

Silence operating to hold out another as having right, see ante § 33.

Acquiescence by drafting or witnessing disposing instrument by another, see ante § 34.

Omission to make claim of individual title in final accounting, see also ante § 16.

Claim by attachment as basis for estoppel to claim exemption against attachment, see also ante ¶ 79.

[Note. The doctrine of laches in equity, if not the same as estoppel by acquiescence, is so much like it that the distinction is largely juristic and impracticable in a digest. Reference is therefore made to Equity, IV, where the general doctrines of laches are treated and numerous cross-references are collected tracing applications of the doctrines into the specific topics.]

Delay and acquiescence regarded as laches, see Equity, IV.

Estoppel to assert negligence against bailee, see Bailments ¶ 18.

Ratification of acts of agent, see Agency, II, C.

Estoppel of signers of drain petition to deny alteration after signing, see Drains ¶ 154.

Failure to notify bank of forgery as working estoppel on depositor, see Banking § 42.

Estoppel to question election by omission to challenge at the polls, see Elections ¶ 262.

Failure to examine checks as working estoppel of depositor to claim violation of his instructions, see Banking ¶ 45.

Acquiescence of public officers as estopping township, see also post ¶ 211.

Receipt, release or acknowledgment as estoppel, see post § 38.

Estoppel to assert error on appeal for first time, see Saving Questions.

¶ 148. If one stands by and sees another dealing with property in a manner inconsistent with the former's right to it, and does not object while the act is in progress, he cannot afterwards complain.—Truesdail v. Ward, 24 Mich. 117; Hayes v. Livingston, 34 Mich. 384.

¶ 149. If, by words or conduct, one has intimated that he consents to an act which has been done, and that he will not oppose it, although it could not lawfully have been done without his consent, and thereby induces others to do that from which they might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of others who have given faith to his words or to the fair inference to be drawn from his conduct.—Truesdail v. Ward, 24 Mich. 117; Heyn v. O'Hagen, 60 Mich. 150.

¶ 150. Whatever may be the actual intent of a party to a transaction, if he so acts as to

lead a reasonable person to believe that he understands and assents to its terms, and the other party, so believing, acts accordingly, the former is estopped from asserting that he did not so understand and assent; and he is bound by the action taken.—Peake v. Thomas, 39 Mich. 584; Vanneter v. Crossman, 42 Mich. 465.

¶ 151. In an action for damages to land caused by the setting back of water by means of a milldam, where the evidence discloses simply that the defendant and his grantor of the millsite for several years before him had flowed the lands and paid a yearly compensation therefor, the doctrine of equitable estoppel does not apply in the absence of any showing that the original construction of the dam was in reliance on any license, or that the course of the defendant or his grantor was changed, or any expenditure made in reliance upon any conduct or promise of plaintiff.—Morrill v. Mackman, 24 Mich. 279.

¶ 152. An estoppel arises where a delay in bringing an action has been relied on by a person or his grantors, or some act done by them on the strength of the delay, or that by reason thereof they will be compelled to surrender, forego or alter what has already been done.—Longton v. Stedman, 182 Mich. 405.

¶ 153. Where, without notice to the owner, taxes on land have been voluntarily paid by one having no record title, there is no estoppel to claim title against the owner, who, on learning of such payments, protests to the supervisor and asserts his title.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246; affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

¶ 154. One who claims title to an island as included in a patent of riparian land, and who has exercised actual ownership, is not estopped as by nonclaim against persons who have had neither possession nor record title.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246; affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

¶ 155. A contiguous owner was estopped from enjoining the operation of a railroad in a street without compensation, by reason of his failure to appeal from certain decrees, and on the contrary acquiescing in one of them and accepting compensation for raising of the street grade for the purpose of enabling the road in question to be operated.—Ilgenfritz v. Toledo & Monroe Ry., 136 Mich. 634.

¶ 156. The original owner of land especially when absent at the time and without knowledge is not estopped from asserting his title by his allowing an invalid tax sale to go on and defendant to make improvements on the land without objection.—Petit v. Flint & P. M. R. Co., 114 Mich. 362.

¶ 157. Vendors who had retained title to logs and lumber to be cut from lands sold by them to grantors of a corporation, as well as a lien on the lands, are not estopped as against the corporation's trustee for creditors to assert title to logs and lumber by having forborne to do so earlier and before they were destroyed by fire, where it appears from voluminous correspondence that vendors had been pressing the trustee for payment and it had requested delay in view of the fact that the claim of vendors was secured on the logs and lumber against which their letters proposed to move.—Mosher v. Lansing Lumber Co., 112 Mich. 517.

¶ 158. A defendant lessee going beyond the privileges of his lease to erect signs for his own business and without communication to the lessor contracted to let an advertising firm put up a whisky sign on the roof of plaintiff lessor's building. Plaintiff's agent discovered the sign in process of erection, consulted plaintiff's attorney, and immediately informed defendant that he had no right to permit the erection of the sign. Held, plaintiff was not estopped to deny the right of defendant to allow the sign to be put up and for an accounting of rentals received for it.—Forbes v. Gorman, 159 Mich. 291.

¶ 159. Where a sheriff's claim for extra compensation is allowed by the court after a contest, the action of the contestant's attorney in directing the sheriff's attorney to draft the proper order, and in assenting to the entry of such order, is not an estoppel, as no remedy can be invoked before the order is entered and some detriment incurred.—Fletcher v. Kalkaska Circuit Judge, 81 Mich. 186.

¶ 160. One of several licensees of a patent, having given to another licensee an authority to sell it for a given sum, is estopped to claim that he should have more corresponding to an aliquot share in the whole amount received for all the licenses, where the other licensee under such authority negotiated sale of the licenses altogether for a sum relatively larger of which sale and the larger sum the first mentioned licensee had full knowledge while the sale was pending and made no protest, but participated in closing the transaction.—Gordon v. O'Neill, 174 Mich. 575.

¶ 161. Twenty years' acquiescence by heirs in voluntary division precludes disturbance by one of them.—Mitchell v. Mitchell, 68 Mich. 106.

¶ 162. Acquiescence does not always work an estoppel.—Weller v. Harrison Land Co., 195 Mich. 624.

¶ 163. A building contractor is not estopped to recover items for extras simply because he did not formally ask credit for them, especially where he claimed too many

extras were charged to him.—Malcomson-Houghten Co. v. Gregorian Bldg. Co., 191 Mich. 678; Wadham v. Gregorian Bldg. Co., Id.

§ 36. Inconsistent claims or positions, accepting benefits.

[Note. Generally speaking the taking of an inconsistent position or contention or claim signifies an election and waiver of rights rather than an estoppel of fact. The distinction, though sound in principle, is difficult to apply. See generally and compare cases in Election and Waiver.]

Holding out contract for fixed price as estoppel to claim contract for value of work, see post ¶ 202.

Concealing intent to assert inconsistent claim, see also ante ¶ 130.

Impeaching title under which one claims, see post § 39.

Impeaching one's own deed or contract, see post § 40.

Accepting benefits or proceeds of sale, see also ante ¶ 132.

Claims as personal representative, distinctness from personal claims, see also post § 54.

Offer by one co-owner as estoppel where sale was made on offer by other co-owner claiming different quantity, see ante ¶ 101.

To pursue agent for fraud after seeking to vacate foreclosure sale for agent's fraud, see also Agency ¶ 506.

To appeal from judgment or decree after compliance with it or acceptance of benefit under it, see Appeal § 66.

To urge on appeal theory differing from trial, see Appeal §§ 267-269.

Changing theory on appeal or on retrial afterwards, see Appeal §§ 267-269, 468, 559.

Petitioning as creditor as estoppel to claim that assignment was absolute, see also Assignments ¶ 86.

Affirming and renouncing contract at same time, see Contracts § 260.

Claiming under decree and at same time seeking to avoid it, see Judgments, VI, VII.

Estoppel to claim salary from corporation by prior inconsistent claim or conduct, see also Corporations ¶ 576.

Voting in meetings as raising estoppel to deny character as stockholder, see Corporations § 298.

To make claim against insolvent corporation for loan represented to others as free capital, see Corporations ¶ 828.

Estoppel of receiver to deny receipt of corporate assets on possession of which he has based a pleading, see Corporations ¶ 900.

Asking recount as estoppel to question power to make it, see Elections ¶ 171.

Estoppel to claim homestead estate by causing sale for debts, see Homesteads, V.

Assessment and sale of park for tax as estopping city to claim dedication, see Dedication § 85.

Estoppel of complainant in bill to quiet title to deny validity of sale to which she consented in ignorance of her legal rights, see Estates of Decedents ¶ 472.

Estoppel of heirs accepting lands discharged from mortgage to question sale by representative, the proceeds of which discharged mortgage, see Estates of Decedents ¶ 815.

Estoppel by proofs of loss furnished on claim for insurance, see Insurance, XV, XX.

Bidding at execution sale as estoppel to assert paramount title to the goods, see Executions, XI.

Estoppel of married woman to deny validity of award on ground of coverture where she has taken benefits under it, see Arbitration ¶ 109.

By receipt of dividend from assigned estate, see Assignments for Creditors ¶ 183.

Estoppel by action taken on it to ask for change of alimony award, see Divorce § 172.

Acceptance of benefit of note as estoppel to deny liability as indorser, see Banking § 16, ¶ 46.

Acceptance or receipt of benefit of drain as working estoppel to attack validity, see also Drains §§ 73, 109, 110.

Full restitution as condition to rescission of contract, see Rescission, III.

¶ 164. No rule is more necessary to enforce good faith than that which compels a person to relinquish claims which he has induced others to suppose he would not rely on; not because he obtains any advantage thereby, but because he has induced others to act so as to be seriously prejudiced if he is allowed to fail in the performance of what he has encouraged them to expect.—Faxton v. Faxon, 28 Mich. 159.

¶ 165. One who has sawed up another's logs and has afterwards agreed to pay for them cannot, when sued for their value, for the first time justify taking them, on the ground that he had already by mistake admitted the other's ownership of certain other logs which the latter had thereupon run down stream incurring expense thereby, which running defendant had never offered to repay.—Kimberly v. Guilford, 34 Mich. 259.

¶ 166. One is estopped to claim a construction of contract different from that which he designedly led the other party to believe was correct.—Manley v. Saunders, 27 Mich. 347.

¶ 167. One is estopped as against execution purchasers from questioning the sale except upon the grounds asserted by him at the time of the sale.—Ganong v. Green, 64 Mich. 488.

¶ 168. A complainant is not necessarily estopped from seeking a relief that is inconsistent with positions theretofore taken, if it is defendant's fault that he has been prac-

tically forced to take them.—Potter v. Brown, 50 Mich. 436.

¶ 169. A party to a litigation cannot be confined to the position first taken by him and out of which the litigation arose, if he took such position under a mistake of facts that was due to the want of information which the other party ought to have given him.—Lyon v. Travelers' Ins. Co. of Hartford, Conn., 55 Mich. 141.

¶ 170. A party having regained possession by a temporary loan of property which he had parted with under a contract of barter and exchange providing for such loan, is not estopped, while retaining such possession, from defending his title on the ground of rescission for fraud—it appearing that he retains nothing except what was originally his own.—Martin v. Ash, 20 Mich. 166.

¶ 171. Where the assignor of a chattel mortgage of whom goods are demanded which have been replevied under the mortgage in excess of the debt says that he has them but will not give them up, he is estopped when the other relying on it sues for conversion from claiming that he did not at such time have possession and control of them, but that they were then in the possession of the assignee.—Cadwell v. Pray, 86 Mich. 266.

¶ 172. In an action by H. for profits lost through A.'s preventing him from carrying out his contract to mine the ore in a certain level in A.'s mine, a letter written to A.'s general manager by H. before he stopped work, saying that the ore in that level was nearly exhausted, does not preclude H. from showing what the fact was as to the ore, whether it was voluntarily written or was written at the solicitation of A.'s superintendent to accomplish a wrongful purpose on the latter's part.—Anvil Mining Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876.

¶ 173. A teamster to whom a team of horses had been intrusted to take into the lumber woods and do teaming, sold the team and the purchaser subsequently sold the horses to defendant. The owner brought replevin to recover the horses. Held that he was not estopped to maintain the action by the fact that he failed to bring replevin against the first purchaser soon after learning of the sale, the owner having no knowledge of any purpose of such purchaser to resell.—Nichols v. Monjeau, 132 Mich. 582.

¶ 174. Plaintiff tenant made a cropping agreement with one W. Dennison, the owner of an undivided half interest in the land, by which the latter was to take as his share certain rows of shocks. Defendant acquired Dennison's interest. Plaintiff represented to her that Dennison was entitled to one-third of the harvested crop, and defendant appropriated this one-third. Held, in a suit for conversion, the plaintiff was estopped to set up the real agreement as against the one represented to the defendant.—Schultz v. Dennison, 159 Mich. 259.

¶ 175. Where the plaintiff had presented an itemized statement of his account which had been rejected in its entirety by the defendant he is not limited in his demand by the charges made in his statement, and may prove the actual value of the services rendered and recover therefor.—Wright v. St. Louis Sugar Co., 146 Mich. 555; Romeyn v. Campau, 17 Mich. 327.

¶ 176. The erroneous rendering of a bill for a certain machine does not estop the plaintiff from claiming that it was agreed that the purchase price of the machine should be applied in part payment of the purchase price of goods sought to be replevined under an oral contract of sale.—Dallavo v. Richardson, 134 Mich. 226.

¶ 177. A defendant who has insisted that he had never bought the goods from plaintiff and has declined to recognize any claim of plaintiff for the goods, is estopped, when sued for the conversion of the goods, from setting up that plaintiff sold the goods to defendant and therefore could sue only in assumpsit for the value of the goods.—Great Western Smelting & Refining Co. v. Evening News Ass'n, 139 Mich. 55.

¶ 178. An attorney for a party in an action in the justice court who secures a reversal of the case in the circuit court upon the sole ground that the purported undertaking for costs given by the adverse party was illegal, is estopped, in an action upon the assigned undertaking as plaintiff, to claim that such undertaking is valid.—Patek v. Ryskewiecz, 189 Mich. 344.

§ 37. Disclaimers and disavowals.

Disavowal of purchase as raising estoppel to claim purchase, see ante ¶ 177.

Purchase of disclaimed title before other party purchases in reliance on disclaimer, see ante ¶ 94.

Estoppel to claim liability of successor corporation by reason of prior silence or disclaimer, see Corporations ¶¶ 790, 791.

Estoppel of chattel mortgagee to assert mortgage after representations as to mortgagor's freedom from debt or incumbrance, see Chattel Mortgages § 54.

Requirements of statute of frauds as to quitclaims and releases of interests in land, see Frauds, Statute of.

¶ 179. A letter disavowing all intention to claim real estate may operate as an estoppel in pais, and may be available as a defense in an action of ejectment.—Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

¶ 180. One who in ignorance of his own rights disclaimed title to land, which the

other then purchased from a person claiming ownership, is in the absence of countervailing equities treated as the victim of his own fault or misfortune; and will be required to make a release of his proper claims. —Beatty v. Sweeney, 26 Mich. 217.

¶ 181. After an irregular foreclosure of a mortgage one of two subsequent joint mortgagees was inquired of, by one who contemplated a purchase of the land, whether he had any claim upon it, and replied that he had not. The inquirer then purchased the land from the first mortgagee. It was held that such subsequent mortgagees were estopped from setting up any claim under their mortgage against such purchaser.—Cook v. Finkler, 9 Mich. 131.

¶ 182. Where an aged widowed father living with his son and the latter's family had sold the land occupied by him, and the purchaser before completing the purchase had asked the son whether he had any claim to the land, and had been told he had none, the son cannot in summary proceedings by the purchaser for possession of the land set up a claim to a life lease from the father; if he had any such claim it should have been asserted when he was asked if he had any claim.—Nagelspach v. Shaw, 146 Mich. 493.

§ 38. Receipts, releases and acknowledgments.

Rendition of account for stated sum and afterwards for more, see ante ¶ 175.

Quitclaim deeds as estoppels, see ante § 8.

Receipt as an admission against interest receivable in evidence, see Evidence § 380.

Receipt as conclusive evidence, see Evidence § 603.

Admissibility of parol evidence to contradict mere receipts, see Evidence § 190.

Statements exonerating or releasing secondary parties on bills and notes, see Negotiable Instruments, VII.

Sufficiency of statements to restrict creditor to recourse against principal and exonerate surety, see Suretyship, II.

¶ 183. One is not estopped from defending against the foreclosure of a mortgage given for the purchase-money of a boat, on the ground of fraudulent representations on the part of the vendor in making the sale, by a receipt given for all claims resulting from the sale, where the receipt was signed by the mortgagor relying on the advice of the vendor's attorney that she was only releasing her right to sue.—Gilchrist v. Manning, 54 Mich. 210.

¶ 184. Under the terms of an agreement, plaintiff was authorized to retain a certain amount due defendant out of a special fund due to both, in consideration of the payment by the former of an indebtedness under which both were jointly liable, no payment or action being required of defendant. The debt was not paid with plaintiff's money, as was intended, but another agreement was entered into by the plaintiff with other parties, under which defendant was paid, and his receipt in full taken, and the debt arranged to be paid by another. Held, that plaintiff, by acknowledging defendant's receipt in full of the amount due him from the special fund, was estopped to retain any sum due the latter, upon a subsequent payment by him of the indebtedness.—Friedman v. Adams, 149 Mich. 615.

§ 39. Repudiation or impeachment of one's own title.

Impeachment of one's own deed or contract, see post § 40.

Estoppel of grantee to deny grantor's title, see also ante ¶ 22.

Necessity of complete election and waiver, see Election and Waiver § 9.

Disability to repudiate and rescind while claiming under contract wholly or in part, see Rescission, III.

Estoppel of tenant to deny landlord's title, see Landlord and Tenant, III.

Estoppel of dowress or her privies to deny seizin and title of husband, see Dower § 36.

Estoppel of one cotenant to deny other's title, see Tenants in Common, II.

Right of taker of undivided interest to assert earlier paramount tax title, see Tenants in Common, II.

Preclusion to question title of common grantor, see Ejectment, II; Quieting Title, I, III.

¶ 185. One is estopped from denying a title under which he himself claims.—Paddack v. Pardee, 1 Mich. 421; Johnstone v. Scott, 11 Mich. 232.

¶ 186. One who comes into possession of land under a person claiming title, and whose title is subject to mortgage, is not at liberty to dispute the validity of such title, and if he procures releases to recover defects in it, they must be regarded as obtained in support of the title and not for its destruction. —Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361; Wilkinson v. Green, 34 Mich. 221.

¶ 187. The doctrine that adverse claimants under a common grantor are estopped from denying their grantor's title does not hold where the grantor's deed does not purport to convey the entire title or leaves it uncertain what interest was conveyed without the aid of other testimony not furnished. —Campau v. Campau, 37 Mich. 245.

¶ 188. One who claims under a deed confirms all its provisions and cannot establish his claim by adopting those provisions, only, which are in his favor, while he repudiates or contradicts others that are repugnant thereto.—Jacobs v. Miller, 50 Mich. 119.

¶ 189. One who claims right in land by virtue of a confirmatory arrangement be-

tween two other persons, from one of whom his original title was derived, must recognize all the terms of that arrangement and cannot insist upon anything which his predecessor in title could not insist upon.—Norris v. Michigan State Ins. Co., 51 Mich. 621.

¶ 190. One who claims land under assignment from the vendor to his agent and who claims logs on the land under a contract with the purchaser, recognizing the rights of another who purchased other logs from the same purchaser, cannot repudiate the contract under which he bought his logs in order to assert title to the other's logs by reason of the ownership acquired of the land; since to do so would repudiate his own title.—Lange v. Muskegon Booming Co., 63 Mich. 584.

¶ 191. One who claims under a tax-deed is estopped from questioning the validity of the title upon which arose the taxes whereon his deed is based.—Tillotson v. Webber, 96 Mich. 144.

§ 40. Impeachment of one's own deed or contract.

See also post ¶ 233.

Impeachment of one's own title, see ante § 39.

Repudiation of exchange of property on ground of fraud, see ante ¶ 170.

To question one's own deed as champertous, see Champerty ¶ 13.

Of county treasurer to assert illegality of deposit in order to claim interest as his own, see Counties ¶ 170.

Estoppel of bank to deny sufficiency of order which it drew up and paid deposit upon, see Banking ¶ 37.

Duress, fraud or mistake as vitiating contract in its inception, see Contracts, III, D; Duress § 5; Fraud; Mistake.

Disability of school district to repudiate teacher's contract for want of recording after full execution, see Schools, V.

¶ 192. At law a party is estopped from disputing his deed; and if he would impeach it in equity he must show in what his equity consists.—Payne v. Atterbury, H. 414.

¶ 193. One who gives a deed of lands which are in the adverse possession of another is estopped from disputing the deed; and the grantee may enforce his rights under it, against the person in possession, in the name of the grantor.—Stockton v. Williams, 1 D. 546.

¶ 194. Where a debtor has mortgaged timber he cannot, as against his creditor, holding by a chattel mortgage, raise an imperfection in the latter's title consisting in the fact that mortgagor owned the land on which it stood.—Brown v. King, 172 Mich. 355.

¶ 195. Where a chattel mortgage is given without consideration and for the purpose of being sold, the mortgagor is estopped as against a purchaser from disputing that it secures a real debt; if it is not meant to be sold, he is not estopped.—Judge v. Vogel, 38 Mich. 569.

¶ 196. One who claims land under a deed describing it as part of block B cannot, in trespass against one who claims under a prior mortgage from the same grantor of all of block B, dispute his own deed and show that it is not in fact part of said block.—Thompson v. Smith, 96 Mich. 258.

§ 41. Recognition of right or adoption of obligation.

Impeaching one's own title or deed, see ante §§ 39, 40.

Disclaimers and disavowals of title or right, see ante § 37.

Estoppel of assignee taking with knowledge to dispute corporate power to make contract assigned, see Corporations § 98, ¶ 353.

Averment in pleading of title in third person, see also ante ¶ 94.

Taking mortgage expressly subject to other incumbrances, see ante § 12.

To dispute agent's right to commissions by filling orders, see Agency ¶ 545.

Recognition of better title as estoppel to assert adverse possession, see Adverse Possession §§ 18, 19.

Taking title of lot according to recorded plat as estoppel to dispute dedication and claim adversely, see Adverse Possession ¶ 121.

Recognition of or dealings with corporation as raising estoppel to question its existence, see Corporations §§ 12-14.

Estoppel of person acting under judgment to assert invalidity as justification for contempt, see also Contempt ¶ 27.

Preclusion of grantee expressly subject to mortgage or who assumes it, see Mortgages, VII.

Estoppel of junior mortgagee to question priority of senior mortgages, see Mortgages, V, VII.

¶ 197. Complainant's recognition of defendants' right to use a stream to float their logs, and his straightening, at their expense, the channel above his mill so as to make the mill safer and to facilitate log-driving, do not estop him from seeking to restrain their misuse of the stream by overcrowding it and by overflooding it.—Koopman v. Blodgett, 70 Mich. 610.

¶ 198. One cannot deny that funds received by him were funds of the state, where they came into his hands by reason of his membership on a commission appointed to represent the state at an exposition.—People v. Swineford, 77 Mich. 573.

¶ 199. A defendant who has appealed in an administrator's name from a decision of commissioners on claims, and has defended

the appeal in such name, cannot, when sued by the administrator seeking to collect the estate to pay claims, question the administrator's title to the office.—Farrand v. Caton, 69 Mich. 235.

§ 42. Contracts and promises as estoppels.

Doing or contracting for work as estoppel to dispute legality of the work, see post § 43.

Making different contract for crops with lessor's grantee, see ante ¶ 174.

Estoppel by deed as including matters of recital, see ante § 15.

Statements and recitals in contracts as admissions, see Evidence § 382.

Statements and recitals in invalid or inoperative instruments as admissions against interest, see Evidence § 384.

Rule that bare agreement to arbitrate does not estop, see Arbitration § 20.

¶ 200. An invalid contract cannot operate as an estoppel.—Hickey v. Hinsdale, 12 Mich. 99.

¶ 201. A verbal executory agreement to purchase real estate subject to the back taxes, being void under the statute of frauds, is a mere nullity, and therefore could not be made the basis of an estoppel of the right to purchase such property at tax sale.—Ball v. Harpham, 140 Mich. 661.

¶ 202. Where parties who have contracted to build a building for another know that their employer understands that they are undertaking the job at a fixed price, which they have given him as their estimate of what the building would cost and that he has acted thereon making payments which they accepted, they will be estopped from asserting, after they have completed the work without undeceiving their employer, that there was no price fixed between them, and claiming that they are entitled to the market value of the work.—Davis v. Bush, 28 Mich. 432.

¶ 203. A mortgagor and mortgagee who join in a covenant that a certain sum is due on a mortgage, which the mortgagee assigns to another in order to enable the mortgagor to find a lender who will take a lower rate of interest, are both estopped thereby to assert that any larger sum is due.—Byrnes v. Martin, 67 Mich. 399.

¶ 204. As between a lien claimant and the owner of property, a recital in an agreement looking to their mutual protection from other liens, as to the amount of indebtedness due the claimant from the owner, does not estop the claimant from recovering a sum greater than that recited.—Fisher v. Burroughs Adding Machine Co., 157 Mich. 126.

¶ 205. The fact that the landowner on making a cropping contract with a farmer for half of the crop knew that the cropper had made a mortgage binding only the crop of the previous year, does not estop him to dispute the validity of the mortgage asserted against the year covered by the crop contract; even though the crop contract was in sequence of one for the preceding year and of an oral agreement that it should run for three years.—Brown v. Bolt, 116 Mich. 52.

§ 43. Contracting or doing work as recognition or assent.

¶ 206. One who bid for the digging of a ditch let by the highway commissioners, for the purpose of getting control of it, was not estopped thereby from contesting their action as illegal and calculated to do him irreparable injury.—Conrad v. Smith, 32 Mich. 429.

¶ 207. Complainant by working upon the construction of a drainage ditch did not consent to the deepening of such ditch and the laying of tile, resulting in damage from overflow waters to his own lands, and he is not estopped to seek an injunction restraining such diversion of waters.—Elliott v. Carter, 140 Mich. 303.

¶ 208. In an action by the owner of land, who was also tenant of another tract of land under the same grantor, against a prior grantor to recover damages for the flooding of the premises due to the filling up of a ravine across a street at the time it was laid out, where it appeared that when the ravine was filled plaintiff's grantor and lessor was in the employ of the defendant and was a foreman working by the day; that he hired some of the men and teams, and made up the pay roll; that the money was paid to him, and that he paid the men, held that plaintiff was not estopped by the acts of such vendor and lessor from claiming damages caused by the flooding of the premises.—Weller v. Harrison Land Co., 195 Mich. 624.

§ 44. Corporate and official acts.

Listing for taxes in wrong place, see ante ¶ 5.

[Note. Whether the act of a member or officer binds or commits the corporation, or its act the members, depends on principles of the law of corporations. See generally Corporations, XVII, XXIV. Effect of public official acts to bind the public or the actor depends on the capacity of the public to be estopped (see ante § 3) or on the effect of an act in one capacity to bind the actor in another capacity or right (see post § 54).]

¶ 209. A government may not be estopped from asserting its rights against an official servant by the acts or omissions of auditors, trustees, supervisors or other guardians of public rights.—Board of Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 210. Where a corporation has no power to convey a title to or interest in its property and no charge of fraud or misrepresentation is made, it is not estopped from claiming that its contract implied no such conveyance.—Hillsdale College v. Rideout, 82 Mich. 94.

¶ 211. A township is not estopped from maintaining a bill to remove a street railway unlawfully on its highway because of the failure of the township officers to take steps to prevent the building thereof nor by their mere acquiescence.—Township of Bangor v. Bay City Traction & Electric Co., 147 Mich. 165.

¶ 212. A city is not estopped from asserting that the claims of an assignee of a city contractor should be subordinated to the claims of materialmen nor does it waive its right to withhold payment to the assignee by the fact that the common council passed a resolution authorizing the mayor and clerk to pay the assignee, the resolution having been rescinded before any action was taken by the assignee and his situation having been in no way changed by his reliance thereon. —Carlisle v. Spain, 147 Mich. 158.

§ 45. Indirect representations, representations to third persons.

See also ante ¶¶ 67, 172.

Representations or acts by agents, see post § 47.

¶ 213. The rule of equitable estoppel is not confined to such representations as are made directly and in person to the parties acting upon them; the material point is that they are calculated to produce and do produce the end (per Christiancy, J.).—Quirk v. Thomas, 6 Mich. 76.

§ 46. Acts done as agent or functionary for another.

Estoppel to question capacity of representative, see Estates of Decedents § 53.

¶ 214. A lease which one executes as agent of the lessor would estop him from setting up any claim to the land inconsistent with the lease.—Blanchard v. Tyler, 12 Mich. 339.

¶ 215. One who forecloses a mortgage as attorney for another, and who permits title to pass to his client under a sheriff's deed, is estopped, as to an innocent purchaser from the latter, to assert his own title to the land under a claim which, if established, would demonstrate his knowledge, at the time of foreclosure, of the invalidity of the mortgage.—Walker v. Bottomley, 110 Mich. 127.

§ 47. Representations and acts by agents or third persons.

Representations to agents or third persons, see ante § 45.

Nonmutuality where agent was unauthorized, see ante ¶ 68.

Knowledge or means of knowledge preventing avoidance of estoppel on claim of want of knowledge of what agent had done, see ante ¶ 110.

[Note. The scope of the authority of agents and other representative persons to bind those represented is determined by the law of Agency or of Trusts or of Estates of Decedents, which see.]

Right to rely on agent's declarations to create estoppel to bind principal that agency exists, see Agency § 20.

Authority of bank officers to make admissions estopping bank, see Banking § 58.

Statement of cashier as estoppel of bank to assert lien on stock for debt of holder, see Banking § 58.

¶ 216. The acts of an agent whose authority is invalid under the statute of frauds will not estop the principal unless adopted by him.—Holland v. Hoyt, 14 Mich. 238.

¶ 217. A man's acquiescence, privately or as a supervisor, in the action of the board of supervisors in authorizing the erection of a dam the effect of which would be to overflow lands belonging to his father, will not bind the latter if the son was not authorized to act for the father and the latter did not know of his action.—Stone v. Roscommon Lumber Co., 59 Mich. 24.

¶ 218. An agent's casually speaking of a certain machine belonging to a corporation for which he acted as "my machine," in the hearing of the president of the corporation and in conversation with a person who was not dealing with the property or proposing to do so, and who was not shown to have relied upon any such expression of ownership, did not estop the corporation from afterwards asserting title to the machine in action of replevin against a sheriff who took it on an execution against the agent.—Michigan Paneling Machine & Manufacturing Co. v. Parsell, 38 Mich. 475.

¶ 219. Whether complainant in a bill to quiet title is estopped by the fact that a person said to be his solicitor had urged the defendant to bring ejectment against complainant, and had represented that complainant knew he had no title and wanted to be ousted so as to have recourse against his warrantor, quære.—Dale v. Turner, 34 Mich. 405.

C. OPERATION, SCOPE AND EFFECT; PLEADING, PROOF AND PRACTICE.

§ 48. In general.

Basis of estoppels in general, see ante § 2.

Nonoperation of estoppel as to matters of law, see ante § 4.

Scope, effect, duration and subjects of estoppel, see post §§ 50, 55.

Persons affected or entitled to urge, see post §§ 52-54.

Manner of urging, pleading and proving estoppel, see post §§ 56-59.
Court and jury questions, instructions and requests, see post §§ 60, 61.
Recognition of equitable estoppels on law side, see post § 49.
Estoppel as improper principle for construction of contract, see Contracts ¶ 1533.

¶ 220. It seems that an estoppel in pais operates as an admission or representation of a fact, which becomes conclusive by reason of the elements of the estoppel.—Dean v. Crall, 98 Mich. 591.

¶ 221. Whatever binds a party by estoppel is as valid against him as what he might voluntarily have done.—People v. Bristol, 35 Mich. 28.

¶ 222. The operation of estoppel is not as broad when real property is involved as when only personalty is involved, since the statute of frauds comes into play; and accordingly a party cannot recover in ejectment on the basis of an estoppel in pais; e. g., an estoppel against the other party's setting up a title in opposition to that which his opponent had acquired in reliance upon his oral statement.—Hayes v. Livingston, 34 Mich. 384.

§ 49. Recognition and effect at law.

As to relieving from contract obligations, see ante ¶ 3.
Necessity of pleading in law actions, see post § 58.
Available defense of estoppel as reason against assumption of jurisdiction by equity, see Equity ¶ 143a.
Estoppel as defense in ejectment, see Ejectment § 20.

¶ 223. Estoppels in pais are not unknown to the common law.—Smith v. Hamilton, 20 Mich. 433.

¶ 224. Estoppels in pais are called equitable because they arise on facts that make their application just, and not because they are in any way limited to cases in equity; they are just as applicable in courts of common law.—Barnard v. German American Seminary, 49 Mich. 444.

¶ 224a. An equitable estoppel in pais may be enforced by a court of law.—Lang v. Lundy, 185 Mich. 390.

§ 50. Scope, extent and duration of estoppel in general.

Equitable basis of policy of estoppel, see ante § 2.
Concrete applications of estoppel to various subjects, see topics referred to post § 55.
Right to resist appeal where one is estopped to take appeal, see Appeal ¶ 308.

¶ 225. Complainant's recognition of defendants' right to use a stream to float their logs, and his straightening, at their expense, the channel above his mill so as to make the mill safer and to facilitate log-driving, do not estop him from seeking to restrain their misuse of the stream.—Koopman v. Blodgett, 70 Mich. 610.

¶ 226. Destruction by a partner of an unrecorded deed by him to his copartner of an undivided half of land constituting firm assets would estop him to enforce partnership notes by which the mortgage was taken up, which the firm gave on the land; but on subsequently going out of the firm and making a clear title to the remaining partner for the land, and the latter's giving a bond to pay all firm debts on consideration of taking all the assets, it ceases to prevent enforcement.—Mette v. Feldman, 45 Mich. 25.

§ 51. Validation or cure of illegal or defective acts.

Nonestoppel as to matters of law, see ante § 4.
Estoppel to impeach one's own deed or contract, see also ante § 40.
Estoppel to urge collateral objection to judgment, see Judgments, VII.
Estoppel to make defense of statute of frauds, see Frauds, Statute of, III; Specific Performance, III.
Estoppel to deny delivery of deed, see Execution of Instruments, III.
Inefficacy of estoppels to perform office of writing required by statute of frauds, see Frauds, Statute of, III.
Establishment or extinction of easements by prescription, see Easements.

¶ 227. The doctrine of estoppel cannot validate an unexecuted contract which is against public policy.—Robinson v. Patterson, 71 Mich. 141.

¶ 228. The doctrine of estoppel cannot be so applied as to render valid and binding an agreement otherwise void for want of consideration.—Ladd v. Brown, 94 Mich. 136.

¶ 229. The enforcement of equities against the owner of the legal title of land is on equitable grounds distinct from estoppel which would offend the statute of frauds by divesting and transferring title to land by parol.—Hayes v. Livingston, 34 Mich. 384.

¶ 230. It seems that estoppels in pais may operate to create or extinguish easements.—Day v. Walden, 46 Mich. 575.

¶ 231. The state, or persons charged with offenses, cannot be estopped by the neglect of individuals to insist on such defenses as the law gives them. Constitutional provisions cannot be destroyed by a practical construction of a city charter based on such neglect.—People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 232. Estoppel cannot arise to bar the right to assert against one conducting a saloon illegally that such is the fact and that because of the fact he is deprived of any exemptions pertaining to the business as such.—McCarthy v. Payne, 141 Mich. 571.

¶ 233. One is not estopped from repudiating the title of a defendant whom he charges with having obtained the property from him by false pretenses.—Dayton v. Monroe, 47 Mich. 193.

§ 52. Persons and privies concluded.

See also ante ¶¶ 133, 139.

Capacity of public to become estopped, see ante § 3.

Persons entitled to claim estoppel, see post § 53.

Persons sustaining dual and diverse characters, see post § 54.

Trustee and creditors under trust deed, see also ante ¶ 138.

By estoppels by deed, see ante § 13.

Right of creditor to deny incorporation and hold individuals, though other creditors are estopped, see also Corporations ¶ 60.

¶ 234. That which estops one from denying the delivery and acceptance of a deed of conveyance precludes his estate from denying it also.—Comstock v. Smith, 26 Mich. 306.

¶ 235. One who marries the widow of a mortgagor and goes into possession of the premises under an adverse title does not hold in his wife's right, and is not estopped by his marriage from disputing the mortgage.—Gorton v. Roach, 46 Mich. 294.

¶ 236. Where heirs who had participated in hearing of claims before probate judge, are estopped from insisting on appointment of commissioners on claims, the administrator who represents them is also estopped.—Jenks v. St. Clair Probate Judge, 96 Mich. 122.

§ 53. Persons protected or entitled to claim estoppel.

Persons and privies bound, see ante § 52.

Persons in diverse or dual capacities, see post § 54.

¶ 237. An assignee of property rights may have the benefit of an estoppel raised for their protection.—Spicer v. Bonker, 45 Mich. 630.

¶ 238. An assignee, who in any event got all that his assignment purported to carry and who was not misled to his prejudice, cannot claim that one of the assignors is estopped by admissions made to deny the interest of the coassignor.—Bank of Montreal v. Potts Salt & Lumber Co., 101 Mich. 546.

§ 54. Persons sustaining diverse capacities, rights and trusts.

See also ante ¶ 217.

Estoppel by acts done for another, see also ante § 46.

Estoppel of representative to bring trover for stock certificate because of indorsement before appointment, see Estates of Decedents ¶ 267.

Estoppel of representative to recover property of estate wrongfully disposed of by him before appointment, see Estates of Decedents ¶ 372.

¶ 239. An administrator does not preclude himself from maintaining a suit for a fund, in his representative capacity, by borrowing a part of it in his individual capacity, and executing his bond and mortgage therefor.—Cullen v. O'Hara, 4 Mich. 132.

¶ 240. The fact that the widow of a deceased shareholder in a corporation had indorsed and delivered the intestate's certificate of stock to an heir, who sold it, would not estop her, having been subsequently appointed administratrix, from claiming the stock for the estate.—Morton v. Preston, 18 Mich. 60.

¶ 241. An administrator's title cannot be affected by any estoppel that does not rest on equities against the estate.—Gilkey v. Hamilton, 22 Mich. 283.

¶ 242. A trustee for the beneficiaries in an insurance policy signed a written acknowledgment that the policy had been canceled, and in making proof of loss to another company made affidavit that there was no other insurance. It was afterwards claimed that he signed these documents without knowing what they contained. Held, that they did not estop him from claiming the first mentioned insurance for the benefit of the cestuis que trustent.—Hillick v. Traders' Ins. Co., 54 Mich. 531.

¶ 243. Where a debtor in 1887 had transferred his property to his wife, and thereafter the claim in question could not be collected, and in 1891 the administratrix of the estate of the creditor indorsed it to an agent for collection and where the latter after the death of the administratrix in 1892, commenced suit in his own name and recovered judgment for the full amount, and in 1896 settled for a much less sum, the new administrator subsequently appointed was not estopped by delay from maintaining a bill to set aside the settlement and for an accounting against the agent, although such administrator was appointed on the application of the agent who was the only creditor, since he also represented heirs who were interested in the estate and the due administration thereof and there was no one to represent the estate in the interim.—Upton v. Dennis, 133 Mich. 238.

§ 55. Particular matters; cross-references.

The principal matters as to which the doctrine of estoppel is sought to be applied are referred to in the following:

To deny or assert inclusion of items in account stated, see Account Stated §§ 4-6.

Deed according to plat as estopping claim of adverse possession of street, see Adverse Possession ¶ 167.

Agency by estoppel, see Agency § 18.

Estoppel to question authority of agent, see Agency § 27.

To question or assert alteration of writing, see Alteration of Instruments ¶ 32.

Estoppel of owner of dog by assuming responsibility for another in custody to deny own liability as "keeper," see Animals ¶ 63.

To claim error on appeal, see Appeal § 230; Saving Questions for Review.

Award of arbitrators as bar or estoppel, see Arbitration § 19.

To question authority of attorney, see Attorneys § 29.

Estoppel to assert preferred claim or trust against insolvent bank, see Banking § 87.

Estoppel of transferee of bank stock to question his liability as stockholder, see Banking § 68.

To question or dispute boundaries, see Boundaries §§ 5-9.

To claim or enforce building restriction, see Buildings §§ 23, 24.

To assert lien outstanding as defense to action on contract, see Building Contracts § 54.

To question delivery by carrier, see Carriers § 35.

Estoppel to claim bill of sale as absolute because filed as chattel mortgage, see Chattel Mortgages § 3.

Estoppel to assert invalidity of chattel mortgage, see Chattel Mortgages § 10.

Estoppel towards third person to question validity of mortgage, see Chattel Mortgages §§ 52-54.

To question constitutionality of statute, see Constitutional Law § 29.

Estoppel to question consideration for contract, see Contracts § 137.

Estoppel to question that other party of same name was mortgagee, see also Contracts ¶ 47.

To claim or deny rights on breach or performance of contract, see also Contracts §§ 259, 260.

To question existence of corporation, see Corporations §§ 12-14.

To question that other party to contract was a corporation, see Corporations § 109.

To dispute or question corporate power, see Corporations §§ 96-98.

To question that person is stockholder, see Corporations § 298.

To question consolidation of corporations, see Corporations § 217.

Estoppel to object to jurisdiction of court, see Courts § 83.

Of public to deny dedication, see Dedication § 35.

Of grantor to deny dedication, see Dedication § 34.

Estoppel to assert dower, see Dower § 27.

To question easement or deny its existence, see Easements § 14.

To question eminent domain proceedings for error or irregularity, see Eminent Domain, VIII, IX.

To assert or deny capacity as personal representative, see Estates of Decedents, IV, A.

To make or assert claim against decedent's estate, see Estates of Decedents, VI.

To ask accounting by representative or to question accounting had, see Estates of Decedents, XII.

Preclusion to assert that things were or were not fixtures, see Fixtures, II.

Estoppel to assert default in mortgage and to foreclose, see Foreclosure, I.

To question regularity of foreclosure sale, see Foreclosure, V.

Estoppel to claim deficiency on foreclosure, see Foreclosure, VI.

To question authority of foreign corporation to do business in state, see Foreign Corporations, II.

To assert fraud or deception, see Fraud, I.

To assert defense of statute of frauds or question want of writing, see Frauds, Statute of, III, IV.

To question fraudulency of conveyance or transfer as against creditors, see Fraudulent Conveyances, II, III.

To assert or question gift, see Gifts, IV.

To assert or deny existence and boundaries of highways, see Highways, II, III.

To assert or deny wife's separate estate or interest, see Husband and Wife, II, IV.

Estoppel to attack other party's contract or conveyance for want of capacity to contract, see Husband and Wife, IV, A; Infants, IV; Insane Persons, IV.

To assert infancy or question majority, see Infants, I, III.

To assert incompetency of person or question sanity or capacity, see Insane Persons, I, III; Incompetents.

To question liability for premiums or assessments for insurance, see Fraternal Associations, III; Insurance, VI.

To forfeit or dispute insurance, see Fraternal Associations, V; Insurance, XII, C.

To question agency in respect to insurance, see Insurance, III.

To attack judgment collaterally or to seek relief against it, see Judgments, VI, VII.

To assert or deny relation of landlord and tenant, see Landlord and Tenant, I.

Of tenant to deny title of landlord, see Landlord and Tenant, III.

Estoppel to revoke license to enter on land, see Licenses to Enter.

To assert or deny operation of statute of limitations, see Limitations, VII.

To question local improvement and assessment proceedings, see Local Improvements, VII.

To question fact of marriage, see Marriage, I.

To affirm or deny relation of master and servant, see Master and Servant, I.
To question or assert mechanics' liens, see Mechanics' Liens, I.
To question powers or acts of municipality, see Municipal Corporations, III.
Respecting negotiable instruments and indorsement or transfer thereof, see Negotiable Instruments.
To claim or seek new trial, see New Trial, I, II.
Estoppel to deny assent to novation, see Novation.
To question emoluments or official salaries, see Officers, VIII; Municipal Corporations, XV.
Estoppel of parties to patent license to dispute validity of patent, see Patents.
To assert or deny partnership or partner's authority to bind firm, see Partnership, I, IV.
To assert or deny pledge, see Pledges, II.
To claim or deny service of process, see Process, II.
To make set-off or recoupment, see Set-off, II.
To assert or deny liability of sheriff or responsibility for his acts, see Sheriffs, IV; Executions, XII.
To assert or deny right of subrogation, see Subrogation, I.
To assert or deny trust, see Trusts, IV, XII.
To make defense or question fact of usury, see Usury, II.
To assert or deny factum of will, see Wills, VII.

§ 56. Modes of urging estoppel.

Necessity of pleading, see post § 57.

¶ 244. It seems that if an estoppel against a municipality from opening a street across a railway track is allowable, it might be urged in the street opening proceeding either by objection on the hearing that no jury need be summoned or on the hearing before the jury by request for a proper charge.—Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641.

§ 57. Necessity and sufficiency of pleading estoppel.

Estoppels by deed, see ante § 23.
Pleading in actions at law, see post § 58.
Pleading estoppel by judgment, see Former Adjudication, VII.
Amendment to plead estoppel in bill, see Equity § 126.
Necessity of amendment or plea puis darrein to admit estoppel arising since suit begun, see Pleading, VI, VII.
Necessity of special allegation of estoppel under contract, see also Contracts ¶ 1181.
Proof under general issue in trover, see also Conversion § 27.

¶ 245. An estoppel relied upon as a basis of relief or as an objection to a defense must be alleged.—Cicotte v. Gagnier, 2 Mich. 381; Moran v. Palmer, 13 Mich. 367; Connerton v. Millar, 41 Mich. 608.

¶ 246. Estoppels, where they form the foundation of the relief asked, and are relied on to defeat a legal title, cannot be proved unless alleged in the bill.—Cicotte v. Gagnier, 2 Mich. 381; Moran v. Palmer, 13 Mich. 367.

¶ 247. A defense based upon an estoppel in pais cannot be relied upon unless it is pleaded.—Dale v. Turner, 34 Mich. 405.

¶ 248. Estoppel in pais from maintaining a bill in equity cannot be relied on unless pleaded.—Dale v. Turner, 34 Mich. 405.

¶ 249. Estoppels, where they form the foundation of the relief asked for in equity, and are relied upon to defeat a legal title, cannot be proved unless alleged.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 250. An estoppel in pais must be pleaded in equity where it constitutes the basis of a right to sue and ground for relief, or as relied upon as a defense.—Saginaw Suburban Ry. Co. v. Connelly, 146 Mich. 395.

¶ 251. A plea of estoppel must be properly framed as such, especially in opening and closing, and it must set forth a claim that the plaintiff should not be admitted to make use of what the estoppel would exclude. The matter of estoppel alleged must be material and traversable.—Whittemore v. Stephens, 48 Mich. 573.

¶ 252. Allegations of facts in an answer to a bill to foreclose are sufficient to permit the defense of estoppel in the absence of an express averment of estoppel in the pleadings.—Union Trust Co. v. Detroit & R. St. C. Ry., 127 Mich. 252.

§ 58. ——In actions at law.

¶ 253. The rule that an estoppel in pais must be pleaded where it constitutes the basis of a right to sue and ground of relief, or is relied upon as a defense, applies to equity cases only, and not to an action at law.—Dean v. Crall, 98 Mich. 591, overruling on this point Gooding v. Underwood, 89 Mich. 187; Pearson v. Hardin, 95 Mich. 360.

¶ 254. An equitable estoppel in pais need not be pleaded in order to be available in an action at law.—Lang v. Lundy, 185 Mich. 390.

¶ 255. Actions of the grantor of the plaintiff in ejectment in relation to the establishment of the true boundary line between his premises and those of the defendant may be shown by the latter without pleading the estoppel.—Mowers v. Evers, 117 Mich. 93.

¶ 256. An estoppel against plaintiff's claiming an interest in the converted goods

is available for defendants in trover under the general issue without notice.—Rogers v. Robinson, 104 Mich. 329.

¶ 257. An estoppel against plaintiff because of his having elected a remedy in assumpsit, whereby he disaffirmed title in himself, is available to defendant in trover under the general issue.—Thomas v. Watt, 104 Mich. 201.

¶ 258. An estoppel constitutes a distinct cause of action and cannot be taken advantage of, either as a ground of recovery or as a defense, unless specially pleaded.—Wessels v. Beeman, 87 Mich. 481; Gooding v. Underwood, 89 Mich. 187.

¶ 259. The object of a declaration is to give the defendant fair notice of the case he is called into court to meet; and a count charging a defendant with the acceptance of a bill of exchange cannot be held to inform him that he will be called upon to meet a liability on the ground of estoppel.—Gooding v. Underwood, 89 Mich. 187.

¶ 260. An estoppel that constitutes a distinct cause of action must be declared upon.—Pearson v. Hardin, 95 Mich. 360.

¶ 261. Where, as in the case of a fraudulently raised note, an estoppel is the only ground of recovery, it must be pleaded.—Pearson v. Hardin, 95 Mich. 360.

§ 59. Burden of proof and evidence of estoppels.

General law of evidence and competency of evidence, see Evidence.

Competency of one to testify of his own intent in making representations or of his own reliance on other's, see Evidence § 235.

Admissibility of evidence of ignorance to rebut estoppel, see also Evidence ¶ 2348.

Estoppel as proper matter to be proved on cross-examination, see Examination of Witnesses § 45, ¶ 233.

¶ 262. Where a party relies upon an estoppel he must show the facts necessary to constitute it.—Bond v. Markstrum, 102 Mich. 11.

¶ 263. If the plaintiff in ejectment claims that defendant is estopped to deny his title, he must show the facts constituting the estoppel.—Clee v. Seaman, 21 Mich. 287.

¶ 264. Where an estoppel in pais is relied on, the facts that support it must be clearly made out.—Rust v. Bennett, 39 Mich. 521.

¶ 265. An estoppel is not established if the evidence fails as to any essential element of it, but if there is more than a scintilla of evidence to establish it, the court will not inquire into its weight.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 266. For the purpose of showing an estoppel it was relevant to introduce a stipulation to pay certain costs on attachment of a boat, where the claim was that by agreement there was a substitution of other property for the boat, which had been levied on, and the action was replevin for the substituted property and defense was estoppel by conduct to attack execution sale.—Payment v. Church, 38 Mich. 776.

¶ 267. Evidence, in an action on a contract, of the temporary postponement of its performance at the request of defendant, but without any contract therefor, is relevant to show that defendant was estopped from denying performance during that time.—Barton v. Gray, 57 Mich. 622.

¶ 268. Evidence that a defendant in a suit was joined as a codefendant in another suit by stipulation of an attorney representing the person claimed to be her partner is incompetent, since it is not an admission by the defendant as evidence of an estoppel, unless she had knowledge of and had ratified it.—Munton v. Rutherford, 121 Mich. 418.

¶ 269. A minor mortgaged a horse belonging to his father, as also one purchased by himself, to secure the purchase price of the latter horse. Prior to the purchase the father had informed the mortgagee that his son had a horse similar to the one owned by the mortgagee; that the son wanted to get a team, and would give the mortgagee a good deal for his horse if he would sell it. When the mortgage became due the father refused to surrender his horse, and it was seized under the mortgage, and the father replevied it. Held, that there is nothing in the evidence to justify a finding that the father is estopped from asserting title to his horse.—Barney v. Rutledge, 104 Mich. 289.

¶ 270. Evidence that plaintiff, actually employed by the C. I. M. Co., an operating corporation, receipted to it for his pay and had a workman's brass check bearing its initials, overcomes evidence that another corporation, controlling the operating one by stock ownership and similar in name, so conducted affairs as to raise an estoppel to deny when sued for injuries that it was the master.—Hannula v. Cleveland Cliffs Iron Co., 188 Mich. 543.

§ 60. Court and jury questions.

Province of court and jury in general, see Trial, VI.

¶ 271. The application of the doctrine of estoppel in pais is a mixed question of law and fact, and in cases of jury trial must be submitted to the jury with proper instructions, and the conclusion from the evidence must be drawn by the jury and not by the court.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 272. Where the elements of an alleged estoppel relied upon as a defense in trover are neither admitted nor conclusively ascertained, and there is evidence tending to show plaintiff's ownership, the case is one for the jury under proper instruction, and should not be taken from them.—Ashman v. Epsteine, 50 Mich. 360.

¶ 273. In an action of trover the elements of a supposed estoppel against the plaintiff from claiming ownership of a watch pawned by her husband should be submitted to the jury under hypothetical instructions.—Ashman v. Epsteine, 50 Mich. 360.

¶ 274. The question of whether plaintiff in trover is estopped to claim the property by her silence is one for the jury under proper instructions, where she contends that she asserted her title to the property in suit when the chattel mortgage upon which it was seized was given by her husband and she refused to execute it; that she again asserted it when the officer attempted to get the property upon the chattel mortgage, and did not allow him to take it until it was replevined; but where her testimony was contradicted.—Holmes v. Smith, 149 Mich. 327.

¶ 275. Where, in a suit for damages for negligently permitting fire to escape upon plaintiff's premises, the plaintiff testified that the defendant stated he would come up later, as soon as the snow was off, look at the damages, straighten up the matter, and pay plaintiff the amount of the damages, the question is properly submitted to the jury whether defendant was estopped to deny that he was the person liable and the proper party to sue.—Ripley v. Priest, 169 Mich. 383.

§ 61. Instructions and requests.

General law of instructions, see Instructions.

¶ 276. Where, in an action to recover for goods sold by plaintiffs to defendants, and upon a like claim that had been assigned to plaintiffs by a third person, the chief question was whether defendants were partners, and where there was testimony, which, if believed, would estop defendants from denying the existence of the partnership as against the assignor, although not as against plaintiffs in their own right, an instruction allowing the jury to apply such estoppel to both claims was erroneous.—Armstrong v. Potter, 103 Mich. 409.

¶ 277. The court should have instructed the jury as to the duty resting upon a party to speak when by silence another acting in good faith is misled, in an action for the price of a carload of lumber; where, even though the lumber was ordered in defendant's name without his knowledge, the evidence shows that plaintiff sent an invoice to defendant stating that the lumber had been sold to defendant, and later various letters and telegrams relating to such shipment, and yet the defendant failed to disclaim having ordered the lumber until several months after such shipment.—Long-Bell Lumber Co. v. Nyman, 145 Mich. 477.

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EVIDENCE.

TREATS of the means and rules for proof or disproof of facts in issue or involved in the issues in civil cases, and of the burden of proof and the presumptions of law and the judicial knowledge which take the place of positive evidence. It excludes the Examination of Witnesses, which see, the practice on introducing or offering proof and the order in which the proofs shall be received (see Trial, V), the necessity and sufficiency of objections to evidence (see Trial, V; Saving Questions), and the calling, competency, credibility, and impeachment of witnesses and also incompetency of priviliged communications to witnesses (see Witnesses). It also excludes evidence and rules of evidence in prosecutions for crime (see Indictment, VIII).

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I. JUDICIAL NOTICE.

§ 1. In general, nature, scope and restrictions.

Nature of presumptions as substitute for affirmative proof, rule against indulgence, see post § 30.

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Judicial notice taken in criminal cases, see Indictment, VIII, A.

Judicial notice on appeal or error, see Appeal § 344.

Judicial notice of identity of attorney of court where effect would be to prove illegal action, see Appeal ¶ 1442.

¶ 1. Where the statute itself prescribes what shall constitute the evidence that its provisions are in force in a particular county, it negatives the taking of judicial notice of such fact.—People v. Murphy, 93 Mich. 41.

¶ 2. Where by statute judicial notice is required to be taken of organizations incorporated under a general act, some means of public information should be provided.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 3. Judicial notice cannot be taken, especially in contradiction of the return on certiorari, that special commissioners in a drain-opening proceeding were interested.—Roberts v. Smith, 115 Mich. 5.

¶ 4. The court will not take notice of the natural laws relating to centrifugal force and rely upon them when to do so it must disregard the testimony of witnesses.—Dupuis v. Saginaw Valley Traction Co., 146 Mich. 151.

§ 2. Matters of general, common or scientific knowledge.

Various subjects of knowledge, see post §§ 3-28.

Qualities and characteristics of particular things, see post § 3.

Mechanical and working experiences and knowledge, see post §§ 14, 16.

Specific gravity and buoyancy of substances in water, see post ¶ 23.

Testimony contradicting natural forces, see also ante ¶ 4.

¶ 5. The obvious laws of nature and of the human mind, and such dictates of common sense and principles of human action as are assumed as truths by the mass of sane minds, constitute a part of the law of the land, and courts are bound judicially to know and apply such laws and principles accordingly.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 6. Courts usually take notice of matters of which everyone takes notice.—People v. Plummer, 189 Mich. 415.

¶ 7. Courts will take judicial notice of modern discoveries and inventions that have become of general and almost universal use in our commercial life.—Theisen v. Detroit Taxicab & Transfer Co., 200 Mich. 136.

¶ 8. The perilous conditions surrounding the people, due to widespread forest fires in Michigan, may be taken judicial notice of. Konieczny v. Detroit & M. Ry. Co., 164 Mich. 66.

¶ 9. The court will take judicial notice that lodge halls to be used by secret societies need to have the floors deadened in order to prevent communications being heard outside the room, or else will not be suitable for such use.—Young v. Collett, 63 Mich. 331.

¶ 10. Judicial knowledge is taken that the cost of building and running railroads in the upper peninsula is much greater than in the lower; that being a matter of general knowledge.—Wellman v. Chicago & G. T. R. Co., 83 Mich. 592; affirmed in 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

¶ 11. Judicial notice will be taken of the fact that it is impossible to make an accurate inventory of saw-logs afloat in a stream.—McGuire v. Saginaw Circuit Judge, 101 Mich. 275.

¶ 12. Judicial notice will be taken of a custom of reading from the Bible in the presence of students, and of offering prayer.—Pfeiffer v. Board of Education of Detroit, 118 Mich. 560.

¶ 13. In a divorce proceeding, where one of the grounds of cruelty was the display of force in breaking down the door of the room in which complainant had fled to prevent defendant's taking from complainant the certificate of her marriage, the court judicially noticed that every wife desires to preserve her marriage certificate.—Creyts v. Creyts, 133 Mich. 4.

¶ 14. Where a health board had reason to fear danger from diseases which are generally recognized as communicable and dangerous to public health, the court could properly take judicial notice that the disease was within Comp. L. 1897, chap. 108, § 4424, relating to the care of sick or infected persons, which in plain terms includes "all diseases" where there is danger to the public health from a threatened spread of the disease.—Township of Cedar Creek v. Wexford Co. Sup'rs., 135 Mich. 124.

¶ 15. Under Comp. Laws 1897, § 11853, permitting the testimony before an examining magistrate to be reduced to writing under his direction, the court on mandamus to compel action by the magistrate will take judicial notice that some time is required to reduce it to typewriting.—Oblaser v. Wayne Circuit Judge, 159 Mich. 665.

§ 3. Qualities and characteristics of things.

As to business of dealing in specific things like ice, see post § 12.

As to care in dealing with dangerous things like electricity, see post § 17.

¶ 16. Neither court nor legislature can have knowledge of the merits or defects of oleomargarine so as to be able to declare its hygienic value.—Northwestern Mfg. Co. v. Wayne Circuit Judge, 58 Mich. 381.

¶ 17. Judicial notice cannot be taken that Calcutta fish poles are perishable property. —Imbrie v. Wetherbee & Co., 70 Mich. 103.

¶ 18. It is a matter of common knowledge that there is a great difference in the quality and value of furniture which looks much alike.—Raymond v. McKenna, 147 Mich. 35.

¶ 19. The court cannot judicially know that a rejected portrait of defendant's child will be worthless to plaintiff, the artist who painted it on an order from defendant.—Turner v. Mason, 65 Mich. 662.

¶ 20. Judicial notice was taken in a prosecution for violating an ordinance relative to disposal of garbage, that table refuse when dumped into receptacles for disposal, will speedily ferment and emit noisome odors calculated to affect public health.—People v. Gardner, 136 Mich. 693; affirmed in 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106.

¶ 21. On a bill to restrain the flooding of lands it must be held to be a matter of common knowledge that lands may be damaged, even though not covered, by water which stands along them.—Miller v. Bank of Belleville, 148 Mich. 339.

¶ 22. The supreme court might well take judicial notice of the fact that the testing of automobiles is a hazardous occupation.—Blick v. Olds Motor Works, 175 Mich. 640.

¶ 23. Judicial notice will be taken of the fact that water-soaked logs, which become greater in specific gravity than the water, will sink to the bottom, and become imbedded in the soil.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 24. Judicial notice will be taken of the dangerous qualities of electric currents.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 25. Judicial notice may be taken that it is a matter of general knowledge that electric wires of high voltage, even if insulated, are dangerous, and to be avoided.—Sweezo v. Cheboygan Electric Light & Power Co., 166 Mich. 25.

¶ 26. The fact that gasoline is a dangerous explosive will be judicially noticed.—Whittemore v. Baxter Laundry Co., 181 Mich. 564.

¶ 27. Judicial notice is taken of the fact that gasoline either alone or mixed with kerosene constitutes a highly explosive agent and that extreme care should be used by vendors thereof to prevent their mixture.—McLawson v. Paragon Refining Co., 198 Mich. 222.

¶ 28. Judicial notice will be taken that many trees annually shed large numbers of dead limbs.—Miller v. City of Detroit, 156 Mich. 630.

§ 4. Animal traits and dispositions.

As to usual measures to prevent frightening of horses on highways, see post ¶ 94.

¶ 29. Judicial notice will be taken that a box freight car standing still at a highway crossing is not of itself a frightful object to horses of ordinary gentleness; the question is not for the jury.—Gilbert v. Flint & P. M. Ry. Co., 51 Mich. 488.

¶ 30. The court cannot have judicial knowledge that an ordinarily gentle horse would or would not take fright at a given hole in a bridge floor. As a matter of common knowledge it is for the jury to determine.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 31. It is a matter of common knowledge that steam from a locomotive will frighten a gentle horse at close range.—Mahan v. Clee, 87 Mich. 161.

§ 5. Meanings of current words or phrases or abbreviations.

¶ 32. Courts take judicial notice of the meaning of the current phrases which everybody else understands, e. g., that "Beecher business" means adultery.—Bailey v. Kalamazoo Publishing Co., 40 Mich. 251.

¶ 33. A fund raised in Detroit by general contribution to aid in the building of a railroad to Butler, Ind., was commonly known as the "Butler bonus." But in proceedings to condemn land for a road to be leased to the Butler road a court could hardly take judicial notice of what the Butler bonus was for the purpose of sustaining a challenge to a juror on the ground that he had subscribed thereto.—Detroit, W. T. & J. R. Co. v. Crane, 50 Mich. 182.

¶ 34. It is a fact of which courts may take knowledge that notes known as "Bohemian Oat Notes" are all obtained and given upon a similar scheme or arrangement, and are void, as against public policy, between the maker and payee, or any other person having knowledge or information of the scheme upon which they are based and by which they are procured.—Ward v. Doane, 77 Mich. 328.

¶ 35. The court has no judicial knowledge that the phrase, "mill tally," in a contract

for the delivery of logs, may not need interpretation.—Corneil v. New Era Lumber Co., 71 Mich. 350.

¶ 36. Court will not take judicial notice of the meaning of abbreviations peculiar to the description of stock in the shoe trade, but not in common use.—Dages v. Brake, 125 Mich. 64.

§ 6. Divisions of time, Sundays and holidays.

¶ 37. Judicial notice will be taken that the date of a lease in suit falls on Sunday, though neither party calls attention to it.—Hoard v. Stone, 58 Mich. 578.

§ 7. Mortality tables.

¶ 38. Judicial notice is taken of the contents of the mortuary tables of the expectancy of life, based upon American experience.—Denman v. Johnston, 85 Mich. 387.

§ 8. Historical and political facts.

Political divisions, see post § 10.

¶ 39. Matter of public history is judicially noticed.—May v. Rumney, 1 Mich. 1.

¶ 40. Judicial notice will be taken of the history of the period of the war of the rebellion.—Smith v. Aplin, Auditor-General, 80 Mich. 205.

¶ 41. Courts will take notice of the recital in public statutes of the time when a turnpike was laid out and built by the general government, and of the fact that it afterwards became subject to the state authority and went into the charge of the ordinary town officers.—Boyd v. Conklin, 54 Mich. 583.

¶ 42. In an action against a street car company for negligent injury to a hearse judicial notice as of a matter of current history may be taken of popular excitement and anger culminating in mob violence against a street car company.—Geist v. Detroit City R. R., 91 Mich. 446.

¶ 43. In a suit for injuries to the premises from the negligent spreading of fires, the court from its files and records, and from its knowledge of the history of the locality, will take judicial notice of a great drought during the period in question, and of the great danger to life and property from the extensive forest fires.—Inglis v. Millersburg Driving Ass'n, 169 Mich. 311.

¶ 44. The courts of Michigan cannot take judicial notice of the value of Canada currency, or the rate of Canada interest, as matters of historical knowledge.—Kermott v. Ayer, 11 Mich. 181.

§ 9. Geographical and geological facts.

Use of streets in travel, see post § 13.

As to times necessary for travel, see post § 15.

Political boundaries in Lake St. Clair, see post § 10, ¶ 60.

¶ 45. The court will take judicial notice of the existence of such a body of water as Lake St. Clair.—People v. Brooks, 101 Mich. 98.

¶ 46. The court took judicial notice of the fact that the city of Port Huron lies to the north of the city of St. Clair.—Vossen v. City of St. Clair, 148 Mich. 686.

¶ 47. Judicial notice is taken of the fact that the great lakes are practically tideless.—Rice v. Ruddiman, 10 Mich. 125; Lorman v. Benson, 8 Mich. 18.

¶ 48. The court will take judicial knowledge that the natural watercourses in this state have all decreased in volume, and many of them dried up, by the cultivation and clearing of the country.—Hilliker v. Coleman, 73 Mich. 170.

¶ 49. Courts will take judicial notice of the fact that small streams grow less year by year.—Andrews v. Weckerman, 144 Mich. 199.

¶ 50. It is a matter of common knowledge that in the course of the seasons the contour of the shore line in inland lakes varies.—Bird v. Stimson, 197 Mich. 582.

¶ 51. A court cannot take notice that a particular boom or any part thereof is within the limits of a certain county.—Two Hundred Thousand Feet of Logs v. Sias, 43 Mich. 356.

¶ 52. Judicial notice cannot be taken that any certain building in a city—e. g., Detroit—is situated in a certain ward.—Schaale v. Wasey, 70 Mich. 414.

¶ 53. The supreme court has no judicial knowledge of the contents of Detroit plats or of the location of Detroit lands, except as identified or affected by legislation or other public action.—Cicotte v. Anciaux, 53 Mich. 227.

¶ 54. Judicial notice is not to be taken of the relative situation of lots and blocks on a map or plat that is not put in evidence, nor of their application to the ground.—Shepard v. Shepard, 36 Mich. 173.

¶ 55. Judicial notice may be taken by the trial court that certain named streets are public streets of the city where it sits. Wheeler v. City of Detroit, 127 Mich. 329.

§ 10. Political divisions and boundaries.

Of statutes under which townships and other divisions of government are created, see post § 23 et seq.

Location of cities relatively to natural geographical places, see ante § 9.

Sufficiency of log lien petition to admit of judicial notice as to county, see Forestry ¶ 105.

¶ 56. Judicial notice is taken of the political divisions of the state.—Wright v. Dunham, 13 Mich. 414, 418.

¶ 57. The court must take judicial notice of the fact that the state and the township are distinct organizations.—Town of La Grange v. Chapman, 11 Mich. 499.

¶ 58. Courts are bound to know judicially the existence of the various township organizations.—People v. Maynard, 15 Mich. 463; People v. Waller, 70 Mich. 237.

¶ 59. Judicial notice is taken whether lands described by township and range in a guardian's petition for leave to sell are located in a township described only by name in the notice of sale.—Dexter v. Cranston, 41 Mich. 448.

¶ 60. The courts will take judicial notice that a portion of the St. Clair river is beyond the state boundary.—Cummings v. Stone, 13 Mich. 70.

¶ 61. Judicial notice will be taken that territory specifically described and located in Midland county does not include any part of Saginaw county.—Sackrider v. Saginaw County Sup'rs, 79 Mich. 59.

¶ 62. Judicial notice can be taken by the supreme court and by the Detroit Recorder's Court that Detroit is in Wayne county.—People v. Curley, 99 Mich. 238.

¶ 63. The supreme court will take judicial notice that with one exception the congressional districts into which Michigan is divided are composed of more than one county.—Beakes v. Board State Canvassers, 172 Mich. 408.

§ 11. Public revenues and fiscal affairs.

Value of foreign currency, see also ante ¶ 44.

¶ 64. Judicial notice may be taken of the fact that sufficient moneys will come from the liquor taxes into the hands of the city treasurer of Detroit to replace moneys directed by Local Acts of 1895, No. 337, § 27, to be placed to the credit of the board of health, and replaced from liquor tax moneys.—Davock v. Moore, 105 Mich. 120.

¶ 65. The court will take judicial notice that the amount raised by the fee imposed on automobiles by virtue of Public Acts 1913, No. 181, would create a surplus so far in excess of the expense of regulation as to make the act a tax measure and not an exercise of the police power.—Vernor v. Secretary of State, 179 Mich. 157.

§ 12. Business methods, usages and facts.

Official business usages, see post § 22.

¶ 66. Courts must recognize present methods of doing business, and under established common-law principles enforce new classes of agreements arising from them if not against public policy, e. g., the usage as to buying and selling through brokers.—Gregory v. Wendell, 39 Mich. 337; Gregory v. Wendell, 40 Mich. 432.

¶ 67. Courts are bound to pay some regard to the well-known incidents of ordinary business, e. g., to know that ice is gathered in cold weather, and that when an ice house is filled it must continue to hold its contents until distributed, and will be useless for any other purpose.—Clark v. Lake St. Clair & Up-River Ice Co., 24 Mich. 508.

¶ 68. Judicial notice must be taken of the ordinary rules and necessities of banking business.—American Nat. Bank v. Bushey, 45 Mich. 135.

¶ 69. Judicial notice is properly taken of the fact that stringent regulations in regard to charging off probable losses are found necessary in our banking system, federal and state.—Owen v. Potter, 115 Mich. 556.

¶ 70. Banks are collection agencies and judicial notice will be taken of the fact that notes and other evidences of debt accompany the agency and are placed in the hands of the banks to be surrendered when the debt is paid.—Bloomer v. Dau, 122 Mich. 522.

¶ 71. Judicial notice was taken that the drawing of a line through a signature on a check was the usual way of erasing or canceling the name.—Samberg v. American Exp. Co., 136 Mich. 639.

¶ 72. Judicial notice is taken of the mercantile custom of mutual credits under which business establishments furnish each other's clerks or customers with goods and charge them to each other.—Cameron v. Blackman, 39 Mich. 108.

¶ 73. It is matter of judicial knowledge that the business of manufacturing illuminating gas is not a domestic one.—Williams v. Mutual Gas Co., 52 Mich. 499.

¶ 74. A Michigan court may well take judicial notice that stockholders in the mining corporations of the state are largely nonresidents and beyond its jurisdiction for rendering personal judgments.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

¶ 75. Courts will recognize that in the ordinary course of business local insurance agents act largely through clerks.—Steele v. German Ins. Co., 93 Mich. 81.

¶ 76. The ordinary authority of mining superintendents must be recognized judicially, like that of bank cashiers, vessel captains and other known agents.—Adams Min. Co. v. Senter, 26 Mich. 73.

¶ 77. It seems that a court may take notice of a general custom to designate as "agents" persons who sell pianos on commission.—Whittemore v. Weiss, 33 Mich. 348.

¶ 78. Judicial notice based on the court's experience was taken of the long general use in the state of a certain printed blank for a warranty deed.—Hovey v. Smith, 22 Mich. 170.

¶ 79. Judicial notice will be taken of custom of letting contracts on the basis of cost plus percentage of contract price.—Carleton v. Foundry & Machine Products Co., 199 Mich. 148.

¶ 80. Judicial notice may be taken that as the contract alleged by an attorney at law to have been made was that he should accomplish a certain thing for a fixed fee, the services required might depend upon the nature of the opposition, and that the fee would be gauged accordingly.—Shakespeare v. Baughman, 113 Mich. 551.

¶ 81. Judicial notice may probably be taken of the existence of a custom that as the real estate business is ordinarily conducted, the seller and not the purchaser, pays the commissions of the agent.—Downing v. Buck, 135 Mich. 636.

¶ 82. The court will take judicial notice that the tangible property of a street railway company has a much larger market value as a railway than it would have if dismantled and sold as material.—Detroit Citizens' St. R. Co. v. Common Council of Detroit, 125 Mich. 673.

¶ 83. The court may take judicial notice of the fact that a six per cent mortgage for one hundred dollars, upon vacant land selling for five hundred dollars, is the equivalent of and readily convertible into cash.—Walling v. Poulsen, 160 Mich. 302.

§ 13. Travel, transportation and communication.

Possibility of measuring timber afloat, see ante ¶ 11.

As to care or negligence in riding, see also post § 17.

¶ 84. The court will take judicial notice that in rural districts the traveled portion is but a small part of the land within the limits of a highway.—Austin v. Detroit, Y. & A. A. Ry., 134 Mich. 149.

¶ 85. A court cannot take judicial notice as to how much a particular city street is used.—Cleveland v. Newsom, 45 Mich. 62.

¶ 86. Judicial notice may be taken that a good highway is as essential to the use of bicycles as to that of any other vehicle.—Murfin v. Detroit & E. P. R. Co., 113 Mich. 675.

¶ 87. Judicial notice may be taken that landed proprietors seek with their products the shortest possible route to a railroad.—Cornell v. Manistee & N. E. R. Co., 117 Mich. 238.

¶ 88. Courts must take judicial notice of what everybody knows with regard to the incidents of railway travel.—Downey v. Hendrie, 46 Mich. 498.

¶ 89. Judicial notice is taken of the fact that passengers are constantly riding upon the platforms of street cars.—Upham v. Detroit City R. Co., 85 Mich. 12.

¶ 90. Having in mind the common method of conducting railroad business at the present day, the court can take judicial notice of the fact that nearly every railroad in this state does issue, and prior to the enactment of Pub. Acts 1891, No. 90, did issue, mileage books or 1,000-mile tickets.—Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460; reversed in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

¶ 91. The court will take judicial notice of the fact that all interurban electric railways in the state have a terminus in a city.—Halladay v. Detroit United Ry., 155 Mich. 436.

¶ 92. The court may take judicial notice that a railway is engaged in interstate commerce.—Dingman v. Duluth, S. S. & A. Ry. Co., 164 Mich. 328.

§ 14. ——Operating and structural facts and conditions.

As to customary care in providing fenders and other safety appliances, see also post § 17.

¶ 93. The court will take judicial notice of the material and mode of construction of sidewalks, as well as the method and period of their use.—Harden v. City of Jackson, 137 Mich. 271.

¶ 94. In an action against a village for personal injuries to plaintiff caused by his horse going down an embankment, judicial notice may be taken that barriers are usually limited to places where a highway and its surroundings are of such a character as of themselves to create the danger of fright, and that they are not common along our highway ditches or causeways.—Bell v. Village of Wayne, 123 Mich. 386.

¶ 95. Courts are bound to recognize the essential differences in the nature and modes of travel and transportation upon railroads

and ordinary highways, both of which are authorized by law; that greater speed in travel and transportation is one of the objects of authorizing conveyance by rail; that locomotives and heavy trains cannot be suddenly stopped or turned out of their course, and that the authority given by law to railroads to cross highways and fixing no limit to their speed necessarily gives them the preference at the crossings, for otherwise their rate of speed must be so reduced, and the regularity of trains so interrupted, as to defeat the very object of railroad transportation.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

¶ 96. The court will take notice as part of the general knowledge of the business community that the railroads of the country conduct inspections under a system which all persons so employed as to be interested are presumed to understand.—Smith v. Potter, 46 Mich. 258.

¶ 97. Courts will take notice of the width of the standard railroad gauge.—Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533.

¶ 98. Judicial cognizance may properly be taken of the fact that it is impracticable to construct railroads upon a level.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 99. The court will take judicial notice of the fact that it is difficult, if not impossible, to handle freight trains of varying length upon roads of varying grade without concussions.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 100. Judicial notice will be taken that concussion is the necessary result of the coupling of freight cars by the use of link and pin, and that it is usually sufficient to destroy the equilibrium of a person standing.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 101. A court as well as a jury is justified in taking notice of the fact that it is impossible, by means of any present known appliances, to so equip a locomotive that it will not sometimes scatter sparks and cinders.—Mann v. Pere Marquette R. Co., 135 Mich. 210.

¶ 102. The supreme court will take judicial notice that the use of street cars is attended by imminent danger to users of the highway and to the passengers.—People v. Detroit United Ry., 134 Mich. 682.

¶ 103. The supreme court will take judicial notice that it is desirable to compel the equipping of street cars with a means of stopping with certainty and expedition.—People v. Detroit United Ry., 134 Mich. 682.

¶ 104. The supreme court in considering the reasonableness of an ordinance requiring street cars to be so equipped will take judicial notice that air brakes are rarely ineffective.—People v. Detroit United Ry., 134 Mich. 682.

¶ 105. Judicial notice is taken of the fact that conductors are in control of street cars, and may cause them to be stopped at any time or place if circumstances require it.—Orth v. Saginaw Valley Traction Co., 162 Mich. 353.

¶ 106. Judicial notice will be taken of the fact that it is usual for railroad sidings to be so constructed as to permit cars to stand close to buildings, such as elevators and coal bins, thereby facilitating the loading and unloading, and reducing the cost and danger of operation.—Pahlan v. Detroit, G. H. & M. R. Co., 122 Mich. 232.

¶ 107. The court may take judicial notice that manufacturing concerns all over the country enjoy facilities of sidetracks by agreement with railroad companies.—Pontiac, Oxford & N. R. Co. v. Reed, 130 Mich. 661.

¶ 108. Judicial notice is taken that November risks in marine insurance are heavier than June risks.—Barry v. Boston Marine Ins. Co., 62 Mich. 424.

¶ 109. Judicial notice will be taken that there is much weather when steamers and sailing vessels may be operated with safety when it would be futile to attempt to tow logs, and that there may be a time before navigation is usually abandoned when the towing of logs would be hazardous.—McLean v. Sandusky Lumber & Box Co., 160 Mich. 324.

¶ 110. No court in Michigan can judicially know that in midwinter the railway is the only available outlet for freight from Windsor, Canada.—People v. Clark, 10 Mich. 310.

¶ 111. The court cannot take judicial notice that the weather on the 1st of April in parts of the Northern Peninsula is always such that the lakes and streams are never then open for the floating of logs.—Haines v. Gibson, 115 Mich. 131.

¶ 112. In a proceeding to enjoin the forcible seizing of complainant's improvements erected along certain rivers, to facilitate logging and prevent the flooding of complainant's lands and injury to the timber, the court took judicial notice that to drive 12,000,000 logs down a known small stream would take an entire season.—Hall v. Nester, 122 Mich. 141.

§ 15. ——Speed and time of transit.

Difference between railroads and highway travel, see ante ¶ 95.

¶ 113. The court will take judicial notice of the time it takes to travel from one city

to another.—McCall v. Jacobson, 139 Mich. 455.

¶ 114. The court will take judicial notice that automobiles may be driven at a speed of at least 40 miles an hour.—People v. Schneider, 139 Mich. 673.

¶ 115. The courts will take judicial notice of the fact that it is part of the business of a locomotive engineer to estimate speed by observation of objects which he was passing while in his engine, both day and night. —Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

§ 16. Mechanical facts and working experience.
Scientifically or generally known qualities and characteristics, see also ante § 2.
Qualities and characteristics of things, see also ante § 3.
Operating and structural facts relative to railroads and facilities for transportation and travel, see ante § 14.
Sound carrying tendency of floors and walls, see ante ¶ 9.
Greater construction and operating costs in Upper Peninsula, see ante ¶ 10.
Danger attending testing of automobiles, see ante ¶ 22.

¶ 116. Such matters as the proper method of boring and tubing salt wells are matters of fact upon which a court cannot assume to have a judicial knowledge.—Clark v. Babcock, 23 Mich. 164.

¶ 117. Judicial notice may be taken without the aid of testimony that a spark arrester lessens the danger of a mill which, with the natural draft, has a tendency to emit sparks. —Webster v. Symes, 109 Mich. 1.

¶ 118. Judicial notice will be taken that boilers and engines used in equipping a shingle mill are usually so attached as to become part of the realty and to pass by a deed of the latter.—Wickes Bros. v. Hill, 115 Mich. 334.

¶ 119. The court may properly take judicial notice that when earth is to be removed, or stone quarried, it is a common and economical method to undermine it, causing it to loosen and fall by its weight, thus facilitating its removal.—Welch v. Brainard, 108 Mich. 38.

¶ 120. Judicial notice could not be taken, in an action for personal injury sustained in an elevator, whether tests of the strength of the elevator cables were common or that it would have been prudent to make them.— Hall v. Murdock, 119 Mich. 389.

¶ 121. In trespass quare clausum fregit against a telephone company for injury to plaintiff's trees in the highway, the court will take judicial notice that telegraph poles must be set near the sides of a street or road and that they are generally outside of the curb or ditch line and therefore necessarily in line with trees.—Wyant v. Central Telephone Co., 123 Mich. 51.

¶ 122. While the court may not judicially notice that there is a choice among machines for doing certain work, it may well be supposed that there is.—Plano Mfg. Co. v. Ellis, 68 Mich. 101.

§ 17. Care, skill and negligence.
Danger from forest fires, see also ante ¶ 8.
Of time of drought calling for special care with fire, see ante ¶ 43.
As to common use of spark arresters on vessels, see also post ¶ 160.
Danger attending testing of automobiles, see ante ¶ 22.
Dangerousness of electric currents, see ante ¶¶ 24, 25.
General doctrine that negligence is a question of fact, see Negligence, V, and topics there referred to.

¶ 123. Judicial notice is taken that to attempt to alight from a train after it has passed a station and is running at a speed of four miles an hour is not the conduct of an ordinarily prudent person.—Jacob v. Flint & P. M. R. Co., 105 Mich. 450.

¶ 124. Judicial notice cannot be taken that it is negligent for a person to sit between two piles of logs upon a car, when riding upon a siding, where he expected to get off to make a coupling before reaching another car.—Balhoff v. Michigan Cent. R. Co., 106 Mich. 606.

¶ 125. Judicial notice may reasonably be taken that a surgeon's skill depends somewhat upon his experience and opportunity for witnessing operations, and it is to be expected that the degrees of surgical skill met with in different localities will be affected by these things.—Pelky v. Palmer, 109 Mich. 561.

¶ 126. In an action for breach of warranty in the sale of fruit trees, the court will not take judicial notice that sowing oats or planting corn in the same field is not good care of fruit trees nor decide how far proper care would make poor varieties bear good fruit.— Long v. Pruyn, 128 Mich. 57.

¶ 127. The court will take judicial notice of the fact that it is the custom of electric railway companies operating their cars in the public streets to equip them with fenders or some similar device, and their object is the protection of the public engaged in ordinary business or travel upon the streets, whence arises a duty on the part of such railways to provide such fenders.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 128. The court cannot take judicial notice of the fact that general inspection of a mine is necessary.—Lewis v. Detroit Vitrified Brick Co., 164 Mich. 489.

¶ 129. The court will take judicial notice that a freight elevator is a place of danger to life and limb, in the hands of an inexperienced boy of fourteen, within the meaning of a statute prohibiting the employment of children under the age of sixteen in the management of dangerous machinery.—Braasch v. Michigan Stove Co., 153 Mich. 652.

¶ 130. Electricity is to be classed with gunpowder, dynamite, and other treacherous and destructive agents, of whose dangerous qualities, and the fact that society recognizes them and acts accordingly, and that no prudent man handles these things with a low degree of caution, judicial notice may be taken.—De Kallands v. Washtenaw Home Tel. Co., 153 Mich. 25.

§ 18. Public records and files, legislative journals, etc.

Of judicial records, see post § 19.

¶ 131. "Courts, in the determination of matters involving the acts of public officials and construing contracts between the state and its citizens, will take judicial notice of public documents, of reports of public officers of the acts of public officials, and of reports required by law from citizens of the state with whom it contracts, to be presented to, and filed with, the officers of the state. Courts will consult them as freely as they would if they were stated in the pleadings or introduced in evidence."—People ex rel. Attorney General v. Michigan Cent. R. Co., 145 Mich. 140, per Grant, J., at p. 154, citing authorities.

¶ 132. Courts are bound judicially to take notice what the law is; and to enable them to determine whether all the constitutional requisites to the validity of a statute have been complied with they can take notice of the journals of the legislature.—People v. Mahaney, 13 Mich. 481; Callaghan v. Chipman, 59 Mich. 610; Attorney General v. Rice, 64 Mich. 385.

¶ 133. Courts have no power to take notice of legislative journals as respects the facts attending the election of the several members of the legislature, even after those facts have been spread upon the legislative journals, for the purpose of impeaching by such notice the validity of an act on the ground that illegally chosen legislators voted for it.—People v. Mahaney, 13 Mich. 481.

¶ 134. Judicial notice will be taken of the journals of the legislature.—Rode v. Phelps, 80 Mich. 598.

¶ 135. The court cannot take judicial notice that the resolution required from a foreign insurance company consenting to service upon agents is on file in the office of the secretary of state, or that persons excepting service as such agents are agents appointed under seal or agents at all.—Hebel v. Amazon Ins. Co. of Cincinnati, 33 Mich. 400.

¶ 136. The court will not take judicial notice of the fact that lands have been bid off in the name of the state.—Peninsular Sav. Bank v. Ward, 118 Mich. 87.

¶ 137. The supreme court cannot take judicial notice of facts contained in the records of tax proceedings.—Auditor General v. Clifford, 143 Mich. 626.

¶ 138. In a suit to set aside notices of tax sales, judicial notice cannot be taken of the forms and dates of the tax deeds, nor of whether or not they were void upon their face, where such deeds are not set forth either in substance or form in the bill.—Fitschen v. Olson, 155 Mich. 320.

§ 19. Judicial records.

See also ante ¶ 43.

Of matters pertaining to the court, its officers, and its terms, see post § 20.

¶ 139. The supreme court can take notice of facts in a record before it in deciding another case with which they are involved.—Chittenden v. Witbeck, 50 Mich. 401.

¶ 140. The supreme court can take notice in a cause that has been once before it of the fact that recovery was then sought upon a particular ground.—Hoffman v. Harrington, 25 Mich. 146.

¶ 141. Judicial notice is taken from the record in a suit begun by declaration that no appearance has been entered and no plea filed by defendant.—Edson v. LaLonde, 88 Mich. 162.

¶ 142. In garnishment proceedings the record in the principal case may be considered without separate proof.—Farrington v. Sexton, 43 Mich. 454.

¶ 143. The court will, on its own motion, enter a defendant's failure to plead in the absence of an affidavit thereof.—Steers v. Holmes, 79 Mich. 430.

¶ 144. The court may take judicial notice of its records in a former related case, to supply defects in the record.—Culver v. Fidelity & Deposit Co. of Maryland, 149 Mich. 630.

¶ 145. The probate court will take judicial notice of its own files and records.—Wilkinson v. Conaty, 65 Mich. 614.

§ 20. Courts, judges and public officers.

Courts and officers of other states, see post § 21.

As to official practices, usages and modes of action, see post § 22.

Judicial notice of jurisdictional situs in loglien proceedings, see also Forestry, III.

¶ 146. The court will take judicial notice of the time of holding its terms.—Trombie v. Hoffman, 130 Mich. 676.

¶ 147. Judicial notice may be taken of the fact that there was no regular term of court intervening between the filing of a petition for the sale of lands for taxes, and the making of a decree ordering such sale.—Roberts v. Loxley, 121 Mich. 63.

¶ 148. The court will take judicial notice of its own officers, but not of those of another court.—Norvell v. McHenry, 1 Mich. 227.

¶ 149. Judicial notice may be taken of the signatures of court officers, including, in some cases, attorneys, where they occur in connection with some kind of official function.—Johnson v. Delbridge, 35 Mich. 436.

¶ 150. Judicial notice is taken of the extent of the jurisdiction and powers of the justices' courts in this state.—Goodsell v. Leonard, 23 Mich. 374.

¶ 151. Chancery may take judicial notice of the terms of a court of law out of which an execution has issued, for the purpose of seeing whether a levy was made during its lifetime.—Williams v. Hubbard, 1 Mich. 446.

¶ 152. Judicial notice will be taken of the fact that a certain person is deputy auditor-general, that being a state office known to the law.—People v. Johr, 22 Mich. 461.

¶ 153. Where the return of service of a justice's writ of replevin is signed "A. S. K., city marshal," the justice may take judicial notice that the person so signing is marshal of the city wherein the court is held.—Fleugel v. Lards, 108 Mich. 682.

§ 21. ——Courts and officers of other states.

Judicial notice that county clerk in New York is clerk of a court of record, see also Acknowledgments ¶ 50.

¶ 154. The supreme court of Michigan will take judicial notice that the supreme court of Massachusetts is a court of record.—Shotwell v. Harrison, 22 Mich. 410.

¶ 155. Judicial notice will so far be taken of the composition of a court of record of another state as to see that by a constitutional provision of that state the county clerk belongs to such court as its recording officer.—Morse v. Hewett, 28 Mich. 481; Munroe v. Eastman, 31 Mich. 283.

§ 22. Official usages, practices and actions.

School usages (Bible readings), see ante ¶ 12.

¶ 156. Judicial notice is taken that the statute authorizing the deputy auditor-general to act in his principal's stead has long been construed in the auditor-general's office as authorizing him to act in his own name when the circumstances arise which enable him to act at all.—Westbrook v. Miller, 56 Mich. 148.

¶ 157. Judicial notice may be taken of the general course of business in the federal land office, in that a purchase commonly precedes the issue of a patent a good while.—Fisher v. Hallock, 50 Mich. 463.

¶ 158. The supreme court took judicial notice that the uniform practice of the land commissioner has not been to refuse patents to lands under legislative grant because not located or entered or patent applied for within the time of limitations for recovering possession of land by action.—Robson v. State Land Commissioner, 148 Mich. 12.

¶ 159. The court judicially notices that a board of supervisors does not meet monthly.—People ex rel. City of Grand Rapids v. Kent County Sup'rs, 40 Mich. 481.

¶ 160. So common has been the use of spark arresters upon vessels that the court is justified in taking judicial knowledge of the fact that the United States inspectors, whose duty it is to inspect vessels from time to time, must have had knowledge of their existence, and have not considered them dangerous to the safety of a vessel, or they would have prohibited their use.—Cheboygan Lumber Co. v. Delta Transp. Co., 100 Mich. 16.

¶ 161. The court may take judicial notice that no actions have been begun by the commissioner of railroads to recover penalties for failure to equip cars with proper coupling devices.—Wight v. Michigan Cent. R. Co., 161 Mich. 216.

§ 23. Statutes and laws.

Ordinances and police regulations, see post § 26.

Of legislative journals, see ante § 18.

Of historical recitals in statutes, see ante ¶ 41.

¶ 162. The courts must take judicial notice of public statutes, and disregard all allegations in pleadings which are inconsistent with them.—People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 389.

¶ 163. Judicial notice must be taken of a public statute.—Jackson v. James, 74 Mich. 733.

¶ 164. Judicial notice will be taken of the legal consequences of the consolidation of domestic corporations.—Jackson Consol. Traction Co. v. Jackson Circuit Judge, 155 Mich. 522.

¶ 165. Judicial notice is taken of the statute which permits a corporation to be-

come a surety on a liquor dealer's bond, and it is not necessary that it be alleged in the declaration in a suit under the Civil Damages Act, that the bonding company was qualified by law to execute the bond sued upon.—Rauhala v. Maki, 172 Mich. 112.

§ 24. ——Acts of incorporation and charters.

¶ 166. Judicial notice is taken of a statute organizing a township and of the existence of a particular township.—Ives v. Kimball, 1 Mich. 308; Town of La Grange v. Chapman, 11 Mich. 499; Wright v. Dunham, 13 Mich. 414; People v. Maynard, 15 Mich. 463; Bouchard v. Bourassa, 57 Mich. 8; People v. Waller, 70 Mich. 237.

¶ 167. Judicial notice will be taken of an act organizing a township.—Ives v. Kimball, 1 Mich. 308.

¶ 168. Acts of incorporation are public acts, and judicial notice is taken of them.—Hurlburt v. Britain, 2 D. 191; People v. River Raisin & L. E. R. Co., 12 Mich. 389.

¶ 169. Judicial notice is taken of the provisions of a city charter.—People ex rel. Bolt v. Riordan, 73 Mich. 508.

¶ 170. Our courts take judicial notice of all domestic statutes, and when they know under what law a corporation exists they know its powers and the limitations thereon.—Chapman v. Colby Brothers Co., 47 Mich. 46.

¶ 171. In an action based on a contract made with a corporation chartered in another state, the court cannot take judicial notice of the laws under which the corporation was chartered, and they must be proved and its charter produced before the rights and liabilities of the parties can be determined.—Chapman v. Colby, 47 Mich. 46.

§ 25. ——Operation, effect or application of statutes.

¶ 172. Judicial notice is to be taken of a public law, general in its operation; but not whether facts that do not appear would bring a case within the statute.—Holdridge v. Farmers' & Mechanics' Bank, 16 Mich. 66.

¶ 173. The supreme court can take judicial notice of the law under which a contract may have been made with the state, but cannot judicially notice whether it has been made.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 174. A city cannot be enlarged except by a public statute, of which all persons must take notice, so that any illegality in a tax founded on the invalidity of such a statute would be a defect apparent to all persons, and requiring no testimony or inquiry into facts, and not a latent defect or illegality of which there might be no general knowledge.—Curtis v. City of East Saginaw, 35 Mich. 508.

¶ 175. It is presumed to be a matter of judicial knowledge that the danger of a cloud upon the title arising from an assessment which has been held void is removed by a subsequent statute recognizing the invalidity of the assessment and providing for a reassessment.—Byram v. City of Detroit, 50 Mich. 56.

¶ 176. While courts are presumed to know what laws of a public nature are in force in the state, they cannot be presumed to know what counties have voted to suspend such laws.—In re Hauck, 70 Mich. 396.

§ 26. Ordinances and police regulations.

¶ 177. Municipal ordinances are not general laws, and cannot be judicially noticed by the courts except so far as they are in proof before them.—Motz v. City of Detroit, 18 Mich. 495.

§ 27. Foreign laws and statutes.

See also post ¶ 370.
Charter or organic act of foreign corporation, see ante ¶ 171.
Value of foreign currency and interest rates, see also ante ¶ 44.
Presumption as to common law of other states or as to foreign laws in general, see post § 59.
Printed books of foreign laws as evidence, see post § 532.
Statutory authority to take judicial notice of common law or statutes of other states and foreign countries as published by authority or used in evidence in such foreign states, see Jud. Act, chap. XVII, §§ 25-27; Comp. L. 1915, §§ 12513-12515.

¶ 178. Judicial notice cannot be taken of a statute of another state invalidating a contract that would be valid if made here.—Jones v. Palmer, 1 D. 379.

¶ 179. Where a foreign law is in question nothing can be known of its purport until it is proved.—Chapman v. Colby Bros. & Co., 47 Mich. 46.

¶ 180. Judicial notice cannot be taken of the laws of a foreign state under which a corporation exists and whence it derives its powers.—Chapman v. Colby Bros. & Co., 47 Mich. 46.

¶ 181. Judicial notice cannot be taken of a statute of another state regulating the rate of interest.—Millard v. Truax, 73 Mich. 381.

¶ 182. Judicial notice will not be taken of foreign statutes.—Swan v. Gregory, 195 Mich. 457.

¶ 183. Where the record in a personal injury suit contains no evidence as to the ex-

istence and terms of a statute of limitations in Canada, the supreme court cannot take judicial notice of such statute.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

¶ 184. Judicial notice will not be taken of usury laws of a foreign state.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 343.

§ 28. Corporate by-laws and regulations and internal affairs.

¶ 185. Courts cannot take judicial notice of the by-laws of a corporation, or assume that it agreed, through a by-law or otherwise, that, upon the disablement and withdrawal of a member, he should receive a specified sum of money; but the existence of such by-law or agreement must be averred, together with such facts as are essential to show that the corporation became liable under and by virtue thereof.—Portage Lake Miners' & Mechanics' Benev. Soc. v. Phillips, 36 Mich. 22.

II. PRESUMPTIONS AND BURDEN OF PROOF.

§ 29. Classes, nature and effect of presumptions.

[Note. The classification of presumptions into those of law and those of fact has not been attempted. Instead the presumptions are classified according to the nature of the fact to which the presumption leads, and as far as practicable the presumptions about a given subject have been treated in the separate specific topics which deal with the facts and issues to which the presumptions relate. See cross-references throughout this division.

The distinctions between presumptions of law and inferences of fact, where passed on by the courts, are treated incidentally in the connection where it becomes material.

Presumptions relating to particular subjects have been treated in the topics devoted to those subjects as far as possible. Those cases which are general in application or which illustrate the more general presumptions which are not referable to any one subject are retained in this topic. For specific presumptions other than those retained here see those portions of specific topics treating of "evidence and presumptions."]

Inadmissibility of presumptions against evidence or where evidence is required affirmatively, see post § 30.

Inference upon inference, rule against, see post § 31.

Neutralization of one presumption by another, see post § 32.

Conclusive and rebuttable presumptions, see post § 33.

Person against whom or in whose favor presumption of acquiescence runs, see post ¶ 266.

Effect of presumptions to shift burden, see post § 70.

As to credibility and truthfulness of witnesses, see Witnesses, VI, A.

As to irrepealability of statutes, see Statutes, VII.

Presumptions in prosecutions for crime, see Indictment, VIII, A.

¶ 186. The fact that a party is compelled to rely on the testimony of persons in an adverse interest and that they testify reluctantly may justify special indulgence in the mode of examination, or have weight in passing upon the testimony, but it cannot supply the lack of proof or change the tendency of plain statements or admissions.—Walker v. Detroit Transit R. Co., 47 Mich. 338.

§ 30. Exclusion of presumptions by evidence, offer or law.

See also post ¶ 400.

Affirmative evidence in addition to presumption, see post § 73.

¶ 187. Presumptions are never allowable when better evidence of a primary nature is required by law to be preserved.—People v. Treadway, 17 Mich. 480.

¶ 188. Presumptions of fact never obtain against positive proof, and are only introduced to supply the want of real facts.—Hill v. Chambers, 30 Mich. 422.

¶ 189. A plain issue of title is to be determined according to the evidence for and against it, and not merely by presumptions.—McKay v. Ross, 40 Mich. 548.

¶ 190. Proof that one received checks from another at a prior time has no tendency to prove a loan and a debt existing to repay it, where the parties are present and might testify.—Dyer v. Rosenthal, 45 Mich. 588.

¶ 191. Abstract presumptions as to title from possession become inapplicable when evidence is introduced of the actual title.—Gavigan v. Evans, 45 Mich. 597.

¶ 192. Presumptions are not allowable when better evidence of a primary nature is required by law to be preserved.—City of Muskegon v. S. K. Martin Lumber Co., 86 Mich. 625.

¶ 193. The presumption that public officers perform their duty cannot sustain their action where the mandatory requirements of a statute concerning the record of such action are wholly disregarded.—Pearsall v. Eaton County Sup'rs, 71 Mich. 438.

¶ 194. The presumption of right official action does not aid records which do not contain what is essential to the validity of the proceedings, and which, being in evidence, must

speak for themselves.—Harding v. Bader, 75 Mich. 316.

¶ 195. An unsuccessful effort to point out by direct evidence the exact cause of a negligent injury does not estop the plaintiff from relying on presumptions drawn from the testimony.—Waidelich v. Andros, 182 Mich. 374.

§ 31. Inference upon inference or presumption.

¶ 196. An inference cannot be based on an inference.—Rattenbury v. Pere Marquette Ry. Co., 172 Mich. 106.

§ 32. Neutralising and opposing presumption.

¶ 197. One officer cannot be assumed to be in default on the mere presumption in behalf of another that the latter has done his duty; this presumption is of equal force for both.—Weimer v. Bunbury, 30 Mich. 201; Houghton County Sup'rs v. Rees, 34 Mich. 481.

§ 33. Conclusiveness of presumptions.

Of presumption of knowledge of law, see also post § 47.

Effect of presumptions against positive evidence, see post § 609.

¶ 198. The presumption that one is cognizant of the contents of his own books of account may be entirely overcome by his positive, uncontradicted testimony that the accounts were kept, and entries made, by a bookkeeper, and were never examined by the party himself and that he had no knowledge thereof.—Hurley v. Watson, 68 Mich. 531.

¶ 199. The presumption that a public officer has performed his duties faithfully and in accordance with law may be rebutted by evidence.—Bangs v. Stephenson, 63 Mich. 661.

¶ 200. Possession of personalty is not conclusive evidence of title.—Mannausau v. Wallace, 87 Mich. 543; Hoppin v. Avery, 87 Mich. 551.

¶ 201. A letter properly addressed, stamped and mailed is presumed to be delivered, but where its receipt is denied it raises a question for the jury.—Rauch v. Michigan Millers' Mut. Fire-Ins. Co., 131 Mich. 281.

¶ 202. The presumption is that letters mailed and telegrams sent in due course of business, by consignor of a carload of lumber to the consignee, were received by him; but this presumption may be rebutted by evidence.—Long-Bell Lumber Co. v. Nyman, 145 Mich. 477.

¶ 203. One who has full knowledge of the facts is conclusively presumed to know the law applicable thereto.—City of Detroit v. Martin, 34 Mich. 170.

¶ 204. Every one is usually bound as if he had knowledge of the law, whether he has or not, but there is no rule which conclusively presumes such knowledge as a fact where that fact is important.—Black v. Ward, 27 Mich. 191.

¶ 205. The presumption that all know the law is in many cases a weak one, and it disappears entirely in the face of a positive representation of what the law is, and upon the truth and good faith of which reliance is placed.—O'Neil v. Lake Superior Iron Co., 63 Mich. 690.

¶ 206. Actual knowledge of the law is not so conclusively presumed as to charge with malice one who is acting in reliance on what he reasonably believes to be lawful procedure.—Hill v. Taylor, 50 Mich. 549.

¶ 207. While a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law.—Hess v. Culver, 77 Mich. 598.

§ 34. Normality, sequence and regularity of action.

Particular presumptions of legality and regularity, see post §§ 36-38, 51.

As to jurisdiction and regularity of judicial and official proceedings, see also post § 58.

As to regularity and validity of incorporation, see Corporations § 15.

¶ 208. Of several acts done together that one will be regarded as prior which ought to be prior.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254; People v. Cummins, 47 Mich. 334.

¶ 209. It is presumed that a grantor known to be a careful lawyer kept his title papers.—King v. Carpenter, 37 Mich. 363.

¶ 210. Acts done on the same day will be presumed to have been done together, if necessary to their validity.—Rash v. Whitney, 4 Mich. 495.

¶ 211. Between suit by declaration and another by attachment begun on the same day the former is presumed to have been commenced first.—Wales v. Jones, 1 Mich. 254.

§ 35. ——Receipt of letters mailed or goods shipped.

That message of notice transmitted by messenger was delivered, see Notices.

Rebuttableness of presumption, see ante § 33.

Burden of proving mailing, see post § 66, ¶ 362.

Necessity of proof of mailing as part of foundation for secondary evidence of contents, see post § 151.

Presumption overcoming denial of receipt, see post § 609.

Sufficiency of proof by stenographer as to writing and mailing, see also post ¶ 1830.
Presumption of receipt of mailed letter containing corporate reports as overcoming presumption that failure to file reports was intentional, see Corporations ¶ 667.

¶ 212. A presumption arises that a letter is duly received where it is placed in the mails properly addressed and with postage prepaid.—Farmers' Handy Wagon Co. v. Newcomb, 192 Mich. 634.

¶ 213. A protest was sent by mail accompanying the payment of taxes, and a postal card purporting to be from the township treasurer and acknowledging the receipt of the payment "and protest" was introduced in evidence. There was but one protest sent, and no evidence was introduced tending to show that the protest was not received. Held, that the presumption was irresistible that the protest sent was received, and that, being a mere notice, it could be proved by copy.—Michigan Land & Iron Co., Ltd. v. Township of Republic, 65 Mich. 628.

¶ 214. Due consignment of goods to their owner, though not conclusive evidence that they were received, is such evidence as is acted on in ordinary business, and will support an inference of the receipt sufficiently strong to call for a counter-showing.—Bacon v. Johnson, 56 Mich. 182.

§ 36. Legality and validity.

Of due performance of legal or official duty, see post §§ 37, 38.
For presumptions as to legality of specific procedure or act, see specific topics treating of such procedure or act.
For various presumptions indulged on error as to facts essential to regularity or right, see Appeal §§ 373-378.
Presumptions and burden of establishing invalidity of statute, see Constitutional Law §§ 23, 24.
As to legality of contracts, see post § 51; Contracts § 305.
As to usuriousness of transaction, see Usury, II, B.
Presumption of legality in aid of pleading, see also Equity ¶ 637.
Presumption in aid of equity pleading that instrument alleged is legally sufficient, see Equity ¶ 592.
Presumption that agreement conforms to statute of frauds, see Frauds, Statute of, IV.

§ 37. Performance of legal duty.

Exclusion of presumption where law requires evidence by record of action taken, see ante § 30.
Presumption as to notice of annual meetings of corporations, see Corporations ¶ 675.
Maxim that equity regards that as done which ought to be done, see Equity § 8.

¶ 215. There can be no presumption that a party will hesitate in the prompt performance of a legal duty.—Edson v. Gates, 44 Mich. 253.

¶ 216. It will be presumed that any action found to be an invasion of another's rights will be discontinued.—Morrison v. Queen City Elec. Light & Power Co., 193 Mich. 604.

§ 38. Performance of official duty.

Presumption of performance against like presumption in another's favor, see ante ¶ 197.
Inadmissibility of presumption where record is required, see ante § 30.
Burden of proving nonperformance, see post ¶ 359.
Rebuttableness of presumption, see ante § 33.
As to rights and regular qualification of de facto officer, see Officers.
As to legality and regularity of exercise of powers of county board, see Counties § 12.
Of regularity of meetings of county board, see Counties ¶ 18.
As to regularity in returning delinquent drain assessments, see also Drains ¶ 185.
That notice of election was given, see Elections § 6.
That ballots were regularly cared for, see Elections ¶ 257.
That bond-issuing officers intended to issue sealed instruments, see Municipal Bonds, II.
Inference of amount secured by mortgage from amount of revenue stamps thereon, see Mortgages, III.

¶ 217. The presumption is that a public officer has faithfully and correctly performed his duty.—Clark v. Mowyer, 5 Mich. 462; Peck v. Cavell, 16 Mich. 9; Wayne Auditors v. Benoit, 20 Mich. 176; Blair v. Compton, 33 Mich. 414; Smith v. Rich, 37 Mich. 549; Westbrook v. Miller, 56 Mich. 148; Crane v. Hardy, 1 Mich. 56.

¶ 218. The presumption is that a public officer performs his duty.—Auditor General v. Monroe County Treasurer, 167 Mich. 453.

¶ 219. Where an act of public duty is enjoined, the law presumes, unless the contrary appears, that everything necessary to give it validity was observed in the performance; e. g., that all persons empowered by law to execute a public trust were present.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119, 150. Writ of error dismissed, 5 How. (U. S.) 343, 12 L. ed. 181.

¶ 220. An officer is presumed, until the contrary is proved, to have performed h's duty.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 221. Regularity rather than irregularity is to be presumed of the action of a public

officer.—Auditor-General v. Ayer, 109 Mich. 694.

¶ 222. It is presumed, in favor of official regularity, that an officer did not attach his certificate prematurely.—Yelverton v. Steele, 36 Mich. 62.

¶ 223. Where officers had the power to act it cannot be presumed from ambiguous facts that they erred in exercising it.—Cuming v. City of Grand Rapids, 46 Mich. 150.

¶ 224. The presumption of performance of official duty supports the action of boards as well as of officers acting singly.—Upjohn v. Richland Tp. Board of Health, 46 Mich. 542.

¶ 225. It is presumed that public officers, in assessing benefits for opening a street, have done their duty.—Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564.

¶ 226. It is presumable that a township board in reviewing the accounts of school districts after boundary changes for the purpose of adjusting their financial rights among them were performing a legal duty and did so fairly without regard to formal or technical irregularities or language, where there is no record presented to show how they proceeded.—Riverside School Dist. No. 3 v. Township of Riverside, 67 Mich. 404.

¶ 227. It is not to be presumed that public officers will neglect to do their duty.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 228. After the lapse of thirty years, it will be presumed in the absence of a showing to the contrary, that the probate court and the executors of the estate did their duty in the settlement of the estate, and that there are no creditors.—Harris v. Bow, 156 Mich. 28.

¶ 229. Where a magistrate with a stenographer examines one accused of murder and orally commits him for trial, it will be presumed on mandamus to compel proper action that he later intends, after having the testimony written up and signed by the witnesses, to enter a formal written order holding the accused over.—Oblaser v. Wayne Circuit Judge, 159 Mich. 665.

§ 39. Causes and effects, natural laws.

Judicial notice of natural laws, see ante § 2.
Normality, sequence and regularity as presumable consequences, see ante §§ 34-38.
Continuance as presumable consequence, see post § 40.
Presumable human actions or conduct, see post § 44.
Presumable intention that natural consequences of acts shall follow, see post § 46.
Presumption as to cause of death, see also Death by Wrongful Act § 17.
Presumptions as to negligence as proximate cause, see Negligence, V, and see also specific topics like Carriers; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV.

§ 40. Continuance of existing conditions.

Presumption as to former conditions, see post § 41.
Presumption that action remains pending, see Actions ¶ 30.
Of continuance of agency until revoked, see Agency § 17.
Presumption as to continuance of authority of agent, see Agency ¶ 226.
Presumption of continuance of life, see Death and Survivorship § 1.
As to continuance of membership in fraternal association, see Fraternal Associations, V, VIII.
As to continuance of possession to time of taking in replevin, see Replevin, III.

¶ 230. In the absence of anything to the contrary, the presumption is that things continue as they are once shown to be; e. g., that ownership once shown continues.—Ormsby v. Barr, 22 Mich. 80.

¶ 231. One shown to have been an officer at a certain time is presumed to continue such until the term for which he was elected has expired.—Kinyon v. Duchene, 21 Mich. 498.

¶ 232. Where there is evidence of the value of goods at the date of shipment and a subsequent sale at that rate, it will be presumed, in the absence of evidence to the contrary, that the same price could have been obtained in the interval.—Howland v. Davis, 40 Mich. 545.

¶ 233. There is no presumption that goods shown to have been in the possession of a firm engaged in buying and selling such articles continue in its possession for four months and a half after.—Bethel v. Linn, 63 Mich. 464.

¶ 234. Possession shown to have been in a person is presumed to have continued in him.—Sanford v. Millikin, 144 Mich. 311.

¶ 235. Reputation once established may well be presumed to continue.—People v. Russell, 110 Mich. 46.

§ 41. Prior condition or facts.

¶ 236. A state of facts once existing is usually presumed to continue, but the facts are not presumed to have always existed.—Blank v. Township of Livonia, 79 Mich. 1.

§ 42. Identity, status or personal conditions and relations.

As to sanity or competency of persons, see Insane Persons, I; Incompetents; and see also Indictment, VIII, A.

As to mental condition of testator and continuance of condition, see Wills, II.
Presumption as to identity of two actions, see Abatement ¶ 31.
As to identity of persons from identity or similarity of names, see Names.
Presumption of legitimacy, see Bastards § 1.

¶ 237. Where two parties are subscribers to the same telephone exchange and one party, using the telephone directory to ascertain the number of the other party, calls for such other party, and is connected by central with such other party, and a conversation ensues in which the party called responds and informs the party calling that he is the party called, upon proof of such facts, a rebuttable presumption or inference arises sufficient to make a prima facie case of identity.—Theisen v. Detroit Taxicab & Transfer Co., 200 Mich. 136.

§ 43. Corporate attributes, existence and facts.

The presumptions as to incorporation, corporate existence and powers, officers and agents, stock, stockholders and dissolution, are treated in Corporations, which see.
As to knowledge of laws of one's own corporation, see post § 48.

§ 44. Human actions and conduct.

As to human thoughts and intents, see post §§ 45-50.
Presumption as to careful person preserving important papers, see ante ¶ 209.
Presumptions as to care or negligence, see Negligence, V; and see also various specific topics treating of negligence, e. g., Carriers, II-IV; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV.
Presumption that person dying unwitnessed was careful for his own safety, see Death by Wrongful Act § 18.
Presumption in absence of eyewitnesses that employee was injured in performance of duty and while in the exercise of due care at the time of fatal accident, see note, 7 N. C. C. A. 1042-1061.

§ 45. Interest or motive.

As to intent or knowledge, see post §§ 46-49.
As to ownership or possession of property, see post §§ 54-56.
Presumptions as to fraudulent motive, see Fraud; Fraudulent Conveyances.
As to malice in torts, see Assault; False Imprisonment; Malicious Prosecution; Trespass; Damages, XI, A.

¶ 238. It is presumed that the grantor of lands has an interest in having them discharged of incumbrances.—Norton v. Colgrove, 41 Mich. 544.

§ 46. Intent, knowledge or notice.

As to hearing audible speech, see post ¶ 268.
Intent to violate law, see also post § 49.
Admissibility of declarations evincing intent or knowledge, see post § 333.
Rebuttal of presumption of knowledge of one's own books, see ante ¶ 198.
As to specific intent or knowledge or notice of specific thing, see topics treating thereof.
Presumption as to intentional failure to file corporate reports, see Corporations § 179.
Presumptions as to mistake, see Mistake.
Presumptions as to knowledge of customs, see Customs § 7.
Presumable knowledge of contents of instrument as signed, see Execution of Instruments, I; Mistake.
Presumption that parties to bond know import thereof, see Bonds ¶ 4.
Presumptions as to notice and receipt of notices sent, see Notices; Negotiable Instruments, XIII, XIV; Notice and Record of Title, I.
As to notice of equities and defenses affecting purchaser or taker, see Negotiable Instruments, XIII, XIV; Notice and Record of Title, I.
Presumption that joinder by wife in husband's deed was for purpose of release of dower, see Dower ¶ 39.
Presumption as to intent in criminal cases, see Indictment, VIII, A; Homicide, VII; Rape.

¶ 239. One is presumed to intend the natural consequences of his acts.—People v. Potter, 5 Mich. 1; People v. Scott, 6 Mich. 287; People v. Getchell, 6 Mich. 496; Allison v. Chandler, 11 Mich. 542; People v. Sweeney, 55 Mich. 586.

¶ 240. The presumption is, in the absence of later evidence, that one intended what his solemn deed naturally imports.—Ward v. Ward, 37 Mich. 253.

¶ 241. One is presumed to intend the natural and necessary consequences of his own act.—Schaible v. Ardner, 98 Mich. 70; People v. Resh, 107 Mich. 251.

¶ 242. Subscribing witnesses to a will are presumed to have had full knowledge of what they were doing at the time.—Abbott v. Abbott, 41 Mich. 540.

¶ 243. Subscribing witnesses are not presumed to know the contents of a lost paper they have attested.—Eslow v. Mitchell, 26 Mich. 500.

¶ 244. There is a presumption that a person is cognizant of the contents of his own books of account, including the bookkeeper's individual account.—Hurley v. Watson, 92 Mich. 121.

¶ 245. The rule that parties are presumed to know the law and that ignorance of it is no excuse, does not apply to the existence or nonexistence of acts which may appear upon some public records, or may be shown

by extrinsic evidence.—G. F. Sanborn Co. v. Alston, 153 Mich. 456.

§ 47. ——Knowledge of the law.

As to facts of public record, see ante ¶ 245.
Conclusiveness of the presumption, see ante § 83.
Applicability in fraud cases of presumption as to knowledge of law, see Fraud, I, III; and see also Mistake.
Of knowledge of taxability and place for payment, see Taxes.

¶ 246. All persons are bound to know and are presumed to know the law.—Cargill v. Power, 1 Mich. 369; Woodruff v. Phillips, 10 Mich. 500.

¶ 247. All men are presumed to know the law.—Spitzer v. Village of Blanchard, 82 Mich. 234; Auditor-General v. Lake George & M. R. R. Co., 82 Mich. 426; Adsit v. Osmun, 84 Mich. 420; Wayne County Savings Bank v. Airey, 95 Mich. 520.

¶ 248. One must be presumed to know the law.—Harris v. Cable, 104 Mich. 365.

¶ 249. Every man is supposed to know what the law is, and his rights are to be determined accordingly.—Hammond v. Michigan State Bank, W. 214.

¶ 250. Every one knows or must be presumed to know the law, and what the law requires to enable him to enforce his claims and within what time he must proceed.—Robert v. Morrin's Estate, 27 Mich. 306, 307.

¶ 251. A testator is presumed to have been acquainted with the rules of law.—Fraser v. Chene, 2 Mich. 81.

¶ 252. It is presumed that one layman knows as much about law as another layman does.—Stanton v. Hart, 27 Mich. 539.

¶ 253. All persons are bound to take notice of a public law.—Le Roy v. East Saginaw City Ry. Co., 18 Mich. 233.

¶ 254. One must be held to know the law that a note given by husband and wife is void as to the wife, unless the money was borrowed for her separate estate.—Schmidt v. Spencer, 87 Mich. 121.

¶ 255. A trustee is presumed to know the law.—Perrin v. Lepper, 72 Mich. 454.

¶ 256. Those to whom a city contract is let are supposed, equally with the common council, to have knowledge of the law.—Mathewson v. City of Grand Rapids, 88 Mich. 558.

¶ 257. A city and its legal counsel must be presumed to know the law.—Canfield v. City of Jackson, 112 Mich. 120.

§ 48. ——Knowledge of laws of one's own corporation.

¶ 258. All members of a mutual insurance company must be presumed to have knowledge of the law and of the company's articles of association.—Goss v. Peters, 98 Mich. 112.

¶ 259. All members of a mutual fire insurance company must be deemed to have knowledge of the law under which the company is incorporated.—Brock v. Dwelling-House Ins. Co., 102 Mich. 583.

§ 49. As to innocence, good faith or fraud.

As to fraud or honesty, see Fraud, III.
As to fraud or undue influence, see Fraud, III; Wills, III; Fraudulent Conveyances, I, V.
As to bona fide purchase or transfer, see Negotiable Instruments, XIII, XIV; Notice and Record of Title, I; and see Fraudulent Conveyances.
Presumptions and burden as to fraud in assignments, see Assignments for Creditors § 15.
Presumption of good faith in architect's or superintendent's measurements or certificates, see Building Contracts §§ 11, 39.

¶ 260. All reasonable presumptions should be indulged in favor of innocence.—Matteson v. Morris, 40 Mich. 52.

¶ 261. The presumption of innocence of criminal conduct exists even in a civil case.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 262. Intention to violate the law will not be presumed.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 263. Falsehood and wrong are not to be presumed.—Thayer v. McGee, 20 Mich. 195.

¶ 264. The presumption of law is in favor of honest rather than dishonest motives.—In re King's Estate, 94 Mich. 411.

¶ 265. Although bad faith is not presumed, it is presumed that there may be bad faith.—Prince v. Clark, 81 Mich. 167.

§ 50. Assent, acquiescence or waiver.

Presumption that declaration in an action was by plaintiff's sanction, so as to bind him by admission therein, see post ¶ 2001.
Presumptions and evidence of waiver and election, see Election and Waiver § 18.
Burden of proof and presumptions as to duress, see Duress § 7.
Presumable acceptance of delivery of instrument, see Execution of Instruments, III.

¶ 266. The inference of assent from mere passiveness is always made against the passive party, and never in favor of that party against the other.—White v. Campbell, 25 Mich. 463; Payne v. Walker, 26 Mich. 60.

¶ 267. One's assent may be presumed to that which benefits him, but not to that which prejudices him.—Higman v. Stewart, 38 Mich. 513.

¶ 267a. Acceptance of a beneficial grant is presumed.—Hatch v. Village of St. Joseph, 68 Mich. 220.

¶ 268. It is presumed that one within hearing and likely to hear did hear a statement by another to a third person bearing on the rights of the first, and that the hearer acquiesced; so held where the statement was offered as an admission by a wife, it having been made regarding her separate estate to one who loaned money on the security thereof while she and her husband, who made it, and the other person were sitting at dinner together.—Vosburg v. Brown, 119 Mich. 697.

§ 51. As to contracts and their legality and consideration.

Admissibility of parol evidence that sealed instrument or note had no actual consideration, see post § 163.
Presumptions as to genuineness and execution and delivery and acceptance on instruments, see Execution of Instruments, I, III.
As to date of delivery of instrument, see Execution of Instruments, III.
Presumption as to time of alterations, see Alteration of Instruments § 12.
As to gratuitousness of services rendered or expectation of pay, see Implied Contracts, II.
Presumptions respecting consideration for contracts, see Contracts §§ 138, 139.
Presumption as to contract with particular custom in view, see Customs §§ 1, 2, 11.
Presumptions in actions on contracts, see Contracts §§ 303-308.
As to sale being on credit or for cash, see Sales, VII.

¶ 269. A written agreement bearing the genuine signatures of the parties in interest is presumed to embody the terms of the preliminary oral negotiations.—Sheley v. Brooks, 114 Mich. 11.

¶ 270. A sufficient consideration to support a restrictive provision in a bill of lading will be presumed.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 271. Where a deed grants lands in one state to a corporation created by the laws of another, but does not show any consideration, it will be presumed to have been made for any species of consideration that will support it: courts will not presume illegality.—Thompson v. Waters, 25 Mich. 214.

¶ 272. The considerations recited in a deed are not sufficient evidence in behalf of a party who has the burden of showing, in a suit between the grantee and third persons, that the consideration was valuable.—Ripley v. Seligman, 88 Mich. 177.

¶ 273. A presumption of fact obtains, in the absence of evidence to the contrary, that the sum mentioned in a mortgage as the consideration therefor is correctly stated.—Cady v. Burgess, 144 Mich. 523.

§ 52. As to payment, discharge or satisfaction.

Presumptions as to payment, either generally or from lapse of time, see Payment, V.
As to application of payments, see Payment, V.
Payment or loan presumable from delivery of money or possession of canceled check or receipt, see Payment, V.
As to check or note representing loan or payment, see Payment, V; Contracts, § 303; Implied Contracts, II; Negotiable Instruments, XIV.

§ 53. As to titles, grants and wills.

As to intent of party to deed, see also ante § 46.
As to knowledge by attesting witnesses of quality of their act, see ante § 46.
Presumptions regarding execution and genuineness, see Execution of Instruments, I, III; Wills, II-V.
Presumption arising from acknowledgment and certificate thereof on deeds, etc., see Acknowledgments § 20.
Presumptions on probate, see Wills, V.
Presumptions indulged in construing wills, see Wills, VI.
Presumption as to testacy, see Descent ¶ 7.

¶ 274. All titles to lands in this state are presumed to have been granted or originally recognized and confirmed by the United States or by the state.—Gamble v. Horr, 40 Mich. 561.

¶ 275. There can be no presumption of title from ancient grant as against the state in a case where the right of the state accrued prior to March 1, 1847, and is not barred by any statute of limitations; nor will such presumption be allowed to dispute the accuracy of public acts and records in a case where there is positive and unquestioned evidence that no such title existed or was ever set up beyond the assumption of possession.—Crane v. Reeder, 21 Mich. 24.

¶ 276. No presumption of title in the grantee who brings an action in trespass is raised by a conveyance by warranty deed by a stranger to the title, of wild and unoccupied land of which the grantor never had possession.—Crawford v. Corey, 99 Mich. 415.

§ 54. As to ownership or seisin.

See also ante ¶ 276.
As to source of titles, see ante ¶ 274.
As to continuing ownership, see ante § 40.
As to possession of grantor after grant, see post § 55.
As to possession following title as incident to it, see post § 56.

As to grants and wills, see ante § 53.
Inconclusiveness of presumption based on possession, see ante § 33.
Consignee as prima facie owner of goods, see Carriers § 23.
Possession of stock certificates properly indorsed as presumptive evidence of title, see Corporations § 284.
As to relative interests and shares of cotenants, see Tenants in Common, II; Wills, VI; Deeds, III.
As to relative rights and estates of husband and wife, see Husband and Wife, II.
As to relative interests and shares of partners, see Partnership, V.

¶ 277. Where one occupies land several years and dies in possession, seizin in favor of his heirs or of purchasers from his estate is presumed.—Hall v. Kellogg, 16 Mich. 135.

¶ 278. Proof of possession under a claim of title, founded upon a deed not emanating from the source of title, or traced back to a person so claiming, does not raise a legal presumption of seizin in fee; and, if such possession were evidence of seizin, it would be at most but a bare presumption, liable to be overcome by other proof, as of title in a third person.—Lull v. Davis, 1 Mich. 77.

¶ 279. Mere occupancy or possession, without color or claim of title, cannot be evidence of seizin, particularly as against a prior occupant.—Millerd v. Reeves, 1 Mich. 107.

¶ 280. Possession and claim of title under a deed which purports to convey it is prima facie evidence of title as against one who shows no right in himself.—McFarlane v. Ray, 14 Mich. 465.

¶ 281. One who assumes as owner to convey lands of which he has peaceable possession and occupancy must be deemed prima facie to have the right to do so.—Gamble v. Horr, 40 Mich. 561.

¶ 282. Possession of personal property under a claim of ownership is presumptive evidence of ownership until the contrary is shown.—Trevorrow v. Trevorrow, 65 Mich. 234.

¶ 283. Wood cut on land which has been for several years peaceably held under claim of title is presumptively owned by the possessor until a better title is shown to exist in some one else.—Beeman v. Black, 49 Mich. 598.

¶ 284. The ownership of animals is not necessarily presumed to go to the person who owns what they feed on.—Burdick v. Michael, 32 Mich. 246.

¶ 285. The mere fact of possession of tax sale certificates after the death of the decedent owner is not proof of ownership nor does it show a prima facie assignment.—Root v. Beymer, 146 Mich. 692.

¶ 286. In replevin A.'s possession and use, for more than a year under claim of title, of a team of horses, raises a presumption of ownership in him that is sufficient until evidence to the contrary is introduced, and that is not rebutted or materially weakened by the fact that the defendant A.'s father bought the team from B. a year and a half before A.'s death.—Trevorrow v. Trevorrow, 65 Mich. 234.

§ 55. ——Grantor in possession after grant.

¶ 287. Possession held without change by a grantor, after conveyance, is presumed to be in subordination to his conveyance.—Bloomer v. Henderson, 8 Mich. 395; Dawson v. Danbury Bank, 15 Mich. 489; Humphrey v. Hurd, 29 Mich. 44; Jeffery v. Hursh, 45 Mich. 59.

¶ 288. A grantor's continued possession is presumed to be in subordination to his own conveyance, unless while he is allowed to remain as apparent owner third persons have in good faith, and relying on appearances, acquired rights under him.—Jeffery v. Hursh, 45 Mich. 59.

¶ 289. The presumption that a grantor's possession is in subordination to his grant would be strengthened rather than weakened by the grantor's taking an assignment of a mortgage given to his grantee on a sale by the latter of the premises, and his rights thereafter would be no greater than those of a mortgagee in possession.—Humphrey v. Hurd, 29 Mich. 44.

¶ 290. The grantor's retention of possession is not incompatible with any other right as against the grantee, if such right exists, and is not inconsistent in fact with the existence of the grant.—Bower v. Earl, 18 Mich. 367.

¶ 291. Where the grant is of a part of a larger tract, and delivery of actual possession follows, retention up to a certain line, and surrender beyond it, by the grantor, indicate a claim of ownership up to that line.—Bower v. Earl, 18 Mich. 367.

¶ 292. The continued possession of a grantor long after the recording of his deed to another may raise a presumption that, as between himself and his grantee, he has either retained or since acquired some right to the land or its possession.—Bennett v. Robinson, 27 Mich. 26; Stevens v. Hulin, 53 Mich. 93.

§ 56. As to possession.

Presumption of receipt from proof of sending or mailing, see ante § 35.
As to possession of grantor after grant, see ante § 55.
Presumption as to continuance of possession, see ante § 40.
Possession as incriminating evidence, see Indictment, VIII, A.

¶ 293. Possession of unoccupied lands is presumed to follow the title.—Safford v. Basto, 4 Mich. 406; Gamble v. Horr, 40 Mich. 561.

¶ 294. A purchaser of property at an auction sale presumptively takes possession.—Hall v. City of Kalamazoo, 131 Mich. 404.

§ 57. As to damages and values, worth or salability.

Presumptions as to damages and amount of same, see Damages, XI, A.
As to eminent domain damages, see Eminent Domain, V, D.
As to values, see Values.

¶ 295. An article that has a market value is presumably salable.—Grosvenor v. Ellis, 44 Mich. 452.

§ 58. As to jurisdiction and procedure and records.

Presumptions as to jurisdiction in general, see Courts § 80; Judgments, VII; Justices of the Peace, III; Municipal Courts, II; Probate Courts, I.
As to scope and subjects of adjudication on plea of res adjudicata, see Former Adjudication, VII.
As to existence of judgment and other valid prerequisites for execution, see Executions, VII, X.
As to correctness of judgments on collateral attack, see Judgments, VII.
As to regularity of tax law administration, see Taxes.
As to legality and regularity of proceedings for local improvements and assessments, see Local Improvements, VII, A.
Presumption as to authority to appear, see Appearance § 4.
Presumptions arising on record on appeal or error, see Appeal, XII, C.
Presumption on error as to admissibility of evidence received or rejected, see Appeal §§ 370, 371.
Presumption on error that there was sufficient evidence, see Appeal § 378, and see also Appeal, XII, E.
Presumptions on certiorari, see Certiorari § 59.
Presumption as to alteration of application for drain, see Drains § 48.

¶ 296. The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices. If a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption arises that no such document has ever had existence.—Platt v. Stewart, 10 Mich. 260; Hall v. Kellogg, 16 Mich. 135.

§ 59. As to foreign laws or common law elsewhere.

Burden of proving foreign laws, see post § 68.
Printed books of foreign laws as evidence, see post § 532.
Presumption as to validity of transactions elsewhere which would have been invalid in Michigan, or vice versa, see post § 60.
Presumption as to law of foreign state, see also Conflict of Laws ¶ 62.
Presumption as to inheritance laws of other states, see also Descent ¶ 51.

¶ 297. The court will presume that the law of a sister state is the same as that of Michigan unless the contrary is shown.—Crane v. Hardy, 1 Mich. 56.

¶ 298. The common law, as in force in this state, will be presumed to prevail in a foreign country in the absence of proof to the contrary.—In re High, 2 D. 515.

¶ 299. If any presumption exists as to the laws of another state it is that they conform to the general principles of the common law. How general such a presumption would be, quære.—Ellis v. Maxson, 19 Mich. 186.

¶ 300. As to things that are usually matters of statutory regulation, it cannot be presumed that the laws of another state are the same as our own.—Gordon v. Ward, 16 Mich. 360.

¶ 301. Our local statutes cannot be presumed to have been adopted elsewhere.—Kermott v. Ayer, 11 Mich. 181.

¶ 302. The presumption that the common law prevails in another state cannot be extended so as to invalidate a transaction that would be valid under our statute if made here.—Worthington v. Hanna, 23 Mich. 530.

¶ 303. Statutes similar to those of Michigan invalidating contracts that would be good at common law will not be presumed to have been enacted by another state.—Kling v. Fries, 33 Mich. 275; Roethke v. Phillip Best Brewing Co., 33 Mich. 340; Webber v. Donnelly, 33 Mich. 469.

¶ 304. In the absence of proof of a statute to the contrary a parol contract for the sale of lands in the state of Illinois must be held valid.—Ellis v. Maxson, 19 Mich. 186.

¶ 305. The rates of interest being established by statute in this state, it is not a presumption of law that the rate in a foreign country is the same.—Kermott v. Ayer, 11 Mich. 181.

¶ 306. Where a New York note is defended because made on Sunday, any New York laws invalidating notes for that reason must be proved.—O'Rourke v. O'Rourke, 43 Mich. 58.

¶ 307. Where a common-law rule—e. g., that giving a husband all his wife's personalty—has been altered by statute here, it cannot be presumed that the common law still prevails in another state so as to invalidate a transaction that would be valid

in Michigan.—Worthington v. Hanna, 23 Mich. 535.

¶ 308. A statute of another state disqualifying a married woman residing in such state from giving notes for goods purchased by her must be proved.—Wheeler v. Constantine, 39 Mich. 62.

¶ 309. The common-law rule in respect to wife's share in deceased husband's personalty is presumed, in the absence of proof, to prevail in Wisconsin.—Knapp v. Knapp, 95 Mich. 474.

¶ 310. Though it may be questionable whether the doctrine can be applied universally that the common law as it prevails among us will be presumed to prevail in a foreign country in the absence of proof to the contrary, yet the reason of it is applicable to all marriages celebrated in Christian countries, in which it may properly be assumed that a general common law on the subject of marriage still prevails.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 311. It is not presumed that there are regulations anywhere restricting the common right of marriage.—Hutchins v. Kimmell, 31 Mich. 126.

§ 60. ——As to validity of transactions abroad.

¶ 312. A contract made in another state for the sale of intoxicating liquors will be presumed to be valid there, unless shown to be contrary to the law of that state.—Kling v. Fries, 33 Mich. 275; Roethke v. Philip Best Brewing Co., 33 Mich. 340; Webber v. Donnelly, 33 Mich. 469.

¶ 313. It will not be presumed that a transaction valid under the laws of this state is not valid elsewhere, although, in the absence of proof to the contrary, foreign transactions have been held valid when conforming to the common law.—Worthington v. Hanna, 23 Mich. 530.

¶ 314. There is no presumption that a transaction valid here is void elsewhere.—Worthington v. Hanna, 23 Mich. 530.

¶ 315. It cannot be presumed that vendors in another state of liquors to be transported into this state intended to assist vendee in violating our statute.—Kling v. Fries, 33 Mich. 275.

¶ 316. It cannot be presumed that a contract valid by our laws is not valid in another state.—Millard v. Truax, 73 Mich. 381.

§ 61. Presumptions against stale claims.

Presumption of payment based on lapse of time, see Payment, V.

Undue delay in claiming under contract as evidence of its nonexistence, see also Contracts ¶ 1267.

Doctrines of laches and estoppel, see Estoppel; Equity, IV.

¶ 317. If a creditor asserts a demand which the law requires to be evidenced by writing, but which rests in parol, as he alleges, because of the dishonest or fraudulent refusal of the debtor to execute the writing agreed upon, a strong presumption arises against his claim if for a considerable period of time—as here eight years—without any obvious or assigned reason, he neglects to take legal proceedings.—McClintock v. Laing, 22 Mich. 212.

¶ 318. Where a claimant to property has acquiesced in dealings adverse to his alleged rights, which he did not assert until the property became valuable, such neglect operates as strong proof that his claim is ill-founded, and shows such laches as will disincline a court of equity to entertain his suit.—Russell v. Miller, 26 Mich. 1.

¶ 319. Pretended beneficiaries who sleep twenty or thirty years upon their rights, and wait until it is fair to assume that important primary evidence will be difficult of access, have no claims upon the indulgence of equity. Claims must be presumed unfounded when not urged within some reasonable time.—Loomis v. Brush, 36 Mich. 40.

¶ 320. Courts of equity, when dealing with matters of fact not barred by lapse of time, consider a delay in bringing suit as an element of judgment, and require stronger testimony in stale cases.—Shadock v. Alpine Plank Road Co., 79 Mich. 7.

¶ 321. In an action for negligent injuries which was begun almost six years after the accident, it is error to instruct the jury that no prejudicial inferences should be drawn from plaintiff's delay in suing.—Shadock v. Alpine Plank Road Co., 79 Mich. 7.

§ 62. Presumption from falsification or contrivance.

From staleness of claim, see ante § 61.

From failure to attend and make or furnish available proofs, see post §§ 63-65.

Evasion or suppression or falsehood as affecting credibility of the witness, see Witnesses, VI, A.

Tampering with evidence as contempt, see Contempt § 9.

¶ 322. In an action by a real estate dealer against the purchaser of the land, for the value of services rendered, the fact that he has included an item for services in going with the purchaser to look at the land which he was employed to sell, may be taken into consideration by the jury in determining whether the other items in the bill of particulars were legitimate or not.—Hale v. Knapp, 134 Mich. 622.

§ 63. Presumptions from failure to attend and make proofs.

From staleness of claim, see ante § 61.

From falsification or contrivance, see ante § 62.

Destruction or nonproduction of books and papers, see post § 64.
Failure to call other person as witness, see post § 65.
Failure to take stand in person, see also post § 341.
Failure to call member of family, see also post ¶ 341.
Evidence to rebut presumption, see post § 86.
Effect of presumption as against positive contrary evidence, see post § 609.
Admissibility of document where party has committed laches, see post ¶ 2570.
Assumption of truth of uncontradicted evidence, see post § 591.
Withholding or suppression as affecting weight of evidence adduced, see post § 593.
Admissions against interest implied from conduct or silence, see post § 385 et seq.
Failure to deny testimony of another as an admission, see post ¶¶ 2068, 2070.
Presumption against person refusing to submit to physical examination of injuries, see also Discovery ¶ 30.
Weighing the credibility of the witnesses, see post, X; Witnesses, VI.
Duty to call witnesses or of party to take stand, see Trial, V.
Calling and examination of party as witness and cross-examination, see Examination of Witnesses.

¶ 323. It is to be presumed that when a witness refuses to explain what he can explain, the explanation would be to his preju dice.—Heath v. Waters, 40 Mich. 457.

¶ 324. Where a party who has the burden of proof neglects to produce evidence that may fairly be presumed to have been within his reach and is needed to make a satisfactory case, he cannot complain if the court declines to extend his showing by construction to meet the defense.—Ruppe v. Steinbach, 48 Mich. 465.

¶ 325. Where a party omits, when on the stand, to testify as to matters peculiarly within his knowledge, his silence may fairly be made to weigh against him.—Tompkins v. Hitchcock, 69 Mich. 121.

¶ 326. Where there is no fact in issue to which it is material or necessary to call plaintiff as a witness, no unfavorable presumption can arise from his failure to testify.—Farrand v. Aldrich, 85 Mich. 593.

¶ 327. The failure of a party interested in a suit to take the stand may strengthen the inference to be legitimately drawn from testimony in the case, but it does not warrant an inference in no manner justified by that testimony.—Blackman v. Andrews, 150 Mich. 322.

¶ 328. Where a party who is not called as a witness in his own behalf possesses knowledge of the facts in controversy unknown to others who are called as witnesses, which facts would supply positive evidence of what must otherwise be established by inference from other facts proved, and upon which inference he relies, a presumption arises that the facts within his knowledge would, if produced, be harmful to him, which presumption may be rebutted by a satisfactory explanation of the absence of the party, or of the failure to take his deposition.—Cole v. Lake Shore & M. S. R. Co., 81 Mich. 156.

¶ 329. Where, in an action for negligent injury, a fact solely within plaintiff's knowledge is sought to be established in behalf of her case by evidence from other facts, the jury may consider her failure to appear as a witness as a circumstance indicating that if she had testified her testimony would have weakened her case.—Cole v. Lake Shore & M. S. R. Co., 81 Mich. 156.

¶ 330. Refusal to answer proper questions on cross-examination warrants unfavorable inference.—Goodrich v. Smith, 87 Mich. 1.

¶ 331. In an action for personal injuries plaintiff's absence at a former trial is a circumstance to be considered against her by the jury, and if not explained might be considered against her indicating that her evidence would have weakened her case, it being her duty, if physically and mentally able, to be present and to testify.—Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77.

¶ 332. A presumption against a husband and wife may be indulged in because of their failure to take the stand and testify to matters peculiarly within their knowledge, where judgment creditors seeking to set aside conveyances as fraudulent, introduce evidence showing that the husband represented himself as being worth $20,000 at the time that the indebtedness was incurred, that he had nothing shortly afterwards and that some of the conveyances were kept off the record for a long time, as in such case the complainant has shown sufficient to cast the onus probandi upon the grantees and vendees in the conveyances.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

¶ 333. The failure of complainant who is present in court to testify as a witness is significant in determining on appeal whether a deed signed by her was intended as a mortgage or a sale, she contending that it is a mortgage.—Sowles v. Wilcox, 127 Mich. 166, per Grant, J.

¶ 334. Where a party defendant to a suit to enforce an oral contract to convey land, the defense to which is a written contract of sale of the premises by defendant to complainant, fails to appear as a witness, all doubts as to whether the written agreement was to be binding must be resolved in complainant's favor.—Woodard v. Walker, 192 Mich. 188.

¶ 335. Where a defendant in a suit for an accounting denies the genuineness of a part of the vouchers produced against him, but does not designate those which are spurious though he has an opportunity to do so, they must all be regarded as prima facie valid in the absence of other evidence that they are not so.—University of Michigan v. Rose, 45 Mich. 284.

¶ 336. An administrator's omission on the hearing of a claim before commissioners to take the stand to contradict the claimant's testimony is not a safe basis for inferences against the estate.—Anderson v. Russell, 34 Mich. 109.

§ 64. ——Nonproduction or destruction of books or papers.

Instructions on effect of suppression or nonproduction of evidence, see Instructions, V.

Presumption against spoliator as aid in restoring destroyed papers, see Restoration of Papers.

Presumption on accounting against party failing to produce evidence, see Accounting Suits ¶ 41.

Nonproduction of evidence as affecting credibility of witnesses, see Witnesses, VI, A.

Failure to introduce instrument in evidence, effect to raise estoppel to claim thereunder in later trial, see also Estoppel ¶ 95.

¶ 337. Where questions arose concerning money payments, sworn to from reliance on books of account, the failure, without excuse, to produce the books for scrutiny, furnishes reason for disregarding such evidence. The suppression of important documentary testimony, under such circumstances, justifies presumptions against the party who should have produced it.—Page v. Stephens, 23 Mich. 357.

¶ 338. Inability to produce a contract that has been fulfilled does not furnish any conclusive presumption against its existence.—Lamore v. Frisbie, 42 Mich. 186.

¶ 339. The refusal of a defendant in foreclosure to produce business books which are in his possession, and which may reasonably be expected to shed light upon the transactions in dispute, is suspicious.—Wiswall v. Ayres, 51 Mich. 324.

¶ 340. A party's unexplained failure to preserve letters received by him from the opposing party, thus rendering him unable to produce them on the trial when notified to do so, raises a presumption against his statement of their contents where it differs from the other's version, especially if he was apprised of the importance of keeping letters bearing in his favor.—Francis v. Barry, 69 Mich. 311.

¶ 341. Where the question is as to the date of delivery of a deed to defendant, which deed after being recorded was taken from the register's office by defendant's daughter, the omission to produce the deed and to call herself and daughter as witnesses requires the evidence to be construed most strongly against defendant.—Lake v. Nolan, 81 Mich. 112.

¶ 342. Where, in an action for personal injuries on a railroad, plaintiff was seeking to prove that defendant was operating the road at the time of the injuries, under a traffic arrangement with the company which owned the road, a witness for defendant, who had been treasurer of the road owning the line, testified on cross-examination that $80,000 of the earnings of the road were sent by him to bankers in New York city, at the direction of the president of his company, who was also defendant's president, and that certain books in defendant's possession, which books it had failed to produce pursuant to notice, would show what disposition was made of said money. Held, that the natural and proper inference, if these facts were established, was that defendant did not care to produce said books, for the reason that they would show the receipt of this money by defendant, and counsel might properly urge it to the jury.—Williams v. Cleveland, C., C. & St. L. R. Co., 102 Mich. 537.

¶ 343. In an action on a promissory note where it is claimed that the defendant is merely an agent of the payee who has disposed of it to a bona fide purchaser and subsequently repurchased it through the alleged agent, the conduct of the plaintiff, of the payee, and of the attorney for the payee, in refusing to produce correspondence between the parties, and also upon the witness stand, may be taken into consideration by the jury in determining the question of whether or not the plaintiff is the agent of the payee.—Battersbee v. Calkins, 128 Mich. 569.

¶ 344. As a general rule, the destruction of documentary evidence raises a presumption that its contents were as alleged by the adverse party.—Barras v. Barras, 191 Mich. 473.

¶ 345. The rule that the destruction of documentary evidence raises a presumption that its contents were as alleged by the adverse party has no application where the instrument is a nullity.—Barras v. Barras, 191 Mich. 473.

¶ 346. Where a trustee wilfully destroys a declaration of trust the maxim "omnia præsumuntur contra spoliatorem" applies.—Pitcher v. Rogers' Estate, 199 Mich. 114.

§ 65. ——Nonproduction of witnesses.

Propriety of offer to call spouse in order to force claim of privilege and raise adverse presumption thereon, see Trial, V.

¶ 347. A husband's neglect to call his wife to prove his case when he might do so is not necessarily suspicious, especially if he can sufficiently establish it by other witnesses.—Dickerson v. Dickerson, 50 Mich. 37.

¶ 348. The mere omission of a party to call a witness, other than the party himself, who might with equal propriety have been called by the other party, is no ground for a presumption that the testimony of the witness would have been unfavorable.—Cole v. Lake Shore & M. S. R. Co., 81 Mich. 156.

¶ 349. Where plaintiff sues for injuries received from falling into a hole on defendant's ground, his failure to call as a witness his wife, who had fallen into the same hole with him, raises no presumption against him.—Cross v. Lake Shore & M. S. Ry. Co., 69 Mich. 363.

¶ 350. Failure of plaintiff in an assault and battery case to produce as witnesses physicians who attended her is proper for jury to consider in determining the merits.—Cooley v. Foltz, 85 Mich. 47.

¶ 351. Where, after a consent order excluding witnesses from the court room in a will contest is made, it is announced that the legatee will not be offered as a witness, and opportunity is given contestants to cross-examine him, which is not done, and it is claimed that legatee's presence in court is necessary and that by his remaining under a modified order of the court he can no longer be called to the witness stand without the consent of the contestants, the benefit of the presumption arising from the failure of the legatee to take the stand and testify in his own behalf may not be claimed by contestants, they, by their actions, having foreclosed him from so doing.—In re Sparks' Estate, 198 Mich. 421; Hodgman v. Sears, Id.

§ 66. Burden of proof in general.

[Note. As far as possible the cases on the burden of proof of specific issues have been treated with the other procedural law relating to those issues. See the appropriate specific topics, in addition to cross-references in this and following sections (§§ 66-70).]

Matters judicially known without proof, see ante, I.

Of negative contentions, see post § 67.

Of proving foreign laws, see post § 68.

Of proving foundation for evidence offered, see post § 69.

Shifting of burden, see post § 70.

Quantity of proof required to sustain burden, see post § 578 et seq.

Discharge of burden by admissions in pleading, see Pleading, IX.

Necessity of affidavit with plea or declaration to require proofs on particular issues, see Pleading, IX.

Burden of proof in equity, see Equity § 158.

Effect of admissions or denials in equity to cast or discharge burden, see Equity § 160.

Burden of proving set-off or recoupment, see Set-off, IV.

Facts assumed to be true in passing on motions to direct verdict, see Directing Verdict § 19.

Burden on appeal or error to show error on the record, see Appeal § 352.

Burden in contempt proceedings, see Contempt § 34.

Burden of proof in stating accounts, see Accounting Suits § 13.

Burden of rebutting accord and satisfaction inferable on plaintiff's case, see Accord and Satisfaction § 16.

Burden of overcoming force of acknowledgment on deed, see Acknowledgments § 20.

Burden of proof as to legality of alterations on paper, see Alteration of Instruments § 12.

Burden of proof on petition to dissolve attachment, see Attachment § 122.

Burden of proving equitable estoppel, see Estoppel § 59.

Burden of proving infancy or other disability, see Infants, VII; Insane Persons, V; Husband and Wife, VI.

Burden of showing discharge, payment or release, see Accord and Satisfaction: Election and Waiver; Releases; Payment, V.

Burden of proving bona fides, see Negotiable Instruments, XIV; Municipal Bonds, III; Notice and Record of Title, I.

As to care or negligence, see Negligence, V: and see also specific topics, e. g., Carriers; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV.

As to undue influence in making of will, see Wills, III.

Burden in probate or contest of wills, see Wills, V.

Burden of proof of damages and amount of same, see Damages, XI, A.

Burden of proof of death of person, see Death § 2.

Right to open and close evidence, see also Trial, V.

Right to open and close arguments, see Argument of Counsel § 6.

¶ 352. The burden of proof is on plaintiff to make out his case.—Gillett v. Detroit Board of Trade, 46 Mich. 309.

¶ 353. The burden of proof rests upon plaintiff to make out a case.—Barker v. Hebbard, 81 Mich. 367.

¶ 354. A plaintiff has always the burden of showing his cause of action, and a defendant is entitled to go free unless made answerable by legal testimony. There are no presumptions against him, and, if there is no such testimony to be found, it is not admissible to make out a case without it.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 355. The burden is upon complainant to prove a fact that is essential to his case.—Peters v. Canfield, 74 Mich. 498.

¶ 356. In civil cases the burden of proving any fact lies upon the party who substantially avers the affirmative of the issue.—White v. Campbell, 25 Mich. 463; Stewart v. Ashley, 34 Mich. 183.

¶ 357. In civil cases the burden of proof is generally upon the party who affirms the existence of facts necessary to make out his case.—People v. Coughlin, 65 Mich. 704.

¶ 358. The general rule is that the party holding the affirmative of an issue takes the onus of proof, and that, in all instances where the right of action depends upon the negative averment, the party making it is charged with the burden of proving it.—People v. Swineford, 77 Mich. 573.

¶ 359. One who claims that the county surveyor has not performed his duty, or has blundered in performing it, has the burden of showing that fact.—Smith v. Rich, 37 Mich. 549.

¶ 360. The burden of proof is upon plaintiff to maintain a point essential to his cause of action; as that a taking of a railroad company's property for a residence crossing is justified upon the ground of public police regulation.—People v. Detroit, G. H. & M. R. Co., 79 Mich. 471.

¶ 361. Where pleadings or papers prepared by solicitors in a suit have been given to the jury as admissions by way of evidence in another suit, it devolves on the client against whom they were admitted to show that they were made by mistake or without authority.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315.

¶ 362. One claiming to have mailed a letter has the burden of proving it.—Smith v. City Nat. Bank of Lansing, 182 Mich. 76.

¶ 363. Common-law rules of pleading are of little aid in determining who has the burden of proof under the general issue.—Ingalls v. Eaton, 25 Mich. 32.

¶ 364. Where defendant pleads the general issue and does not rely upon payment or other discharge as a defense, the burden of proof is on plaintiff throughout.—Berringer v. Lake Superior Iron Co., 41 Mich. 305.

¶ 365. Wherever a prima facie right is disputed the burden of proof is on the party attacking it.—Walker v. Detroit Transit R. Co., 47 Mich. 338.

§ 67. ——Negation, avoidance or exception.

Burden of proof of facts avoiding admission, see ante ¶ 361.

In criminal cases, see Indictment, VIII, A.

Burden of proving negative in allegation of breach of bond, see Bonds § 7.

Direction of verdict against party failing to disprove negative within his knowledge, see Directing Verdict ¶ 9.

¶ 366. As to the burden of proof in case of negative averment, see People v. Swineford, 77 Mich. 573.

¶ 367. The burden of avoiding an accord and satisfaction rests on the plaintiff to prove not only the accord but also that it remains unsatisfied, where he pleads in avoidance of it as a part of his cause of action on the original debt. If, however, an accord is pleaded defensively the defendant must prove both elements of it.—Browning v. Crouse, 43 Mich. 489.

¶ 368. When the party having the affirmative of the issue introduces competent evidence in support thereof, and the adverse party, instead of offering evidence upon the facts alleged by the plaintiff, sets up another and distinct fact in avoidance, then the burden of proof is upon him to establish such defense.—Manistee National Bank v. Seymour, 64 Mich. 59.

¶ 369. Where a statute makes transactions of a certain kind illegal, with specified exceptions, the party claiming the benefit of an exception takes upon himself, in civil cases, the burden of proving his case within it.—Niles v. Rhodes, 7 Mich. 374.

§ 68. Burden of proving foreign laws.

Rules as to judicial notice, see ante § 27.

Presumptions as to foreign laws, see ante §§ 59, 60.

Sufficiency of proofs, see post § 587.

¶ 370. As our courts cannot judicially notice a foreign statute, one who seeks to recover upon a liability arising from the violation thereof must aver and prove such statute.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

¶ 371. A note made on Sunday is not void at common law, and in a suit on a foreign note any foreign statute invalidating it must be proved.—O'Rourke v. O'Rourke, 43 Mich. 58.

§ 69. Burden of proving foundation for evidence offered.

¶ 372. The burden of proof is upon the proponent to show that an exclamation was spontaneous so as to be admissible as a part of res gestæ under the exception to the hearsay rule.—Rogers v. Saginaw-Bay City Ry. Co., 187 Mich. 490.

§ 70. Rule as to shifting of burden.

See also ante ¶ 368.

[Note. As appears by the following case the burden is shifted by whatever suffices to make a prima facie case. For cases deciding what suffices to make a prima facie case, see specific topics.]

¶ 373. The burden of proof is shifted by presumptions of law, by presumptions of fact of the stronger kind, and by evidence strong enough to establish a prima facie case.—Bly v. Brady, 113 Mich. 176.

III. RELEVANCY AND COMPETENCY IN GENERAL.

§ 71. In general, relation to issues and theory of case.

[Note. "Relevancy," as used in this analysis, means "applicability to the issue joined," and "competency" means fitness or propriety of the evidence to be used. Technically the rules of competency operate to exclude on grounds of unfitness, impropriety or impolicy evidence which might otherwise relate to the issues and tend towards proof. Only the more general rules of relevancy are illustrated by the cases retained in Evidence. Relevancy to prove a few facts not easily referable to any specific topic (see post §§ 98-106) is also treated here, but in the main relevancy is treated in the specific topics. See references post § 98. On the other hand the treatment of competency in Evidence is full and exclusive. See post this division (III), also Best and Secondary Rules, post, IV; Parol or Extrinsic Evidence, post, V; Opinions and Conclusions, post, VI; Hearsay, Character, Declarations, and Res Gestæ, post, VII; Documentary Evidence, post, VIII; Real Evidence, post, IX. The competency of witnesses, as distinguished from the competency of evidence, is treated in Witnesses, II-V.

Materiality or immateriality of the evidence offered is treated herein as practically the same as "relevancy." In this sense evidence is immaterial when its tendency to prove the issues is so slight as to be negligible, even if deemed relevant. See post §§ 71-80.]

Circumstantial or indirect evidence, see post § 77.
Cumulative or corroborative evidence, see post § 79.
Negative evidence, see post § 80.
Evidence against public policy or wrongly procured, see post §§ 82, 83.
Rebuttal, explanatory or supplementary facts, see post §§ 84-92.
Facts prior or subsequent to times in issue, see post § 94.
Similar disconnected facts, see post § 95.
Comparisons and tests with other things, see post § 96.
Acts and transactions with third persons, see post § 97.
To prove various particular facts, see post §§ 98-106.
Admissibility for some but not for all purposes, see post § 93.
Res inter alios acta, see post § 97.
Irrelevant rebuttal, see also post § 84.
Irrelevancy of evidence to rebut court's or counsel's statements, see post § 88.
Opening door to admission by putting in other evidence, see post §§ 89-92.
Best and secondary rule, see post, IV.
Parol evidence as to contents or meaning of instruments, see post, V.
Conclusions and opinions, see post, VI.
Declarations and statements made out of court, hearsay, character, res gestæ, see post, VII.
Documents and records as evidence, see post, VIII.
Tangible things and experiments in evidence, see post, IX.
Competency of conversations over telephone, see post § 319.
Competency of evidence of reputation and character, see post, VII, B.
Admissibility of witness' testimony given in former case where witness has become incompetent or is not available, see post §§ 337-344.
Relevancy of admissions, see post § 361.
Necessity that documents be relevant as well as competent, see post § 491.
Admissibility of deeds variant from issues, see post § 492.
Admissibility of photographs as documents, see post § 505.
Admissibility and competency of depositions and of matter contained therein, see Depositions, VI.
Corroboration of witnesses, see Witnesses, VI, D.
Discretion to close case or refuse further cumulative proofs, see Trial, V, D.
Admission or rejection as harmless error, see Harmless Error.
Insufficiency of cumulative newly discovered evidence to warrant new trial, see New Trial, II.
Contract provisions and stipulations for measurement or ascertainment of facts of performance or compensation as excluding other evidence, see Contracts §§ 316-318; Insurance, XX; Sales, VIII, IX; Stipulations.
Admissibility as affected by likelihood that offered evidence will appeal improperly to jury's sympathy, see Damages ¶ 1219.
Probative and legal effect of custom, see Customs § 9.
Test for relevancy and materiality of question on deposition in proceedings to compel answer, see Depositions § 14.
Relevancy and competency in trials for crime, see Indictment, VIII, B.
Materiality of false testimony to predicate perjury or subornation thereon, see Grimes § 116.

¶ 374. In all testimony the object of the law is to enable the jury to know all that the witness knows which is pertinent to the issue; and every rule of evidence is designed to secure this end.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 375. The relevancy of evidence depends on the issue to be tried.—White v. Bailey, 10 Mich. 155.

¶ 376. All evidence should have some legitimate tendency to establish or disprove the fact in controversy, otherwise it should be rejected.—Stroh v. Hinchman, 37 Mich. 490.

¶ 377. The opinions of the attorney general and of the officers of the federal land department, embodied in another's deposition, cannot go to the jury as evidence of the law of the case. The law is for the court to give.—Roberts v. Cooper, 20 How. (61 U. S.) 467, 15 L. ed. 969.

¶ 378. Plaintiff cannot shift his position from the issue presented by him in his opening to the jury, and introduce testimony under a different issue.—Hood v. Olin, 80 Mich. 296.

¶ 379. A single item of evidence cannot be rejected for failing to establish the whole case, but should be received if it contributes to that end; and its sufficiency in connection with the other evidence must be determined on a review of the whole when the case is closed.—Collins v. Beecher, 45 Mich. 436.

¶ 380. It is no objection to the admissibility of a party's testimony that it is only admissible upon his own theory. He is entitled to have the case submitted to the jury upon his theory if there is any testimony tending to prove it.—Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239; Wilcox v. Young, 66 Mich. 687.

¶ 381. Plaintiffs cannot complain that evidence is irrelevant when it meets the only issue on which they could possibly recover, under their own theory; so when A. sues B. for money B. owed C., his subcontractor and a debtor of A., and sues upon the theory that B.'s debt to C. is money had and received to A.'s use, it is relevant to show that B. had in fact overpaid C.—Barden v. Briscoe, 36 Mich. 254.

§ 72. Legal and equitable rules.

Sameness of rules of evidence in equity and at law, see also Equity ¶ 315.

Statutes relating to taking proofs in equity, see Jud. Act, chap. XVII, § 1 et seq.; Comp. L. 1915, § 12489 et seq.

¶ 382. In general the rules of evidence are the same at law as in equity, and the principles which govern the means of obtaining proof are substantially the same in the one court as in the other.—Dougherty v. Randall, 3 Mich. 581.

¶ 383. The rules of evidence at law and in chancery are the same.—Pittman v. Burr, 79 Mich. 539; Bush v. Merriman, 87 Mich. 260.

§ 73. Facts admitted, presumed or not questioned.

Admissions to exclude res gestæ, see also post ¶ 2354.

Admissions made in open court on trial to dispense with proofs, see Trial, V.

Stipulations of fact, see Stipulations.

¶ 384. Evidence tending to prove facts not in question is inadmissible.—Ortmann v. Merchants' Bank of Canada, 41 Mich. 482.

¶ 385. In an action to recover money lent to pay off incumbrances there was no error in excluding the securities themselves, if the purpose of the borrowing was conceded and the only dispute was as to who provided the means.—Waterman v. Waterman, 34 Mich. 490.

¶ 386. It is immaterial whether or not the terms of a certain contract in issue were settled while two of the partners on one side of it were present, where those terms were all merged in a written contract which was in evidence and assented to by all.—Ellis v. Whitehead, 95 Mich. 105.

¶ 387. It is not error to exclude letters and telegrams which either throw no light upon the controversy or relate to admitted facts.—Scheibeck v. Van Derbeck, 122 Mich. 29.

¶ 388. The fact that affirmative proof of a matter as to which there is a rebuttable presumption, is unnecessary, does not show that it is inadmissible.—O'Dell v. Goff, 153 Mich. 643.

¶ 389. Hearsay to prove a collateral fact which is not necessary to be proved is inadmissible.—Wright v. Dickinson, 67 Mich. 590.

¶ 390. A party cannot, by admitting a fact, prevent his adversary from producing documentary evidence on the subject.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310.

¶ 391. Defendant's admission on the trial that there was a valuable consideration for an agreement does not deprive plaintiff of the right to show what the consideration actually was.—De Camp v. Scofield, 75 Mich. 449.

¶ 392. Lessees suing their lessor for forcible ouster are not shut out by defendant's offer on the trial to admit that he kept them out of possession from giving evidence of the fact and of the circumstances attending it.—Baumier v. Antiau, 79 Mich. 509.

¶ 393. An offer to admit the effect of written documents does not render them inadmissible in evidence.—Milligan v. Sligh Furniture Co., 111 Mich. 629.

¶ 394. In an action by an administrator upon a policy insuring his intestate's life, defendant admitted plaintiff's representative character and the existence of his letters of administration. Held, that the letters were nevertheless properly admitted to show plain-

tiff's capacity, and could not be excluded as not being evidence of death or on any theory.—John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

¶ 395. It was not prejudicial error to refuse testimony on an issue settled by stipulation. In re McNamara's Estate, 154 Mich. 671: Richter v. McNamara's Estate, Id.

§ 74. Reason or genesis of facts in issue.

Res gestæ, see post, VII, D.
Evidence in explanation made relevant by other evidence, see post §§ 89-92.
Rebuttal by showing reasons, see post §§ 84-86.

¶ 396. Evidence as to trouble experienced between the parties in concluding an accounting required of a new corporation and its promoter at the instance of majority stockholders of a defunct corporation in a former suit to enforce the assignment and delivery by the promoter to complainants of stock of the new corporation and for performance of an agreement between the promoter and such stockholders relative to a division of stock of the new corporation, is wholly irrelevant in a later accounting suit based upon alleged material facts obtained in the partial accounting entitling them to other or further relief. The material thing was proof of such facts, not how they were secured.—Millen v. Potter, 201 Mich. 1.

§ 75. Reality and origin of plaintiff's interest in suit.

Evidence of title, interest or capacity of plaintiff, see specific topics treating of the property, interest or capacity claimed.
Irrelevancy of evidence that original plaintiff died and present plaintiff was substituted, see Abatement §§ 18, 19.

¶ 397. Where the cause of action survives, the fact of a plaintiff's death cannot enter into the merits, and evidence thereof may be excluded on the trial.—Mason v. Finch, 28 Mich. 282.

¶ 398. On cross-examination evidence that third persons paid the fees of a witness for plaintiff, who, though not subpoenaed, came from a distance to attend the trial, is incompetent to show that plaintiff is not prosecuting the suit and that some one else is doing so, though it would be admissible on interest and bias of the witness.—Connor v. Levinson, 115 Mich. 297.

¶ 398a. Where the grantee in a deed received in evidence seeks to recover in ejectment under it, it is competent for defendant, although no party to the deed, to show that a third person, the real owner, caused it to be made to the grantee without consideration; as, in such case, the stamps required would depend upon the value of the land and be indicative of a consideration.—Groesbeck v. Seeley, 13 Mich. 329.

§ 76. Preliminary or foundation facts.

For secondary evidence, see post § 148 et seq.
For opinions, see post §§ 248 et seq., 271, 272.
For declarations, former testimony or other statements out of court, see post §§ 343, 367, 437, 438.
For documents, see post §§ 515-521, 526, 527, 549, 550.
For admission of articles in evidence, see post § 576.
Proof of agency or authority to sustain admission of agent's admissions, see post §§ 437, 439.
Preliminary question as to land ownership, applicability of secondary evidence rule, see post § 114, ¶ 580.
Oral evidence as to existence, identity or custody of writing, see post § 117.
Order of proof of foundation and probative evidence, see Trial, V, B.

¶ 399. In an action by a woman for an indecent assault upon her committed by defendant in her own rooms, it was proper in examining a witness for the plaintiff to ask, as preliminary to more definite inquiries, whether the witness had ever seen defendant in plaintiff's rooms.—Mawich v. Elsey, 47 Mich. 10.

§ 77. Indirect or circumstantial facts.

Hypothetical and speculative facts, see post § 78.
To show attentiveness or observation by witness, see post § 81.
Sufficiency of circumstantial evidence, see post § 582, and see specific topics treating of the fact to be proved.
Circumstances probative of fraud, see Fraud, III; Fraudulent Conveyances, I, V.
Latitude allowable on hearing of claims against decedents' estates, see Estates of Decedents ¶ 610a.

¶ 400. It is not proper to prove a physical fact indirectly and by inference when it is susceptible of direct proof.—Perkett v. Manistee & N. E. R. R. Co., 191 Mich. 106.

¶ 401. Where defendants' promise was to pay plaintiff for extra work done by him in running the mixed logs of both parties should he do proportionally more on their logs than they did on his, it was competent for defendants to show how much their own men did in running the mixed logs.—Bewick v. Butterfield, 60 Mich. 203.

§ 78. Hypothetical and speculative facts.

Conjectural and speculative opinions, see post § 210.
Hypothetical questions to experts, see post § 299 et seq.
Insufficiency of evidence leading only to speculation or conjecture, see post § 582 et seq., and see specific topics treating of the facts to be proved, e. g., Negligence, V.

¶ 402. Where there is full proof of the actual condition of merchandise, evidence of the damage it might possibly have suffered under supposable circumstances is theoretical and improper.—Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310.

¶ 403. Where defendant has contracted to take all the pine blocks sawed at plaintiff's mill and delivered during the season, and defendant after a time refuses to receive any more, the number of loads delivered by plaintiff during the preceding period cannot be considered in determining the number that plaintiff might have delivered after the refusal; the amount sawed at the mill after such refusal being easily ascertainable without speculation.—McFadden v. Wetherbee & Co., 63 Mich. 390.

§ 79. Cumulative or corroborative evidence.

Evidence admissible because of other evidence, see post §§ 89-92.
Affirmative evidence in addition to presumption, see ante ¶ 388.
Corroboration of witnesses when impeached, see Witnesses, VI, D.
Discretion of court to exclude further cumulative evidence of fact when sufficiently proven, see Trial, V.
Newly-discovered cumulative or corroborative evidence as ground for new trial, see New Trial, II, H.
Admission or rejection as harmless error, see Harmless Error.

¶ 404. In order to be relevant, testimony need not be essential; it may be cumulative, or it may be supererogatory.—Comstock v. Smith, 20 Mich. 338.

¶ 405. A principal's personal knowledge of danger may be shown as bearing on the care required, although the agent's knowledge would suffice to fix a liability.—Hoyt v. Jeffers, 30 Mich. 181.

§ 80. Negative evidence.

Mode of proving absence of matters from records, see post § 531.
Absence of mention in books and writings as negative evidence of fact, see post ¶ 2569.
Quantity and degree of proof required to establish negative, see post § 583.
What is negative, see post § 606.
Conflict between positive and negative, see post § 605.
Evidence of observation to fortify testimony in negation of observable fact (train whistling), see post ¶ 414.
Admissibility of negative evidence in particular actions, see also specific topics, e. g., Carriers § 211 et seq.; Highways, XII; Master and Servant, III; Railroads, VIII; Street Railways, IV.

¶ 406. Where a witness has testified to a material conversation in the family of a decedent, a neighbor cannot be called to testify merely that he never heard such a conversation in the family; such negative testimony has no positive legal value.—Chambers v. Hill, 34 Mich. 523.

¶ 407. Defendant in an action for criminal conversation introduced testimony to show that plaintiff's wife was subject to fits of stupor and insensibility and was afflicted with hysteria, and showed by experts that persons so troubled were subject to hallucinations and unreliable. Held proper for the plaintiff to show by the evidence of relations and their neighbors that they were well acquainted with his wife and frequently at his house and never saw or heard of her having "unconscious spells."—Johnston v. Disbrow, 47 Mich. 59.

¶ 408. A boy was struck on the head by a stone thrown in a mining blast. Held, that in an action for the injury it was not clearly error to allow the testimony of witnesses that they had not heard any warning before the blast was fired, even though there was positive testimony that such warning had been given.—Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

¶ 409. In an action for an injury caused by an obstruction in a highway, a witness cannot be permitted to testify that he had never heard nor known of any one being injured on the obstruction before the accident to plaintiff.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 410. In an action by an employee, the testimony of coemployees that they were not informed of the dangerous character of the common employment is inadmissible to rebut defendant's testimony that plaintiff was so informed.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 411. Plaintiff's testimony that he never heard of a certain report, viz., that he was heavily indebted at three or four banks at rates of interest of from eight to ten per cent, was offered to negative the statement in an alleged libel that it was so reported. There was, however, no testimony that plaintiff would have been likely to have heard such report, if made. Held, that such negative testimony was incompetent.—Simons v. Burnham, 102 Mich. 189.

§ 81. Evidence to prove attentiveness, observation and memory of witness.

Res gestæ showing attention or hearing, see post § 452.
Likelihood of seeing, hearing and observing as rendering testimony positive rather than negative, see post § 606.
Explanations of answers by witness, see Examination of Witnesses, I.

¶ 412. A witness may be allowed to state any reason or circumstance which induced him to give particular attention to facts ob-

served by him, and to which he has testified.—Angell v. Rosenbury, 12 Mich. 241.

¶ 413. In giving the reasons for his recollection of a transaction a witness cannot be permitted to state facts inadmissible by the rules of evidence, nor to relate his own conversation with other persons, containing reflections on the motives of another witness.—McBride v. Cicotte, 4 Mich. 478.

¶ 414. Where a witness in a personal injury case testified that the train in question did not whistle for the crossing, it was competent for him to state that he and his brother conversed about it at the time (the conversation not being given), for the purpose of showing that the attention of the witness was called to the fact at the time.—Grenell v. Michigan Cent. R. Co., 124 Mich. 141.

¶ 415. In trover for property bought at an assignee's sale, but withheld by the assignee, who disputed the amount of the bid, claiming it was eleven dollars while the bidder claimed it was eleven cents, it is proper to admit the evidence of a bystander, who had also bid on the property, as to his understanding and hearing of the amount of plaintiff's bid.—Ives v. Tregent, 29 Mich. 390.

§ 82. Evidence against public policy.

Evidence wrongfully procured, see also post § 83.

Evidence violating secrecy of ballots, see Elections, XI.

Evidence or affidavits impeaching verdicts or revealing matters of secrecy, see Verdicts and Findings, VI.

Privileged communications to counsel, clergy, husband, or wife, see Witnesses, V.

Privileged nature of return of taxable property, see Witnesses, V, E.

Admissibility of self-criminating testimony not objected to as privileged, see also Examination of Witnesses ¶ 218.

¶ 416. Where a question concerns the marital relations of a woman plaintiff and the subject-matter is against public policy, an answer is properly excluded.—Renaud v. City of Bay City, 124 Mich. 29.

§ 83. Evidence wrongfully procured.

Wrongdoing or neglect as objection to admission of document, see post § 491.

¶ 417. Physicians cannot testify in a divorce suit to what they have found out by compulsory examination of a party thereto; and such examinations are illegal and improper and a party should refuse to submit to them.—Page v. Page, 51 Mich. 88.

¶ 418. A witness who obtained his information concerning the contents of books while they were in the sheriff's possession under an unauthorized attachment, in abuse of the process of the court, may, in behalf of one who was in no way responsible for the abuse or wrong by which such information was obtained, testify as to such contents, even though the wrongdoer could not.—Cluett v. Rosenthal, 100 Mich. 193.

¶ 419. The fact that a brother of plaintiff's counsel, upon finding in the street a sealed envelope containing a letter from a defendant, placed the same in the hands of such counsel, instead of forwarding it to another defendant, to whom it was addressed, did not deprive plaintiff of the right to introduce the letter in evidence.—Schloss v. Estey, 114 Mich. 429.

§ 84. Rebuttal and explanatory evidence.

[Note. The question, "what is proper rebuttal?", when applied to a particular issue involves the general rule that evidence is relevant, which tends to explain, repel, counteract, or disprove evidence adduced or inferences raised by the opposite party; and also, and usually, the real question is on the relevancy of offered evidence to a specific issue. For convenience of the user the general expressions of this rule are here treated and the specific applications are treated in the topics to which the issue relates. E. g., see Agency, I, A (rebuttal of evidence of agency), II, A, C (rebuttal of evidence of authority or of ratification); and like portions of other topics. For the proper practice in adducing rebuttal matter and the order in which it ought to be put in, see Trial, V; and for proper mode of interrogation, see Examination of Witnesses.]

Mode of examination to bring out rebuttal, see Examination of Witnesses, II, III.

Order of proof of evidence in chief and in rebuttal, see Trial, V, B.

Order of proof, rebuttal in anticipation or after the evidence to be rebutted, see Trial, V, B.

Examination on redirect or on recall of witness for purpose of rebutting other evidence, see Examination of Witnesses, III.

Rebuttal of other party's theory, see also ante ¶ 381.

Rebuttal of presumptions, see ante § 33.

Showing want of consideration for deed to rebut plaintiff's claim of title under it, see ante ¶ 398a.

Rebuttal of promise to pay for extra work by proof that none was done, see ante ¶ 401.

Rebuttal by negative evidence that given fact was unheard of, see also ante § 80, ¶ 407.

Rebuttal of relationship, authority or financial condition, see post § 85.

Rebuttal or explanation of discrediting inferences, see post § 86.

Evidence made relevant or competent by other evidence, see post §§ 89-92.

Nonpayment of taxes to rebut ownership, see post ¶ 549.

Rebuttal of character evidence, see post § 358.
Admissions to rebut testimony, see post § 366.
Explanation and rebuttal of admissions, see post §§ 442, 443.
Rebuttal of conversations by inconsistent statements later, see also Brokers ¶ 167.
Self-serving declarations as rebuttal, see post ¶ 2545.
Admissibility of rebutting version of transaction though tending to prove improper matters, see post § 93.
Proper rebuttal or explanation in trespass for assault where threats or quarrelsomeness are shown, see Assault § 27.
Admissibility of evidence of erroneous or correct datum used for survey, see Boundaries § 31.
Evidence making it improbable that party would have made disputed contract, see Contracts § 312.
Ability or means as evidence bearing on probability of making contract with person, see Contracts § 312.
Admissibility of evidence bearing on probability that agreement would have been made as alleged, see also Brokers ¶ 157.
Financial conditions as evidence of improbability of subscription to corporate stock, see Corporations § 59, ¶ 215.
Right of witness to explain answers and admissible matter of explanation or correction, see Examination of Witnesses, I.

¶ 420. The relevancy of rebutting evidence is to be tested, not by its convincing or persuasive character, but whether it tends to cut down, limit, explain or obviate the defense, or to illustrate some legitimate answer to the defense.—Comstock v. Smith, 20 Mich. 338.

¶ 421. What may be proved may be disproved.—Jacobs v. Callaghan, 57 Mich. 11.

¶ 422. The testimony of defendant's witnesses, in so far as it contradicts the testimony of the plaintiff and shows admissions made by him, is admissible for that purpose. —Marx v. King, 162 Mich. 258.

¶ 423. Evidence in rebuttal contradictory to evidence on part of defendant is proper.—Ward v. Carey, 200 Mich. 217.

¶ 424. When the character of evidence, whether it be rebutting or not, depends upon the effect which the jury may give to evidence which it is introduced to rebut, it is not error to admit it, even though its tendency as rebutting evidence is doubtful.—Hollister v. Brown, 19 Mich. 163.

¶ 425. As against one claiming that a wife made a certain request, stating that her husband had sent word to her to do so, the husband may testify for her that he sent her no such word; since the husband's testimony tends to show which claim is the more probable, hers or the contrary one of defendants. —Eberenkrook v. Webber, 100 Mich. 314.

¶ 426. A purported copy of an inventory having been put in evidence as secondary proof on failure to produce the original, it was error to exclude rebutting testimony by the other party that the copy was not a copy of any inventory made by him or of any such as it purported to be, and that witness never had possessed such an instrument as he was notified to produce.—Moulton v. Mason, 21 Mich. 364.

¶ 427. Where, in an action upon a building contract, the parties are in dispute upon the question of a waiver of delay for completing the building, and of an acceptance of the work by defendant, a contract between defendant and a third person, whereby he had agreed to construct and sell to the latter half of the building, and to complete and deliver the same at the time when by the contract in suit the work was to be completed, is admissible as bearing on the probabilities.—Andre v. Hardin, 32 Mich. 324.

¶ 428. Where an attorney suing for services rendered shows that after a note had been placed in his hands by defendant for collection and after he had ascertained, through correspondence, the maker's residence, defendant took back the note and accepted a new one from the maker, it was incompetent for defendant to show in rebuttal that such new note had not been paid.—Wildey v. Crane, 69 Mich. 17.

¶ 429. Where a defendant sued for assault and battery has testified that he had seen a fight between plaintiff and a policeman in which the former was the aggressor, the policeman's testimony as to what occurred is admissible.—Culley v. Walkeen, 80 Mich. 443.

¶ 430. In an action for assault and battery all circumstances leading up to the assault that tend to explain the relations or the rights of the parties may be shown.—Gillespie v. Beecher, 85 Mich. 347; Pokriefka v. Mackurat, 91 Mich. 399.

¶ 431. If defendant suing for assault and battery offers testimony tending to show some other cause or reason for plaintiff's injury, plaintiff may rebut such testimony.—Pokriefka v. Mackurat, 91 Mich. 399.

¶ 432. Where testimony of the reputed time of particular trotters is admitted to show the value of a horse of their blood, it is error to exclude evidence in rebuttal that certain horses of the same blood have not developed into fast trotters.—Ellis v. Simpkins, 81 Mich. 1.

¶ 433. In an action to recover damages for overflowing plaintiff's lands where plaintiff has introduced in evidence a stump of a small tree grown on his land now covered with water, in order to establish the fact—

based upon his theory that timber cannot grow in water—that the water must have been raised upon the land by defendant's dam since the growing of the tree some ten or fifteen years before, testimony is admissible from one whose land adjoins plaintiff's, that water from defendant's dam backed upon his land and that trees like the one introduced in evidence grew in water there.—Shearer v. Middleton, 88 Mich. 621.

¶ 434. Where the attention of a defendant is called on cross-examination to a chattel mortgage given by him to plaintiff, the existence of which tends to support plaintiff's claim upon the trial, plaintiff cannot, by not offering the mortgage in evidence, deprive defendant of the right to explain its execution; but if such explanation is made, it is error to reject the mortgage when afterwards offered in evidence by plaintiff.—Williams v. Clink, 90 Mich. 297.

¶ 435. A witness called by defendant to show that carbonate of iron would not stain marble was asked on cross-examination if he had not seen soot and creosote coming out of the electric light works chimney in large quantities, and if he had not so told a certain person, both of which questions were answered in the negative; whereupon the person referred to was called on rebuttal, and, against defendant's objection, permitted to testify that from a conversation had with the witness he got the impression that the witness meant that he had seen some substance come from said chimney. No foundation for an impeachment of the witness had been laid. Held, that to admit such testimony was error, it being hearsay, and well calculated to corroborate plaintiff's claim that something came from said chimney to his injury.—Skelton v. Fenton Elec. Light & Power Co., 100 Mich. 87.

¶ 436. Where, in an action upon a breach of warranty of the value of mining stock, sold to one who became a corporate employee as part of the inducement, defendant offered evidence to show that plaintiff's work in constructing a mill on the mining property was not well done, testimony is inadmissible in rebuttal to show plaintiff's ability as a carpenter or millwright, that matter not being necessarily involved.—Maxted v. Fowler, 94 Mich. 106.

¶ 437. It was proper to permit a witness to state the difference in results reached by measuring timber by the Canadian and American methods, where he had testified that a measurement of timber was made by the objecting party's request on the Canadian system and that such system would show less than by the American system.—Duplanty v. Stokes, 103 Mich. 630.

¶ 438. Upon objection to allowance of compensation to an administrator, where the contestant testifies that the administrator obtained her consent to his appointment by agreeing to act without compensation, it is proper to exclude on the ground of immateriality, when offered in rebuttal, a consent for his appointment as administrator in Canada, as that did not tend to negative the testimony of the contestant.—Morton v. Johnston, 124 Mich. 561.

¶ 439. Upon the trial of a claim against an estate on a promissory note which it is alleged had been turned over to the deceased upon his promise to deliver a new note to replace it and never returned by him, and on testimony by the claimant that she never owned any other note given by the deceased, it is not error to admit in evidence a note by the deceased payable to the claimant for a less amount indorsed with payments of interest, checks showing payment of interest and part of the principal and notes for the balance, which papers had been found among the deceased's effects.—Taylor v. Greene, 129 Mich. 564.

¶ 440. In an action on a life insurance policy, in which the defense was that the insured was guilty of having procured a criminal abortion upon herself in violation of terms of the policy making it void for violation of the criminal laws of the state, where a witness for defendant, a nurse, testified that she heard deceased, on the day before her death tell the attending physician, in answer to his direct inquiry, that an abortion had been performed on her the day before she was brought to the hospital, and that the deceased told witness that the reason the act was done was that she could not afford to raise any more children, and the witness stated on cross-examination that upon the day deceased was brought to the hospital she stated that she had suffered a miscarriage, brought on by working in the garden, held that evidence of facts tending to show the improbability of the statement implying criminality and the probability of the other was proper in rebuttal.—Gilchrist v. Mystic Workers of the World, 196 Mich. 247.

§ 85. ——Relationship, authority or financial condition.

¶ 441. A note made payable to a certain person or bearer was by that person assigned by writing his name under the maker's instead of by indorsement. In an action by the assignee defendant claimed he was an indorser and not a maker, that such was his contract when he let plaintiff have the note, and that no notice of protest was given him. Held, that plaintiff could prove in rebuttal that when the defendant signed the note it was understood by the parties that his liability was to be that of maker, not indorser.—Cook v. Brown, 62 Mich. 473.

¶ 442. Where defendants had given evidence tending to show that plaintiff had treated with a third person for a new lease to such third person, prior to the expiration

of the lease to them, and plaintiff had introduced evidence tending to show that such negotiations were brought about by collusion between defendants and such third persons to make a show of surrender of their lease, it was competent to ask such third person whether he had any conversation with defendants prior to his obtaining such lease from plaintiff.—Hill v. Robinson, 23 Mich. 24.

¶ 443. Where the defense has introduced testimony to show other persons to have been joint parties with plaintiff to the contract, rebutting evidence is admissible to show the contrary.—Owen v. Union Match Co., 48 Mich. 348.

¶ 444. In trover by an administrator for the value of property alleged to have been converted by defendant, who was decedent's father, the defense of purchase from decedent was set up, and defendant introduced evidence tending to show that his relations with his son were friendly and that his son owed him money. Held, that he could not object to rebutting evidence on the same point.—Ransom v. Bartley, 70 Mich. 379.

¶ 445. C. sued N. on orders which C. had cashed, and which were drawn upon N. by a firm who managed a lumber camp for him, and who used the orders to pay them. C. claimed that N. had asked him to cash such orders, and had promised to repay the money advanced in doing so. N. denied this and claimed that he had nothing to do with paying the men, and that his relations with them were inconsistent with his assuming any such liability. Held, that C. could put in evidence, as relevant and material to his case, a written contract between N. and the firm whereby it was contemplated that N. would or might look after the wages.—Comstock v. Norton, 36 Mich. 277.

¶ 446. Where, in an action against a principal, the letter of an agent is put in evidence to show ratification, it is error to exclude on cross-examination a subsequent letter which would rebut the inferences to be drawn from the first.—Turner v. Phœnix Ins. Co. of Hartford, 55 Mich. 236.

¶ 447. Even if testimony as to statements of defendant's alleged agent bearing on the question of his authority is admissible as part of the res gestæ, it is error to admit it and at the same time to exclude direct testimony of defendant and of such agent as to the authority which was in fact conferred.—Hansel v. Maas, 94 Mich. 563.

¶ 448. Where plaintiff in an action for money lent, claims that he had lent defendant money with which to meet a mortgage on his farm, and defendant denies it, the latter's admissions and declarations that plaintiff had an interest in the farm may be shown.—Waterman v. Waterman, 34 Mich. 490.

¶ 449. Where, in defense to an action for money lent, the attempt is made to show that plaintiff could not have lent the amount because he did not have enough money, plaintiff can show in reply what means he had from which he could have made the loan.—Waterman v. Waterman, 34 Mich. 490.

¶ 450. In trover for goods seized on attachment the defense gave evidence as to the state of the debtor's bank account. Held, that on rebuttal the debtor could be asked how much he had checked out of the bank within the period under examination, as it was pertinent to a portion of his affairs examined into by the defense.—Beurmann v. Van Buren, 44 Mich. 496.

¶ 451. Where the defense in an action upon a check, given in part payment for a quantity of cedar posts, is that payment of the check was stopped by the vendee because of the failure of the vendor to furnish a bill of lading of the posts, which defendant claims he agreed to do, but which plaintiff denies, it is competent for plaintiff to show, as rebutting such defense, that the check was dishonored because defendant had no funds in the bank to meet it.—Cullen v. Detroit Tug & Wrecking Co., 99 Mich. 23.

§ 86. ——Explanation to rebut discrediting evidence or inferences.

Admissibility of evidence of good character to rebut inference, see also post ¶ 1930.
To rebut fact coupled with statement of opposing counsel, see post ¶ 463.
Rebuttal of admissions, see post § 442.
Admissibility of evidence to rebut or explain impeaching evidence, see Witnesses, VI, D.

¶ 452. Testimony explaining the omission of a witness to testify at a previous trial is admissible.—McDonald v. City Elec. Ry. Co., 144 Mich. 379.

¶ 453. It is always competent to show that any evidence in a cause is given for the first time, when there have been previous trials, or to explain why it is so given, and the reason it was not produced before.—Seligman v. Ten Eyck's Estate, 74 Mich. 525.

¶ 454. A party on the trial of a case may explain a mistake made in the trial of another case between the same parties, for the purpose of avoiding a conclusion against him which, but for the explanation, would be obvious. As where the plaintiff in replevin, who has sued the same defendant in assumpsit, has by mistake in the latter action treated the value of the property replevied as an item of set-off.—McDonald v. McDonald, 55 Mich. 155.

¶ 455. Where the plaintiff's witness has testified to admissions made in conversation by the defendant's agent, it is competent for the defendant to prove by another witness

who was present immediately after such admissions were alleged to have been made, and while the conversation continued upon the same subject, subsequent statements by the agent, which, though not directly contradicting the alleged admissions, would tend to convince the jury that they were not in fact made as testified to by the prior witness.—Continental Life Ins. Co. v. Willets, 24 Mich. 268.

¶ 456. A woman brought suit against her husband's employer for an indecent assault. The employer had discharged the husband before the action was brought. Held proper for him to show the reason why, in order to exclude the pretense that it was induced by any change caused by defendant's alleged misbehavior.—Mawich v. Elsey, 47 Mich. 10.

¶ 457. In an action of assumpsit to recover money alleged to have been misappropriated by defendant while a clerk in plaintiff's store, another clerk who testified for plaintiff that he had knowledge of the misappropriation two years before he informed plaintiff, should be permitted to explain why he withheld the information in order to rebut the inference which would arise from such concealment.—Adams v. Elseffer, 132 Mich. 100.

§ 87. Evidence supplementary or explanatory of view by jury.

¶ 458. Where a view of the locus by the jury was had and there is nothing to show whether the jury noticed or observed the physical situation with reference to a particular fact of impermanent character, an officer who accompanied it on the view may be asked what he saw for the purpose of showing whether the situation was the same as at the time the declaration speaks of.—Close v. Lake Shore & M. S. R. Co., 73 Mich. 647, per Sherwood, C. J., and Morse and Long, JJ., concurring in result.

¶ 459. Evidence of the action of a freight elevator subsequent to an accident held competent where at the request of the defendant and with the consent of the plaintiff, the jury were permitted to view it.—McGary v. Buick Motor Co., 182 Mich. 345.

§ 88. Evidence to meet or rebut statements of court or counsel.

See also post ¶ 1942.

¶ 460. Statements of counsel to the jury on summing up are not testimony, and evidence to contradict them is inadmissible.—Hirschfield v. Waldron, 83 Mich. 116.

¶ 461. In an action for labor done by plaintiff and his wife on defendant's farm, testimony of their financial condition when they went to defendant's and when they left there is inadmissible as rebuttal of a statement made by defendant's counsel in his opening speech to the jury, but not supported by any evidence in the record, that plaintiff had used his opportunity of living at defendant's home to accumulate property.—Alderton v. Wright, 81 Mich. 294.

¶ 462. Testimony is not admissible to rebut a statement made by counsel in his opening to the jury, which there is no evidence to sustain.—Munzer v. Stern, 105 Mich. 523.

¶ 463. Where defendant's counsel has by implication charged counsel for plaintiff with having advised a witness to get out of town on a certain train, the charge may be refuted by the testimony of plaintiff's counsel as to his connection with the subpoenaing of the witness, and his reason for not calling him, in order that the jury may correctly understand his conduct.—Lockard v. Van Alstyne, 155 Mich. 507.

§ 89. Evidence made relevant or competent by other evidence.

Evidence to show reason or history of fact to be proved, see also ante § 74.

Opinion made admissible by other opinion or evidence, see post § 208.

Effect of proof of accounts to make bill of particulars made up from them admissible as evidence, see post ¶ 2778.

Admission or rejection of evidence as harmless error because of other evidence admitted or rejected or because of other ruling or practice, see Harmless Error.

¶ 464. A builder's contract is irrelevant to a suit brought by him for extra work which in no way depends upon the contract; and the incidental mention of the contract by one of his witnesses does not make it necessary to produce it.—Webber v. Hanke, 4 Mich. 198.

¶ 465. An inquiry as to what a certain person who by appellant's own evidence had charge of securing witnesses on a former trial of the case, did in that connection, is proper if kept within reasonable limits.—Fulton v. Priddy, 123 Mich. 298.

¶ 466. Where a defendant sued for a criminal assault upon plaintiff in his house has made the state of the weather on the night of the alleged assault material by claiming that it was so hot on that night that the family had to sleep with the doors and windows open, the weather records kept at the insane asylum twelve miles distant are admissible as rebutting evidence in plaintiff's favor.—Hart v. Walker, 100 Mich. 406.

§ 90. ——By admission of improper evidence.

Opening door to transactions with deceased person by offering proof thereof, see Witnesses, IV.

Disability to object by first putting in improper evidence, see Saving Questions.

Admission rendered harmless by other improper evidence in case, see Harmless Error.

¶ 467. Where irrelevant testimony has been introduced by one party he cannot object to rebutting evidence on the same point. —Ransom v. Bartley, 70 Mich. 379.

¶ 468. Where a party has put a fact in issue by his pleadings and has testified to it, he cannot, on the ground that it is immaterial, prevent his opponent from rebutting it.—Ribble v. Starrat, 79 Mich. 204.

¶ 469. Under the general issue without any notice of special defenses, the fact that the plaintiff in an action on a written contract testified as to preliminary conversations does not render competent testimony by the defendant as to the same conversation in order to show fraud or to show a subsequent modification of the writing; the rule permitting incompetent testimony by one party to be contradicted by incompetent testimony by the other does not permit trial of issues not raised by the pleadings.—R. K. Carter & Co. v. Weber, 138 Mich. 576.

¶ 470. Where defendant, in an action for personal injuries alleged to have been caused by a defective brake, introduced in evidence plaintiff's original declaration, which had been amended, it is not error to admit a letter written by plaintiff to his counsel showing that plaintiff was not responsible for the mistake in the declaration.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 471. To the statements of a witness which were not properly admissible in the cause, contradictory evidence was given by the opposite side; evidence corroborative of the statements of such first witness is equally inadmissible, though offered as rebutting merely to such contradictory evidence.—McBride v. Cicotte, 4 Mich. 478.

§ 91. ——Complementary portion of records, correspondence or conversation.

See also post ¶ 2496.
Later letter to rebut earlier, see ante ¶ 446.
Declarations and acts as res gestæ of other act, fact or event, see post, VII, D.
Correspondence as res gestæ, see post § 472.
Complete files in other action to show fact, see also post ¶ 2773.
Pleadings and files requisite to proof of judgments, see post §§ 545, 546.
Offers of documents in whole or in part and construction and effect of offers, see Trial, V.
Right to bring out entire conversation by cross-examination, see Examination of Witnesses, II.
Whole instrument as evidence when part is admissible as declaration against interest, see also Adverse Possession ¶ 248.

¶ 472. Where one party to an action on a replevin bond puts in evidence a part only of the files in the replevin case, the other can introduce the rest; as showing, e. g., that more executions have been issued on the judgment than has been made to appear. —Greenlee v. Lowing, 35 Mich. 63.

¶ 473. In a suit for damages from a wrongful attachment, the affidavit for attachment and the other proceedings are properly put in evidence by the defendant plaintiff having proved only the taking under the writ and the value of the goods.—Blanchard v. Brown, 42 Mich. 46.

¶ 474. Where a letter is put in evidence, the letter to which that is an answer, and which is referred to in it, is proper evidence. —Lester v. Sutton, 7 Mich. 329.

¶ 475. Where, upon plaintiff's direct examination, he puts in evidence letters constituting part of the contract sued on, defendant, on cross-examination, may put in evidence letters written in reply to those introduced.—Gage v. Meyers, 59 Mich. 300.

¶ 476. Letters introduced as parts of a series relating to the period under consideration, in an action for breach of contract of employment, and covered by other letters, are admissible as evidence; where some of the letters objected to were in answer to letters introduced by defendant's counsel on cross-examination of plaintiff, and others were competent as bearing upon the good faith of defendant's statements regarding the claim in controversy.—Proctor v. Hobart M. Cable Co., 145 Mich. 503.

¶ 477. Where plaintiff introduced in evidence a letter from defendant, upon which he relied to support his claim of employment by defendant, which letter referred to one received by defendant from a third party, and which caused defendant to write the letter to plaintiff, as he claimed, the letter so received is admissible in evidence.—Parrish v. Bradley, 73 Mich. 610.

¶ 478. Where on rebuttal plaintiff introduces letters from defendant who had no occasion to introduce testimony on the subject earlier, the latter may show the full correspondence.—Pinkham v. Cockell, 77 Mich. 265.

¶ 479. In an action for goods sold and delivered where the defendants had agreed to make a cash payment and give a note for the balance but had not given the note, there was no error in admitting a letter from plaintiff to defendant relative to the subject-matter and calling attention to the fact that the agreement had been ignored, and stating that unless complied with suit would be brought.—Illinois Roofing & Supply Co. v. Aerial Advertising Co., 142 Mich. 698.

¶ 480. The exclusion of parts of conversations between the parties which are connected in sense with admitted parts and are pertinent to the matter in controversy is error.—Barry v. Davis, 33 Mich. 515.

¶ 481. Where part of a party's statement or conversation is put in evidence as an admission against his interest, he may himself bring out whatever has been omitted that bears upon it.—Vanneter v. Crossman, 42 Mich. 465.

¶ 482. In an action for the value of land which defendant agreed to convey to plaintiff in exchange for other lands, defendant's statements about the trade made before the alleged delivery of the deed though irrelevant standing alone would be relevant, when coupled with the testimony of what he said to the same witness the next day to the effect that the trade had been consummated, as tending to show that the deed was delivered and accepted as claimed by the plaintiff.—Dikeman v. Arnold, 83 Mich. 218.

¶ 483. It is not the rule to allow that part of a conversation which is favorable to a party to be testified to, and to exclude that which may be against him; but the entire conversation is admissible.—People v. Palmer, 105 Mich. 568.

¶ 484. Plaintiff corporation had employed defendant to install a heavy wheel which was broken in placing and plaintiff sought to hold defendant responsible. Plaintiff's superintendent testified that on the next day defendant, admitting that his negligence caused it, said that he would pay for the wheel. Defendant testified that he said he supposed that he would have to pay for it, but that he afterwards stated that he had learned that he was not liable and "was not going to pay." Held that defendant might show all conversations respecting liability had with the superintendent until their discussion ceased.—Swift Electric Light Co. v. Grant, 90 Mich. 469.

¶ 485. A witness having testified in a replevin suit that he sold the horses in question to the wife of the defendant, that the defendant had told him the property given in exchange for the horses belonged to the defendant's wife and that it looked as though he would get beaten, an answer on cross-examination that the defendant said he was so blind he could not see and if he did not get the horses he would go to the poorhouse cannot be held competent on the ground that the defendant is entitled to the entire conversation. He is entitled only to the part which is relevant and material.—Atherton v. Defreeze, 129 Mich. 364.

¶ 486. In an action to recover against the sureties upon the official bond of a township treasurer, a witness may be allowed to testify to a conversation which he had with members of the town board at a certain meeting, although none of the defendants were present, where defendant had cross-examined a town clerk, at length, as to what the witness had claimed at the same meeting.—Township of Alpena v. Mainville, 153 Mich. 732.

§ 92. ——Writings referred to in testimony.

See also ante ¶ 434.

Admissibility of copy of writing without foundation for secondary evidence where other evidence makes it an object of original inquiry, see post § 111.

Copy of letter admissible because of admission that it is a true copy, see also post ¶ 570.

Lease as evidence of character of agreement based thereon, see also Estoppel ¶ 9.

¶ 487. Where a plaintiff had been cross-examined as to certain instruments executed by her and her husband with certain third persons, the instruments themselves could be put in evidence to explain what had thus been drawn out.—Pierce v. Rehfuss, 35 Mich. 53.

¶ 488. Recoupment for breach of warranty was claimed in an action on a note given for the articles sold. The plaintiff claimed that defendant had sent certain letters expressing his satisfaction with the article and asking an extension of time for payment. Held proper to introduce the letters so that the jury, by comparing them with the note, and from other evidence, might determine whether they were genuine and were written by the defendant or by his authority.—Worth v. McConnell, 42 Mich. 473.

¶ 489. A settlement of partnership accounts was claimed to have been made from a memorandum drawn from the books of a firm instead of from the books themselves. Held, that the fact of such settlement being for the jury to determine, the memorandum was admissible in evidence.—Miner v. Lorman, 66 Mich. 530.

¶ 490. A contract may be introduced in evidence on redirect examination, in an action for breach of a contract of purchase, where the defendant testifies on cross-examination to the making of another one-sided contract. The existence of the contract having been testified to on cross-examination, it is admissible.—Blitz v. Roach, 121 Mich. 135.

¶ 491. Where, in a suit by an architect against an owner for services in the supervision of the construction of a building, the defense is that the plaintiff did not compel the contractor to live up to the plans and specifications and the plaintiff admits that his report shows items and details in which the building as completed did not comply with the specifications, it is error to exclude the report as evidence.—Johnson v. O'Neill, 172 Mich. 334.

§ 93. Admissibility for some but not for all purposes.

See also post ¶ 1779.

Testimony partly hearsay but otherwise competent, see post § 314.

Testimony as to statements made out of court admissible for other purposes but not as hearsay on the direct facts stated, see post §§ 326-335.
Declarations by testator as admissions or evidences receivable for certain purposes or against certain persons, see post § 412.
Paper bearing two instruments, one not relevant and other admissible, see also post § 499.
Necessity of foundation for proper purposes, see also ante ¶ 435.
Effect of admission without restriction, see post ¶ 2911.
Reception or offer limiting purpose for which evidence is admissible, see Trial, V, C.
Cautionary instructions, see Instructions, VI.
Previous unchastity as matter of mitigation alone if unknown at time of breach of promise, see also Damages ¶ 676.

¶ 492. Testimony competent for one purpose cannot be excluded because incompetent for another purpose.—McKenzie v. Vandecar, 105 Mich. 232.

¶ 493. Testimony admissible for one purpose cannot be excluded because tending to prove a fact that is inadmissible.—Dalton v. Dregge, 99 Mich. 250.

¶ 494. On a bill of interpleader to determine the right to the proceeds of certain insurance policies, evidence as to the purpose expressed by insured in changing the beneficiary from his wife to his sister was admissible upon the issue of mental incompetency of the insured, but was not admissible for the purpose of proving a gift to the sister.—Great Camp Knights of the Modern Maccabees v. Deem, 143 Mich. 652.

¶ 495. Testimony offered for a purpose for which it is competent is not to be excluded because it tends to prove another fact which is incompetent.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 496. In replevin where the plaintiff testified to conversations with the defendant in which the defendant agreed to return the property, the defendant is entitled to give his version of the conversations in rebuttal even though they tend to show an unaccepted offer of compromise.—Padgett v. Jacobs, 128 Mich. 632.

¶ 497. Testimony competent for one purpose cannot be excluded because it is incompetent for another purpose.—Sykes v. Village of Portland, 193 Mich. 86; Whittemore v. Walter, 193 Mich. 365.

¶ 498. In a suit by an administrator to reach funds of the estate, where the defense relied on is that the funds in question were given by deceased to defendant, and where there was evidence that defendant had admitted that the funds belonged to the estate, defendant is entitled to deny the conversations as to her admissions, to state what the conversations were, and to show that she had claimed the money as hers. However, these statements are not admissible as substantive evidence of the gift, but only to repel the inference of an admission against her ownership.—Campbell v. Sech, 155 Mich. 634.

¶ 499. Where defendant had agreed to give plaintiff half the profits realized from a sale of lands which plaintiff should look up and procure the purchase of, in an action to recover such profits, evidence of a conversation in which defendant stated that he sold the land was admissible in connection with the amount received as showing maturity of the conditions, not being offered to show title.—Davis v. Gerber, 69 Mich. 246.

¶ 500. Letters complaining of delays because materials were not furnished are not evidence in favor of the writer introducing them to show the delay and the complaint, but may show the time of giving orders for shipment.—Carnegie, Phipps & Co. v. Holt, 99 Mich. 606.

§ 94. Prior and subsequent facts.

Acts and declarations subsequent to accident or injury as admissions, see post §§ 399, 400, and see note under § 399.
Deed record made after commencement of suit, where deed was prior to suit, see post ¶ 2747.
Of subsequent conditions as explaining view by jury, see ante ¶ 459.
Doctrine that pleadings speak from time of commencement of action, see Pleading, IX, X.
Evidence of conditions subsequent in time to wrong as affording basis for estimating damages, see Damages, XI, B.
Evidence of physical and bodily condition before and after personal injury, see Damages § 320 et seq.
Evidence of prior injury to and condition of uninjured eye to show impairment of one alleged to have been hurt, see Damages ¶ 1218.

¶ 501. In the absence of direct, circumstantial evidence is admissible to prove the origin of a fire in an action for the damages caused thereby; e. g., it is proper to show that a certain mill chimney often threw sparks and set fire to sawdust, sidewalks, etc., in the neighborhood of the building burned, when the wind and other circumstances were the same, and the burning since of another building from the same alleged cause.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 502. In an action by a physician for his pay in a case in which it was to be contingent on a cure, it was perhaps admissible to allow the jury to consider the patient's condition at the time of the trial, a year after he was discharged, provided there was evidence fairly tending to show that his then

infirm condition related back to the disease for which he was treated.—Beebe v. Koshnic, 55 Mich. 604.

¶ 503. On the issue how a sidewalk appeared to a person killed by a defect, evidence to show the appearance of a sidewalk under exactly similar circumstances and surroundings on the night succeeding an accident is not objectionable as relating to facts observed subsequent to the time of the accident.—Stone v. Standard Life & Accident Ins. Co., 71 Mich. 81.

¶ 504. In an action for the price of articles of which the courts cannot take notice as being perishable property, and which were rejected on arrival as not merchantable, it is not error, in the absence of evidence that their condition is subject to change, to admit evidence of their condition nine months after their arrival.—Imbrie v. Wetherbee & Co., 70 Mich. 103.

¶ 505. In an action for breach of warranty in the sale of fruit trees on account of furnishing trees of inferior variety, testimony of the destroying of trees by frost subsequent to starting suit is inadmissible. The warrantor's liability is determined at the time of bringing suit.—Angell v. Pruyn, 126 Mich. 16.

¶ 506. Where one who has purchased from a partner his interest in the firm sues for false representations that the business is profitable, evidence that the business was unprofitable after the sale is inadmissible unless accompanied by evidence that it was so before the sale.—Totten v. Burhans, 91 Mich. 495.

¶ 507. In an action for personal injuries alleged to have been caused by a defective brake on a hoisting derrick, evidence showing how the brake operated a year after the accident is inadmissible where it had been changed so as to be a different appliance.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

¶ 508. In a suit for alienation of affections, it is not error to exclude questions relating to something which occurred after the suit was commenced.—Gornetzky v. Gornetzky, 174 Mich. 492.

¶ 509. Measurements taken a week after an accident constitute proof that the defects in a railroad gauge existed at the time of the accident where the evidence of the adverse party is that in repairing the track after the accident no change was made.—Anderson v. Michigan Cent. R. Co., 168 Mich. 207.

¶ 510. Testimony as to the disposition, temperament and gentleness of a certain mare, both before and after the accident, is material and relevant upon the question of her disposition, temperament and gentleness on the day of the accident.—Putnam v. Phoenix Preferred Acc. Ins. Co., 155 Mich. 134.

¶ 511. Evidence of the strength of a bridge to sustain heavy loads at the time of the trial of an action for injuries from its nonrepair, and after the structure has been changed, is inadmissible.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 512. Where a city is sued for injuries from a defective bridge, evidence that a few days before the accident another person drove over it and found the planks loose, by reason of which his horses fell through, is competent as tending to show the bridge's condition before the accident complained of occurred.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 513. On an issue raised by recoupment in assumpsit that plaintiff suffered his machinery to be out of repair during the period of the contract so that defendant was on its part subject to enforced delays to its damage, it is not proper to receive evidence that the machine was in bad repair at a later time.—Robinson v. Lake Shore & M. S. R. Co., 103 Mich. 607.

§ 95. Similar distinct or disconnected facts.

Facts related to times other than those pleaded, see ante § 94.

Other forged notes, see post ¶ 553.

Reputation of associates and colleagues of defamed person, see post ¶ 1934.

Admissibility of other alterations as proof of alteration in question, see Alteration of Instruments ¶ 41.

Proof of other illegal certifications to characterize certification in question, see also Banking ¶ 134.

Evidence of treatment of other cattle in action for injury to cattle, see Bailments ¶ 17.

Instances of fright of other horses as evidence of dangerous character of bridge, see Bridges § 16.

Admissibility of other acts of intercourse in bastardy proceedings, see Bastards § 9.

Transactions and correspondence relating to other deals in action for broker's commissions, see also Brokers ¶ 173.

Admissibility of other similar acts under divorce bill to show character of those alleged, see also Divorce § 55.

Evidence of other contract for purpose of proving relative time, see also Contracts ¶ 1334.

Evidence of other times, things and places to show proper performance of contract, see Contracts § 319.

¶ 514. In an action to recover rent, receipts for rent for certain months preceding those for which recovery is sought, standing by themselves and unconnected with the case by any other evidence, are irrelevant.—Campau v. Traub, 27 Mich. 215.

¶ 515. Where a person sued upon a subscription defends upon the claim that he signed the paper "as a starter" upon the condition that it should not be delivered until he should authorize it, evidence that the holder of the paper made a similar agreement with another person is inadmissible in support of his claim.—Davis v. Kneale, 97 Mich. 72.

¶ 515a. In a suit to recover for the loss of property by fire alleged to be due to the negligent driving of defendant's engine near plaintiff's barn, evidence that the same engine, under similar weather conditions and using the same fuel, set another fire on the day following, is admissible to show the lack of a suitable spark arrester.—Ainsworth v. Hover, 162 Mich. 135.

§ 96. Comparisons or tests with other things, times or places.

In rebuttal, see also ante ¶ 433.

Rejection of comparison as indirect evidence when direct is available, see ante § 78, ¶ 403.

Transactions with third persons, see post § 97.

Other contracts as extraneous evidence in aid of contract, see post § 167.

As basis for opinions by experts, see post §§ 296, 297.

Comparison of goods by jury, see post § 568.

Comparison of questioned writings by jury, see post § 569.

Admissibility of conditions or acts at other times or places in action for injuries to passenger, see Carriers § 212.

Relevancy of evidence as to warehouses of other carriers, see also Carriers ¶ 232.

Admissibility of written lease to show terms of related oral lease, see Landlord and Tenant, I, V.

In dispute over missing deposit check, evidence of other deposit checks as fixing amount deposited, see Banking ¶ 48.

Relative wealth or poverty as evidence of contract or ability to perform, see Contracts § 309 et seq.

¶ 516. In an action for the price of goods sold, but rejected by the vendee on their arrival as not merchantable, it is not error to permit the exhibition of some of the goods to the jury, and to admit testimony as to how they compared with others, and also to allow, in connection with such testimony, the exhibition of a sample of goods taken from the original packages of other merchants to show that the goods were not No. 1, as ordered.—Imbrie v. Wetherbee, 70 Mich. 103.

¶ 517. Where the question is about the saving of fuel effected by an engine sold under warranty, tests made with other boilers differently constructed and located and using different fuel are properly excluded as too remote and uncertain for purposes of comparison.—Wickes Bros. v. Swift Electric Light Co., 70 Mich. 322.

¶ 518. Evidence as to the use and effect of spark catchers on steamboat and locomotive smokestacks and the iron smokestacks of mills was held admissible in a case where suit was brought to recover damages for a fire caused by sparks from the brick chimney of a mill.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 519. In an action to recover the price of a machine constructed for defendant, and which he has refused to accept because it does not meet the contract, evidence of the workings of other machines, not like the one in suit, and as to the amount of help required to operate them, is inadmissible.—Locke v. Priestly Express Wagon & Sleigh Co., 71 Mich. 263.

¶ 520. In an action against a railroad company for fire from sparks scattered by a particular engine known and designated, it is not competent to show that another of defendant's engines caused fire at other times and places.—Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163.

¶ 521. In an action for personal injuries sustained by stepping off a train where the stop was so short as to necessitate haste in getting on or off the train it was not error to exclude testimony of a subsequent test to determine the length of time that the engineer probably took to oil his engine at the station at the time of the accident.—O'Dea v. Michigan Cent. R. Co., 142 Mich. 265.

¶ 522. Where a street car collided with an automobile, the testimony of a policeman, who used a motorcycle having upon it a speedometer, as to the speed of a car at the place of the accident on the day prior thereto (based on the testimony of the motorman that all cars ran at about the same rate of speed) is incompetent.—Puffer v. Muskegon Traction & Lighting Co., 173 Mich. 193. (Moore, C. J., and Bird, J., dissenting.)

¶ 523. In a suit to recover for property destroyed by fire from a locomotive, reports of the United States Weather Bureau showing the direction of the wind 120 miles from the place in question are not admissible, where no evidence is offered to show that the wind would likely be in the same direction at both places at the same time.—J. H. Worden Lumber & Shingle Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 168 Mich. 74.

¶ 524. The general condition of a bridge at the time of an accident from its nonrepair being in issue, it is proper to ask, after evidence had been offered showing the condition of the lugs carrying the floor joists where the accident occurred, about the condition of the lugs on other parts of the

bridge.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 525. In order that evidence that other plants in the immediate vicinity of a cement company were started on the same plan and successfully operated may be competent on an issue as to watering of stock in an action on notes given for stock, it is necessary not only to offer to show a similarity in the soil and means of access to the market but also to offer to show that the material facts in the organization of the neighboring companies were the same.—Loud v. Solomon, 188 Mich. 7.

¶ 526. In an action for the loss of crops, resulting from defendant's flooding plaintiff's land, plaintiff's testimony as to the amount of crops from the land the year before is admissible to show the land's capacity for producing.—Witheral v. Muskegon Booming Co., 68 Mich. 48; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

¶ 527. In an action to recover freight overcharges on interstate shipments, the tariffs and classifications having been duly published, and the only question being whether wastes and overflows and traps were subject to the minimum tariff as brass goods or to a maximum tariff as plumbers' supplies, held that the report of the Interstate Commerce Commission in another case was inadmissible in evidence where it appeared that the report was based upon the fact that the wastes and overflows were mixed in a package with other goods which were clearly plumbers' supplies, thus subjecting the whole shipment to the higher rate.—Wolverine Brass Works v. Southern Pac. Co., 187 Mich. 393.

§ 97. Acts or transactions with third persons.

Hearsay and admissions involving third persons, see post, VII.

Pleadings and files in other actions as documentary evidences, see post § 548.

Admissibility of judgments between strangers or between one of the parties and strangers, see Former Adjudication, I.

Admissibility of judgment as bar or estoppel between parties and their privies, see Former Adjudication.

Matters relating to other persons as evidence in trespass for assault, see also Assault ¶ 92.

¶ 528. The quality of goods furnished at a given time by plaintiff to defendant being in question, it is competent for plaintiff to show that the quality of like articles furnished by him at the same time to another party was good, if such evidence be followed by evidence that the goods furnished by him at that time to defendant were of the same kind and quality.—Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116.

¶ 529. In an action by a firm of merchants against their traveling man to recover money overpaid to him in refunding his traveling expenses, the action being based on the theory that he had reported his expenses as larger than they actually were, it was not error to exclude evidence of the actual expenses of other traveling men over the same route in the same years, and that they were much less than were charged by defendant. Such matters are res inter alios acta, and if the circumstances are not identical they cannot be relevant.—Linn v. Gilman, 46 Mich. 628.

¶ 530. Where one of the parties to a contract sues the other for preventing its performance, a prior contract, made by the defendant with a third person, can have no bearing unless it appears from the contract in suit that it was made with reference to the prior contract.—Goodrich v. Hubbard, 51 Mich. 62.

¶ 531. In a garnishment proceeding on an issue of a fraudulent transfer by the principal debtor to the garnishees according, as claimed, to a purpose of buying goods on credit and transferring them in satisfaction of a fictitious indebtedness to the garnishees, it is improper to admit evidence that the garnishees had settled with other creditors or to show the record of judgment in a case between them and other creditors.—Gumberg v. Treusch, 103 Mich. 543.

¶ 532. Evidence by plaintiff that defendant "company through its agent paid other claims similar to his" is inadmissible either to show the agent's authority or to raise an inference that an agreement to pay plaintiff's claim was made.—Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422.

¶ 533. Evidence, in trover for logs alleged to have been converted by defendant, of defendant's conversions and attempted conversions of logs belonging to others, tending to show that defendant was engaged in the business of stealing and sawing the logs of others, was incompetent.—Seymour v. Bruske, 140 Mich. 244.

§ 98. To prove particular facts.

[Note. Both the relevancy and the sufficiency of the evidence offered and receivable in proof of specific facts are treated in the specific topics dealing with such facts. See generally those portions of the other topics devoted to "evidence" or "actions and procedure."]

Sufficiency of proofs, see post § 586, and cross-references there collected.

Best and secondary evidence of particular facts, see post §§ 113-136.

Admissible opinions and conclusions, see post, VI.

Proof of pedigree, age or relationship by hearsay, see post § 323.

Proof of matters of general interest by hearsay, see post § 321.

Proof by recitals in ancient documents, see post § 322.
Admissibility of character and reputation as bearing on particular facts, see post §§ 349-357.
Birth, baptismal and marriage records as evidence of age, see also post §§ 509, 510.
Proof of sounds by phonograph, see post § 571.
Proof of appearance by photographs, see post § 572.
Issues of fact as to jurisdiction, and evidence thereon, see Courts, V.
Mode of proving customs and usages, see Customs § 7.
Habits and appearance of animals as bearing on viciousness, see Animals § 16.
Evidence as to vicious character of animal, see Animals § 16.

§ 99. To prove mental state or attitude.

Declarations competent to show intent, knowledge or thoughts of declarant, see post §§ 329-335.
Admissible opinions and conclusions, see post §§ 231 et seq., 259.
Evidence as to insanity, see Insane Persons, I.
Evidence as to intent and malice, see topics treating of torts in which intent or malice may be an element, e. g., False Imprisonment; Malicious Prosecution; Libel.
Deed as evidence of mental state or belief though superseded by later deed, see also Easements ¶ 79.

¶ 534. Where one's consent to the flowing of water on his lands is in issue, he may show all things done by him or by others in his behalf by way of protest or remonstrance against such diversion.—Chapel v. Smith, 80 Mich. 100.

§ 100. To prove physical or bodily conditions, causes and effects.

Admissible opinions and conclusions, see post §§ 236 et seq., 257.
Evidence as to damnatory consequences of injury, see Damages, XI.

¶ 535. In an action for negligently causing the death of plaintiff's decedent, who was struck by a street car, and received injuries from which he died, testimony of what appeared by a post-mortem examination of the decedent is competent as furnishing one of the means of ascertaining what the result of the injury was.—McClellan v. Fort Wayne & B. I. R. Co., 105 Mich. 101.

¶ 536. On the issue whether there was a drug addiction it may be shown that the alleged subject manifested certain symptoms, since these might become a proper basis for expert testimony on the issue.—Buxton v. Emery, 139 Mich. 341.

§ 101. To prove expectancy of life.

Admissible opinions and conclusions, see post §§ 236, 243, 258.
Admissibility of mortality tables in action for death, see Death by Wrongful Act § 26.
Admissibility of mortality tables on expectancy for purpose of measuring prospective damages from injury, see Damages §§ 329, 330.
Proving money value of dower interest by mortality tables, see Dower § 56, ¶ 143.

¶ 537. Testimony as to longevity of a person's ancestors is admissible on the question of such person's expectancy of life, the mortality tables not being conclusive on that point.—Sterling v. Union Carbide Co., 142 Mich. 284; and see also Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582, per McGrath, C. J.

¶ 538. In a suit by an administrator under the Survival Act (Comp. Laws 1897, § 10117) for injuries to a child resulting in its death, the father may be permitted to testify whether or not his grandparents are living, and the mother to testify as to the age of her father and other ancestors.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 539. Computation of the value of the estate of a dowress may be based on mortality tables, but conjecture as to the probable duration of the claimant's life, based on her present state of health or bodily condition, seems inadmissible.—Brown v. Bronson, 35 Mich. 415.

§ 102. To prove intent, knowledge or motive.

Competency of one to testify to his own intent, see post § 235.
Books of account as evidence of knowledge of person having access to them, see also post ¶ 2691.
Admissible opinions and conclusions, see post § 232 et seq.
Best and secondary evidence of notices, see post § 116.
Evidence probative of intent, see generally topics treating of subjects or torts whereof intent is a factor, e. g., Malicious Prosecution; Libel; Fraud; Fraudulent Conveyances.
Evidence of notice or knowledge, see topics treating of thing which is the subject of notice, e. g., Negotiable Instruments, XIII, XIV; Notice and Record of Title, I.
Other agreements and letters to show knowledge and assent to alleged contract, see also Contracts § 312.
Acts evincing intent to have domicile, see Domicile § 7.

¶ 540. Where the motive of a person for doing an act out of the ordinary course of events is a legitimate subject of inquiry, under the issue, all the surrounding circumstances and influences that might have con-

tributed to or caused such motive may be inquired into.—White v. Bailey, 10 Mich. 155.

¶ 541. In torts not involving intent evidence of the good faith of the defendant is irrelevant where actual damages only are sought.—Grant v. Smith, 26 Mich. 201; Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 542. Where, in an action for damages from a collision in a highway it appeared that defendant, who was approaching plaintiff in a buggy on the opposite side of the road drove across and ran into plaintiff's horse, injuring it, evidence of defendant's ill-will towards plaintiff before and up to the time of the collision was admissible as bearing upon his motive in crossing the road.—Tyler v. Nelson, 109 Mich. 37.

¶ 543. The fact that one had such an interest as might have afforded a motive for giving a bonus is not admissible where tending solely to corroborate the giving of the bonus of which there was no evidence.—Devereaux v. Estate of Phillips, 97 Mich. 104.

¶ 544. In an action on a life insurance certificate, where waiver of a forfeiture for nonpayment of assessments is in issue, evidence of statements made by the insured to an officer of the company relative to its custom of reinstating delinquent members upon a showing of good health, is admissible to show his knowledge of such custom.—Jones v. Preferred Bankers' Life Assur. Co., 120 Mich. 211.

¶ 545. In an action by one daughter of the testatrix against another daughter to set aside a deed made by the mother, evidence that the testatrix of full mental capacity executed a deed to a daughter and granddaughter, in order ostensibly to claim a dependent's pension, has a legitimate bearing on the question of the actual intention of testatrix as to the distribution of her estate, since a deed to the two daughters would have accomplished her ostensible object as well as one to a daughter and granddaughter.—Price v. Hagle, 171 Mich. 455.

¶ 546. On the question whether a certain mare was known to be vicious and unmanageable, it was competent for plaintiff disputing such knowledge to prove by a former owner that she was valued at $250 as bearing on the reputation and quality of the mare.—Putnam v. Phoenix Preferred Acc. Ins. Co., 155 Mich. 134.

§ 103. To prove ownership, control or possession.

Admissible opinions and conclusions, see post §§ 213-215.
Best and secondary evidence, see post § 114.
Best and secondary evidence of custody of writing, see post § 117.
Declarations and acts in derogation of or as res gestæ of title or possession, see post §§ 364, 365, 414 et seq., 447, 448.
Admissibility of common report as to claim, see post § 357.
Admissibility of deeds and mortgages, see post §§ 492, 493.
See generally topics treating of actions based on right or possession, e. g., Ejectment; Replevin; Conversion; Trespass.
Evidence of title by particular method, see Adverse Possession; Easements; Descent and Distribution; Gifts; Wills.
Evidence as to ownership or control of railroad, see also Carriers § 215.
Relevancy of evidence as to who were decedent's heirs in ejectment by one claiming under heir, see Ejectment ¶ 157.

¶ 547. In trover for the conversion of a heifer which both parties claimed to have raised, it was proper, in proving identity, to ask a witness who had testified to having been among the plaintiff's cattle for two or three years, about their being gentle and coming about people; all such facts and circumstances or characteristics as would tend to settle the question of ownership would be competent evidence.—De Armond v. Neasmith, 32 Mich. 231.

¶ 548. Where, in order to show title to the note in suit, plaintiff testifies to the purchase and to the amount paid, the check given in payment is admissible as part of the transaction, and as tending to corroborate the alleged purchase.—Pearson v. Hardin, 95 Mich. 360.

¶ 549. Proof that the claimant of land has not paid the taxes on it has some tendency to rebut his claim of absolute ownership.—Stevens v. Hulin, 53 Mich. 93.

¶ 550. As tending to show insincerity and baselessness of one's claim of right to occupy land with a house bought as a chattel on the ground that such right of occupancy passed with sale of the house, it is admissible to receive the bill of sale to claimant's immediate predecessor and a chattel mortgage back for the purchase price, where the absence in such instruments of anything indicative of a tenancy in land or the creation of one tends to show a total want of such right in claimant, who took by a parol sale.—Thurkettle v. Frost, 137 Mich. 115.

Proof of ownership of vehicle causing injury, see note, 2 N. C. C. A. 580-587.

§ 104. To show identity, genuineness or authorship.

Best and secondary evidence of identity and genuineness of writing, see post § 117.
Admissible opinions and conclusions, see post § 222.
Admissibility of hearsay, see post § 324.

See generally specific topics dealing with the subject whereof identity, genuineness or authorship becomes material.
As to genuineness of instruments, see Execution of Instruments, I.
As to authorship of and responsibility for another's acts, see topics treating of torts, and see also Agency, II; Master and Servant, IV; Independent Contractors.
Presumption of identity of persons of same or similar names, see Names.
Mode of proving identity of goods sold, see also Account Stated ¶ 39.
Evidence to identify animals, see Conversion ¶ 153.
Appearance of dog compared with other dogs in the county as evidence to establish liability for injury, see Animals ¶ 77.

¶ 551. Where an exhibit consists of a blank leaf from a scratch pad, and is alleged to have been a writing made at a certain bank, a witness may be allowed to testify that there was paper used in the bank similar to that upon which the exhibit was written.—Township of Alpena v. Mainville, 153 Mich. 732.

¶ 552. Where an exhibit is in evidence which is claimed to be an original memorandum of figures made by the parties at a certain settlement alleged to have taken place at a bank, the cashier of the bank may be allowed to testify that at the time paper similar in color and size was in the room where the settlement was made.—Township of Alpena v. Mainville, 153 Mich. 732.

¶ 553. Where the defense to an action upon a note is forgery, evidence from which the jury might infer that another note which plaintiff had attempted to collect was a forgery, is admissible as bearing upon the question.—Hyman v. Kirt, 153 Mich. 113.

§ 105. ——Identity or location of land.

Best and secondary evidence, see post § 118.
Hearsay to identify land, see post § 325.
Official surveys as documentary evidence, see post § 541.

¶ 554. In ejectment for lands described as "a certain lot according to the plat of the village of Portsmouth," the identity of the lands may be proved by persons acquainted with it, without the production of the recorded plat.—Johnstone v. Scott, 11 Mich. 232.

¶ 555. The location of lands may be proved by any kind of evidence that would be admissible to prove any fact.—Twogood v. Hoyt, 42 Mich. 609.

¶ 556. Where the controversy was whether lumbering on certain lands ceased in 1873, a witness testified that subsequently he worked upon lands the government description of which he could not give, but which he had pointed out to another witness. Held, that the latter witness, after testifying that the lands were so pointed out to him, and that he knew the descriptions, could give the same.—Wright v. Dickinson, 67 Mich. 590.

¶ 557. In an action of ejectment, where land is described as lying in a given direction from a certain creek, and in later deeds as lying in a like direction from a supposed river, the identity of the two streams may be shown for the purpose of showing the identity of the land.—Sanscrainte v. Torongo, 87 Mich. 69.

§ 106. Solvency and insolvency.

Rebuttal evidence as to pecuniary resources or ability, see ante ¶¶ 449-451.
Admissible opinion or conclusion, see post ¶ 1247.
Admissibility of reputation, see post § 355.
Solvency or insolvency of person as bearing on probability that credit was extended to him or contract made with him or as basis of inference of motive to defraud, see Contracts, X; Sales, VIII, IX; Fraud, III; Fraudulent Conveyances, I, V; etc.

IV. BEST AND SECONDARY RULES.

A. DISTINCTION BETWEEN BEST AND SECONDARY; WHAT IS BEST.

§ 107. In general, nature and distinctions.

Various writings and reproductions considered as originals or copies, see post §§ 108-112.
What is best and what secondary evidence of particular facts, see post §§ 113-136.
Best evidence rule applied to matters usually or necessarily required to be in writing, see post §§ 117-126.
Rule as applied to contracts and particular kinds of contracts and conveyances, see post § 127 et seq.
Testimony to fact of deed, contract or ownership, etc., without going into contents of the writing, see generally post §§ 117-119, 127-133.
Competency of one to testify to his own intent, see post § 235.
Contents of writing tendered and refused, see post ¶ 608.
Inadmissibility of presumptions where better evidence is required, see ante § 30.
Right to have best evidence of fact as reason for compelling production of books and papers, see Discovery ¶ 22.
Best and secondary rules in prosecutions for crime, see Indictment, VIII, B.

¶ 558. The rule requiring the best evidence does not operate to exclude evidence merely because it is not all or the most satisfactory that might be adduced, when the evidence offered and that withheld is of the same general quality and grade.—Shotwell v. Harrison, 22 Mich. 410.

¶ 558a. Degrees of evidence exist only in the case of documents to which the best evidence rule applies, and that rule does not exclude testimony of lay witnesses to matters observed of which they are competent to testify merely because there are medical witnesses to testify to the same matters.—Elliott v. Van Buren, 33 Mich. 49.

¶ 559. One who tallied lumber on a shingle and who threw the shingle away after copying the result into a certificate may testify to the amount of the tally against an objection that the shingle was the best evidence.—Crane Lumber Co. v. Otter Creek Lumber Co., 79 Mich. 307.

¶ 560. Evidence of a scale of logs held competent where, from the nature of the lumbering business, greater certainty was impossible.—Seligman v. Ten Eyck, 60 Mich. 267.

¶ 561. Defendant, a boom company, agreed to drive plaintiff's logs at a certain sum per 1,000 feet, the final settlement to be made on the woods' scale. Plaintiff employed a scaler in the woods, who scaled the logs cut and put afloat in the river there, and payment was made on the basis of the scaler's statement. After the logs had been taken out of defendant's boom and sawed, plaintiff, claiming that there was a gross mistake in the woods' scale, sued for the overpayment. Held, that it was competent to prove by the mill-tally sheets and the scalers who made them the actual amount of logs taken out of defendant's boom; the mill tally being the best evidence then obtainable, and the difference between it and a woods' scale being properly explained to the jury.—Lane v. Pere Marquette Boom Co., 62 Mich. 63.

¶ 562. Since a waiver need not be in writing, parol evidence is admissible to prove the exercise by a party of his option to waive a written stipulation or condition in his own favor.—Cobbs v. Fire Ass'n of Philadelphia, 68 Mich. 463.

§ 108. Duplicates and multiple originals.

Equal admissibility of oral evidence or carbon copy to prove lost letter, see post § 154.

Competency of copy of lost duplicate as secondary proof without accounting for other original, see post ¶ 760.

Which is "original" of contracts in duplicate, see Contracts § 5.

¶ 563. In an action upon a contract executed in duplicate plaintiff may put his contract in evidence without calling for the production, or explaining the absence of its duplicate.—Cleveland & T. R. Co. v. Perkins, 17 Mich. 296.

§ 109. Photographic or mechanical facsimiles.

Photographic copies of handwriting, see post ¶ 2851.

¶ 564. Copies of any kind, photographic or otherwise, are merely secondary evidence.—In re Foster's Will, 34 Mich. 21.

¶ 565. An X-ray picture of an injury is the best evidence of what the picture reveals.—Jolman v. Alberts, 192 Mich. 25.

¶ 566. Where an original letter was sent to a third person, a carbon copy thereof being at the same time sent to defendant which it failed to produce on notice, a carbon copy retained by plaintiff was held not to have been improperly received in evidence.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

¶ 567. Carbon copies of letters are inadmissible, because not best evidence, where no showing is made of demand upon the adverse party to produce the originals.—Plankinton Packing Co. v. Berry, 199 Mich. 212.

§ 110. Oral statements reduced to writing.

¶ 568. Copies of statements made orally to a commercial agency of what a merchant stated as to his financial standing, which were written down by persons receiving such statements at the time, and which the testimony tends to show were subsequently approved of by the merchant, but not signed by him, are admissible as evidence in favor of creditors who claim to have been defrauded by such representations.—Mooney v. Davis, 75 Mich. 188.

¶ 569. Parol testimony as to testimony given in another case was competent, although the testimony in such other case was taken by a stenographer and the latter testified from his minutes.—Lange v. Klatt, 135 Mich. 262.

§ 111. Copy itself as primary evidence.

Carbon copy as original when duplicate copy was mailed, see also ante ¶ 566.

¶ 570. Where a defendant testifying admits that an alleged copy of a letter written by him is substantially correct, this is sufficient to make it evidence.—Kelly v. McKenna, 18 Mich. 381.

¶ 571. Oral testimony as to the contents of a communication written to a defendant is competent where the loss has first been proven, even though no notice to produce was given to the defendant, it appearing that during the course of negotiations a copy of the communication was read to him.—Meade v. Bowles, 123 Mich. 696.

¶ 572. A copy of a letter in which plaintiff informed defendant as to his fraudulent misrepresentations regarding the mortgages in question, was properly admitted as against objection that the original and not the copy should have been produced; where the identical paper, to wit, the copy in question, formed the subject matter of a conversation

between defendant and plaintiff's representative.—Simonds v. Cash, 136 Mich. 558.

¶ 573. A copy of a verified bill of complaint served on the defendant in an action between two defendants in another action, in which it is sought to hold one of them liable for the acts of the other as agent, is competent to show admissions on the part of the alleged principal tending to prove the existence of an agency, such copy being the one served, and objection being that the original should be offered although the weight of such admission as evidence is for the jury.—Mally v. Excelsior Wrapper Co., 181 Mich. 568.

§ 112. Records and official copies as primary evidence.

Admissibility of records of instruments, see post, VIII, C, 1.
Admissibility as original proofs of transcripts and copies of records and documents, see post, VIII, C, 2.
Certified copies, see post, VIII, C, 2.
Necessity and sufficiency of authentication and certification of copies offered as proof, see post, VIII, C, 2.
Certificate of record indorsed on deed, see post § 535.

¶ 574. In the absence of a statute authorizing it, the record of a deed is not primary evidence of the existence and genuineness of the original.—Brown v. Cady, 11 Mich. 535.

¶ 575. A document certified by the secretary of state under the great seal of the state to be a true transcript of a record kept in his office, of a patent from the state, is not admissible as primary evidence of title.—Bradley v. Silsbee, 33 Mich. 328.

§ 113. One's own age.

¶ 576. One's testimony as to his own age cannot be rejected on the ground that it is not the best evidence.—Cheever v. Congdon, 34 Mich. 296; Morrison v. Emsley, 53 Mich. 564.

§ 114. Ownership, title or claim.

Deed as best evidence of extent of possession thereunder, see also Adverse Possession ¶ 247.

¶ 577. A party owning property consisting of chattels and choses in action is presumed to know it, and may testify to the fact of ownership where it is material; the means of his knowledge can be disclosed on cross-examination.—Cilley v. Van Patten, 68 Mich. 80.

¶ 578. Ownership of lands cannot, against objection, be proved by parol evidence.—Jennison v. Haire, 29 Mich. 207.

¶ 578a. The record of title to the land is not the best evidence of the right of one of the spouses owning by the entirety to have the crops, where the claim to them was not on the title but was based on a parol agreement by husband and wife that he should have all of the crops.—Parks v. Norris, 101 Mich. 71.

¶ 579. Parol evidence is admissible of a bare license to do certain acts on another's land, although a claim of right therein must be based on writing.—Millerd v. Reeves, 1 Mich. 107.

¶ 580. In an action of ejectment for land purchased from heirs, it is admissible, by way of identifying the original owner of the land, to ask whether he had owned real estate at the locus in quo. The question is preliminary and not objectionable as an attempt to prove title to lands by parol.—Taylor v. Youngs, 48 Mich. 268.

¶ 581. Parol testimony as to the size of the lot claimed by plaintiff in ejectment was not admissible, where plaintiff's only claim of title was an executory contract for a lot in a plat from one who is not shown to be seised of such property, and where nothing was offered to show the location of such property or what were its dimensions.—Stolnski v. Pulte, 77 Mich. 322.

¶ 582. One suing to recover back taxes paid under protest on lands not owned by him may testify what lands he owns in the township, without producing the deeds, his purpose being not to establish title to lands but to show what he does not own.—Babcock v. Township of Beaver Creek, 65 Mich. 479.

§ 115. Amount or debt or payment.

¶ 583. Mortgagees bringing replevin against an officer who has attached the goods may testify from their recollection as to the amount due upon the mortgage, and are not compelled to put in evidence books produced in court which they say contain the account between them and the mortgagor.—Hyde v. Shank, 93 Mich. 585.

¶ 584. Where the validity of a tax and of a deed based thereon is involved, it is admissible to show by parol the payment and actual receipt of unlawful additional compensation to certain judges out of the tax levy where the records show the tax was raised for the purpose of such payment.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

§ 116. Notices.

Secondary evidence without notice to produce original, see post § 146.

¶ 585. A notice to quit may be proved by copy without notice to produce the original.—Falkner v. Beers, 2 Dougl. 117.

¶ 586. A tax protest, being a mere notice, may be proved by secondary evidence, and is

provable by copy made at the same time with the original, without showing loss of the original or notice to produce it.—Michigan Land & Iron Co. v. Township Republic, 65 Mich. 628.

¶ 587. Parol evidence of contents of a notice to quit may be given by plaintiff in ejectment, who served it, where the notice retained by plaintiff has been lost, and defendant, being notified, fails to produce it at the trial.—Johnson v. Johnson, 70 Mich. 65.

¶ 588. The notice served by a wife upon a liquor dealer forbidding him to sell to her husband need not be in writing, and, in proving it, it is not therefore necessary to give notice to produce the original, even if it was written.—Loranger v. Jardine, 56 Mich. 518.

§ 117. Identity, existence or custody of writing or entry.

See also post ¶ 658.

Proof that deed was executed and delivered, see also post § 119.

¶ 589. Where the immediate issue is whether there was a contract in writing, oral testimony bearing on that issue cannot be excluded on the assumption that such writing exists.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

¶ 590. Oral evidence is admissible to show identity of an affidavit returned to files with one taken therefrom.—Beebe v. Morrell, 76 Mich. 114.

¶ 591. To identify a lien statement a witness may be asked whether or not at a specified time he swore to a statement of lien in another's behalf.—Huntoon v. O'Brien, 79 Mich. 227.

¶ 592. Parol evidence is admissible to show the existence of a note which has been surrendered to the maker upon his agreement to pay the balance due thereon.—Hanselman v. Doyle, 90 Mich. 142.

¶ 593. Testimony that a plaintiff claiming to have been damaged by an enforced shutdown of its mill had orders ahead is admissible without producing the orders, where loss of time and not loss of the orders was the gravamen of the claimed damages.—Michigan Paper Co. v. Kalamazoo Valley Elec. Co., 141 Mich. 48.

¶ 594. A witness may testify without producing them whether books contain a given entry.—Maxwell v. Paine, 53 Mich. 30; and see also Hoffman v. Pack, Woods & Co., 114 Mich. 1.

§ 118. Location, identity or possession of property.

Mode of proving identity and location of lands, see ante § 105.

To identify property levied on rather than to show contents of writ, see also post ¶ 621.

¶ 595. Parol evidence is admissible to show that certain lands are within a specified school district where it becomes material to show it in determining the legality of school taxes.—Brooks v. Fairchild, 36 Mich. 231.

¶ 596. Parol testimony that the property in question had been taken on an execution may be given, not to show the contents or validity of the execution, but to identify the transaction.—Hunt v. Strew, 33 Mich. 85.

§ 119. Execution, filing and recording of instruments.

¶ 597. Where it is necessary, in order to show performance of a condition, to prove the execution and delivery of a deed, the deed should be produced or accounted for. It is not sufficient for a witness to testify that such a deed was executed and delivered.—Thompson v. Richards, 14 Mich. 172.

¶ 598. Oral testimony that a deed was made by a third person to the defendant is sufficient to support a claim for an agreed commission for inducing a third person to make a deed in the absence of objection to the evidence and no contrary testimony.—Gruett v. Dibble, 126 Mich. 623.

¶ 598a. A conditional delivery of a deed in escrow to a third person for ultimate delivery to the grantee, may be shown by parol.—Brown v. Keiser, 182 Mich. 432.

¶ 599. Testimony of a witness in regard to returning or filing a public document is limited to such a general description as will suffice to identify it.—City of Muskegon v. S. K. Martin Lumber Co., 86 Mich. 625.

¶ 600. The testimony of a mortgagee that he left a copy of his mortgage with the township clerk for record, and paid him his fees, as he thinks, upon a certain day, cannot be considered by the jury as evidence of the filing of the mortgage, in the absence of the copy with the filing upon it, or of some showing why it cannot be produced.—Curtis v. Wilcox, 91 Mich. 229.

§ 120. Contents of writings in general.

Particular contracts and their terms, see post §§ 127-136.

When secondary is admissible, see post, IV, B.

Evidence of corporate purposes and objects, see also Corporations § 72.

Testimony that record does not contain given matters, see also post § 531.

¶ 601. A witness cannot be asked what he stated in an affidavit, but the proper practice is to produce the affidavit itself.—De May v. Roberts, 46 Mich. 160.

¶ 602. The contents of a receipt for a permit to make sewer connections should be proved by the receipt and not by oral evidence.—Zube v. Weber, 67 Mich. 52.

¶ 603. Testimony as to the contents of a paper which is not introduced in evidence is incompetent.—Coburn v. Muskegon Booming Co., 72 Mich. 134.

¶ 604. Oral testimony as to letters written by the witness is incompetent, the letters themselves being the only competent evidence of their contents.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

¶ 605. A question as to whether a letter was ever written and what it contained is objectionable as calling for the contents of a writing.—Conroy v. Haffner, 182 Mich. 289.

¶ 606. A question calling for the name of an association to which the witness has referred in a letter written by him does not necessarily call for the contents of a written instrument.—Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 607. A plaintiff's testimony that goods sold were charged to defendant married woman on his books and not to her husband is not the best evidence as to whether they were so charged at the time of the purchase, if the books might show that fact.—Powers v. Russell, 26 Mich. 179.

¶ 608. A plaintiff may state the contents of a receipt presented to him by defendant, for a certain sum in full of all claims, which plaintiff refused to sign, and returned to the defendant, without producing the paper or giving notice to the defendant to produce it; it amounts only to proof of a conversation of which the receipt was a part.—Ranney v. Donovan, 78 Mich. 318.

§ 121. Public acts and resolutions, ordinances and statutes.

See also post ¶¶ 1173, 1175, 1177.
Sufficiency of foundation proofs to admit secondary, see post §§ 148, 149.
Admissibility of parol to add to or contradict or explain records, see post §§ 195-197.
Documentary proofs, see post §§ 532, 534.
Necessity of proving foreign laws by copy or transcript, see post § 555.
Admissibility of parol evidence of common law in other states and countries, see Jud. Act, chap. XVII, § 27; Comp. L. 1915, § 12515.

¶ 609. Parol evidence, if objected to, is inadmissible to prove a resolution of a school district board fixing the rate of tuition of nonresident pupils.—Thompson v. Crockery School District No. 7, 25 Mich. 483.

¶ 610. Whenever the law requires written evidence of the action taken by officers in tax proceedings, the record is the only proper evidence.—Mills v. Township of Richland, 72 Mich. 100.

¶ 611. A city or township treasurer may testify to the fact and time of making a return or statement of unpaid personal taxes to the county treasurer in a suit for their collection.—City of Muskegon v. S. K. Martin Lumber Co., 86 Mich. 625.

¶ 612. The county clerk may testify, from an examination of the record of the board of supervisors, that the signatures of the chairman and clerk are wanting, and that a certain transcript of a part of the record comprises all that appears therein upon a particular subject.—Hoffman v. Pack, Woods & Co., 114 Mich. 1.

¶ 613. Under Local Acts 1897, No. 374, title 9, § 31 (Charter of Grand Rapids), requiring the board of public works to keep a record of its proceedings and determinations showing the vote of each member on every question, no other evidence of the action of the board than its records on a subject of action can be considered.—Graham v. City of Grand Rapids, 141 Mich. 612.

¶ 614. Testimony of the presiding officer of the board of supervisors sitting in review of the assessment of taxes, and the minutes of an unofficial stenographer, transcribed long after the record of the action of the board was made, to the effect that at the close of each day's proceedings an adjournment was publicly announced to the date of the next session, will not make valid the certificate and record of such board, in which no adjournments are shown; since such a holding would be permitting the levy and assessment of taxes to be founded upon parol.—Delray Land Co. v. Township of Springwells, 149 Mich. 397.

§ 122. Judgments and judicial acts and process.

When secondary is admissible, see post IV, B.
Admissibility of parol evidence to explain, vary or impeach, see post § 198.
Record and documentary proofs, see post §§ 544-546.
As to identity of levy under process, see ante ¶ 596.
Proof of proceedings before justice by his oath, see Jud. Act, chap. XVII, § 31; Comp. L. 1915, § 12519.

¶ 615. Journal entries and interlocutory orders and decrees in chancery are to be considered as originals; and are admissible in evidence without producing the enrollment.—Lothrop v. Southworth, 5 Mich. 436.

¶ 616. An order of partition by the territorial register of probate (1 Ter. Laws, p. 160), requiring conveyance of a parcel of land to a certain person, held to be the best and only legitimate evidence that such person's right to the conveyance had been established.—Willetts v. Mandlebaum, 28 Mich. 521.

¶ 617. The paper in a justice's files which he treated as a confession of judgment is

the best evidence to show its own real character, though the judgment recites that it was made on confession.—Dodge v. Bird, 19 Mich. 518.

¶ 618. Under Michigan Const., art. 6, § 10, providing that "the decisions of the supreme court shall be in writing, signed by the judges concurring therein," and any judge "dissenting therefrom shall give the reasons of such dissent in writing, under his signature." and all "such opinions shall be filed in the office of the clerk of the supreme court," a written opinion so filed is the best evidence of what was decided, for the purpose of determining the conclusiveness of the decree.—Stearns v. Lawrence, 83 Fed. 738, affirming Lawrence v. Stearns, 79 Fed. 878.

¶ 619. Since the day on which a justice renders judgment is required to be entered on his docket, the entry when made imports his presence within the jurisdiction as well as the fact and amount of the judgment, and as to such occurrences the docket is the best evidence and may not be disputed.—Swantek v. Jarmoszki, 162 Mich. 617.

¶ 620. In an action of replevin, parol evidence that at the time the goods were taken from the plaintiff he was served with an attachment against a third person and in favor of the defendants, without any proof of the process or proceedings in attachment, is insufficient to prove that the goods were in the custody of the law when the replevin suit was brought.—Van Baalen v. Dean, 27 Mich. 104.

¶ 621. It was held proper, for the identification of a transaction, to ask whether certain property had been taken on an execution in favor of the plaintiffs in an attachment, the question being relevant to the issue, and its purpose not being to show the contents or validity of the execution.—Hunt v. Strew, 33 Mich. 85.

§ 123. Ballots and elections.

Parol evidence to explain or contradict, see post § 196.

¶ 622. The ballots cast by the voters constitute the best and are the primary evidence of the intention and choice of the voters.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

¶ 623. The best accessible evidence must be introduced in case of an election contested upon the votes, and the ballots themselves are primary and the best evidence.—Keeler v. Robertson, 27 Mich. 116.

§ 124. Establishment and location of roads and public places.

¶ 624. The maps, plats, and deeds of land referring to a specified road, of which all traces have disappeared, are the most reliable data to establish its location.—Hoffman v. City of Port Huron, 110 Mich. 616.

¶ 625. Where maps, plats and surveys were available in an action to recover land described as "lying between the Lake road and the lake," it was error to permit witnesses to give their opinions as to the location of the road, based upon their recollection of where they used to travel in passing along the shore—especially where no road of any definite or uniform width had ever been cut out.—Hoffman v. City of Port Huron, 110 Mich. 616.

§ 125. Private corporate acts and resolves.

Effect of failure to make records on right to put in secondary proofs, see post § 144.

Inadmissibility of prior discussions by directors to show terms of appointment made by them, see post ¶ 964.

Corporate books and records as documentary evidence, see post §§ 503, 524.

Parol evidence as to purposes and objects of corporation, see also Corporations § 72.

Admissibility of parol evidence as to authority of corporate officers, see also Corporations § 129.

¶ 626. Resolutions adopted at a meeting of a board of directors of a private corporation may be shown by the record of the proceedings if one was made and is kept; otherwise parol evidence is permissible to show what was resolved upon and by what vote it was carried.—Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226.

¶ 627. When an original minute book of a corporation is in existence and can be compared with a copy the latter is not admissible in evidence.—Bartholomew v. Walsh, 191 Mich. 252.

¶ 628. If the authenticity of a notice of sale under proceedings to foreclose a mortgage by advertisement over the name of a bank can be questioned at all for want of its authority, the fact that the foreclosure was authorized by the directors may be shown by parol.—Gage v. Sanborn, 106 Mich. 269.

¶ 629. Parol evidence to show that all the directors of an agricultural fair association voted for a resolution authorizing the negotiation of a loan secured by mortgage on land owned by the association, was admissible to supply the omission from the minutes, as the law did not require a record of the vote.—Ismon v. Loder, 135 Mich. 345.

§ 126. Official or representative or trust capacity.

Of the trust or its terms, see post § 133.

Of the incidents of administration, see post § 134.

¶ 630. Parol proof is admissible to prove a person's official character.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119,

writ of error dismissed, 5 How. (U. S.) 343, 12 L. ed. 181; Cahill v. Kalamazoo Mut. Ins. Co., 2 D. 124; Johns v. People, 25 Mich. 499.

¶ 631. Where the question of official character arises collaterally parol evidence is admissible to prove an actual incumbency de facto.—Druse v. Wheeler, 22 Mich. 439.

¶ 632. Parol proof is admissible to show who are the officers of a school district.—Crane v. Bennington Township School Dist. No. 6, 61 Mich. 299.

¶ 633. Parol evidence is inadmissible to prove administration, or the appointment of administrators, for the sake of proving title through them.—Albright v. Cobb, 30 Mich. 355.

¶ 634. Proof of administration and as to who are administrators does not fall within the rule applicable to the proof of official character in the case of a public officer or officer of a corporation, which makes proof that they are officers de facto sufficient; where the office or trust is of a private nature, rather, or where the appointment is the result of the proceedings or determination of a court, the appointment must be strictly proved in the original way.—Albright v. Cobb, 30 Mich. 355.

¶ 635. Parol testimony is not admissible to prove the granting of letters of administration by a court, but such fact must be proved by the record.—General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium and Benevolent Ass'n, 166 Mich. 504.

¶ 636. Executors cannot prove their office by general reputation in an action brought by them.—Middlesworth v. Nixon, 2 Mich. 425.

¶ 637. Oral evidence is admissible, if no objection is made, to show that plaintiff in replevin is trustee in bankruptcy of the owner of the property, and that his previous right as assignee of the owner is not cut off by the decree in bankruptcy so far as relates to the right to maintain the action.—Gordon v. Farrington, 46 Mich. 420.

¶ 638. Parol evidence is admissible to prove the official character of trustees of a religious society, where the only proof required is that they are officers de facto.—Walrath v. Campbell, 28 Mich. 111.

§ 127. Contracts and their terms and effect in general.

Correspondence as best evidence of contract therein contained, see also post ¶ 1135.
Parol proof of waiver of conditions, see also ante ¶ 562.
Inadmissibility of prior terms to control or vary written contracts, see post, V, A.
Admissibility as documentary writings and proof of authenticity, see post, VIII, A.
Requirements of the statute of frauds for writings, see Frauds, Statute of.
Necessity of written new promise to take contract obligation out of statute of limitations, see Jud. Act, chap. IX, § 21; Comp. L. 1915, § 12331.

¶ 639. Oral testimony as to the terms of a partnership agreement is inadmissible where the terms are contained in written contracts.—Smith v. Walker, 57 Mich. 456.

¶ 640. As between the proprietor of a building and the builder, the contract is the best evidence whether the relation between them is that of principal and agent or master and servant.—Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405.

¶ 641. Evidence of oral negotiations preliminary to the execution of a written agreement cannot be considered by the jury as independent evidence of the agreement.—Sheley v. Brooks, 114 Mich. 11.

¶ 642. Parol evidence as to the contents of a written agreement is incompetent.—Johnson v. O'Neill, 181 Mich. 326.

¶ 643. Where a plaintiff vendee of rye sues a defendant vendor for a breach of the warranty of quality, plaintiff on the question of damages may introduce secondary evidence to show what were the terms of its written agreement with the person to whom it resold the rye.—Stockbridge Elevator Co. v. Booth, 165 Mich. 212.

¶ 644. Upon the question whether certain items of indebtedness were included in a statement and settlement so as to preclude further recovery for them, the admission of the oral evidence of plaintiff's witness that the items were not so included because they were not yet entered on the ledger at the date of the settlement, is not error as contravening the best evidence rule.—Rock Island Plow Co. v. Smith, 162 Mich. 180.

¶ 645. When parties put their contract in writing, the writing is the evidence of what such contract is.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

§ 128. ——Contracts partly written.

¶ 646. Where a contract, not required by the statute of frauds to be in writing, rests partly in writing and partly in parol, the whole is regarded as a parol agreement and may be orally proved, and the jury must determine its terms from the whole testimony. In such a case the writing is competent evidence to prove the terms of the contract so far as they are expressed therein, and may be regarded as admissions of the facts, and, indeed, the best evidence of the facts so stated therein.—Stahelin v. Sowle, 87 Mich. 124.

¶ 647. In an action by an agent in his firm's name against a third party for the

amount of an order for goods forwarded to the firm defendant, where there has been no written acceptance of such order, may show the negotiations and conditions upon which it was given.—Bronson v. Herbert, 95 Mich. 478.

¶ 648. The terms of a special contract of carriage may be proved by oral evidence, and such terms are not determined entirely by the provisions in the tickets purchased several days after the contract was made.—Hayes v. Wabash R. Co., 163 Mich. 174.

§ 129. Sales and transfers.

Necessity of writing, see Frauds, Statute of.

¶ 649. Where plaintiff sues upon defendant's agreement to give him half the profits of the sale of lands, the purchase whereof plaintiff should have procured for defendant, the conveyance of the land is the best evidence of the performance of the condition precedent to plaintiff's claim, and it should be produced.—Davis v. Gerber, 69 Mich. 246.

¶ 650. Where it becomes important to show whether a sale under a written contract was completed before a given event, it is error to admit parol evidence of the sale when the contract is accessible as written evidence.—Hatch v. Fowler, 28 Mich. 205.

¶ 651. If actual sale and transfer of possession of personalty is shown, the writing by which the sale was perfected need not be put in evidence in a case where the terms of the agreement are not material, and though such writing is admissible it cannot exclude parol evidence of the transaction.—Sirrine v. Briggs, 31 Mich. 443.

¶ 652. Proof of sales may be made without introducing the books of the business.—Steketee v. Kimm, 48 Mich. 322.

¶ 653. A parol assignment of a mortgage debt is admissible even in a court of law to show that the mortgagee has parted with his interest.—Dougherty v. Randall, 3 Mich. 581.

¶ 654. Where, in an action to recover the amount secured by a mortgage, plaintiff has the burden of showing that there was no sale under the mortgage, the testimony of a certain witness that he went to plaintiff's office and, looking at plaintiff's books, found there had been no sale, is inadmissible.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315.

¶ 655. In an action on a written guaranty to pay for goods sold by plaintiff to a third party, the original order for the goods need not be produced to identify what goods were sold and delivered to the vendee; that may be shown by other evidence.—Feustmann v. Gott's Estate, 65 Mich. 592.

§ 130. Warrants, commercial paper, payments and receipts.

¶ 656. The orders upon which money is said to have been paid out are the best evidence of such payment, if accessible, and parol proof of it is properly excluded until it is shown that they cannot be produced.—Mason v. Scio Fractional School Dist. No. 1, 34 Mich. 228.

§ 131. Grants and conveyances and mortgages.

Proof of leaseholds and tenancies, see post § 132.

Necessity of writing, see Frauds, Statute of.

¶ 657. Parol evidence of the contents of a United States patent is not admissible.—Platt v. Haner, 27 Mich. 167.

¶ 658. A witness may be asked whether a deed and mortgage have been given; the question not calling for their contents.—Clemens v. Conrad, 19 Mich. 170.

¶ 659. Where under an Indian treaty the selections of land were in writing, oral testimony of such fact is incompetent, in the absence of a legal excuse for the nonproduction of the writing or of a certified copy.—Brown v. Quinland, 75 Mich. 289.

¶ 660. Parol testimony is admissible to show to whom a deed or mortgage ran, and, if material, in whose custody the instruments were placed.—Showman v. Lee, 86 Mich. 556.

¶ 661. A deed under which title is claimed is the best evidence as to the extent of the claim of title.—Greene v. Anglemire, 77 Mich. 168.

¶ 662. The deposition of a register of deeds as to the contents of deeds recorded in his office, without giving copies thereof, is inadmissible. And where the purpose for which the evidence is offered is collateral to the issue the rule is still the same.—Angell v. Rosenbury, 12 Mich. 241.

¶ 663. One suing to recover back taxes compulsorily paid under protest on lands not owned by or listed to him may testify what lands he owns in the township, without producing the deeds, his purpose being not to establish title to lands but to show what he does not own.—Babcock v. Township of Beaver Creek, 65 Mich. 479.

¶ 664. Certain parol proof, and also a resolution of the governor and judges of the territory of Michigan, offered in evidence for the purpose of showing an assignment by them prior to 1823 of certain premises, held irrelevant and inadmissible.—Scott v. Detroit Young Men's Society's Lessee, I D. 119. Writ of error dismissed, 5 How. (U. S.) 343, 12 L. ed. 181.

¶ 665. Where defendant had agreed to give plaintiff half the profits realized from

a sale of lands which plaintiff should look up and procure the purchase of, held, in an action to recover such profits, that evidence of a conversation in which defendant stated that he sold the land was admissible for plaintiff in connection with the amount received to show maturity of his right.—Davis v. Gerber, 69 Mich. 246.

§ 132. Leases and leaseholds and tenancies.

¶ 666. If it appears that plaintiff in trespass q. c. f. is not the owner of the land, but holds under a written lease, and the damages are not confined to an injury to the possession only, the plaintiff will not be allowed to prove the nature of his tenure by parol, but must produce the lease.—Gilbert v. Kennedy, 22 Mich. 5.

¶ 667. The fact of a tenancy may be proved by parol, though the lease creating it is in writing.—Rayner v. Lee, 20 Mich. 384.

§ 133. Trusts and their terms.

Necessity of written instrument declaring or creating trusts, see Trusts, II.

¶ 668. Parol evidence is admissible to prove the facts that create a trust in favor of a principal whose agent has purchased land of him concealing important facts so that the transaction amounts to a fraud.—Moore v. Mandlebaum, 8 Mich. 433.

¶ 669. Parol evidence is admissible to show that land was conveyed by heirs to an administrator in trust to sell and divide the proceeds among the heirs.—Bitely v. Bitely, 85 Mich. 227.

¶ 670. Where a trust for the sale of land and disposition of proceeds is evidenced and defined by writing, parol testimony regarding its terms is inadmissible.—Collar v. Collar, 86 Mich. 507.

§ 134. Administration, probate and settlement.

Of appointment and character of personal representatives, see ante § 126.

When secondary is admissible, see post, IV, B.

As to will and its contents, see post § 135.

§ 671. The fact that an estate has been settled may be proved by testimony of a witness without introducing the probate records.—Turnbull v. Richardson, 69 Mich. 400.

¶ 672. Proof of the payment of legacies need not be matter of probate record; it may be by parol.—Chapman v. Craig, 37 Mich. 370.

§ 135. Existence and contents of wills.

Documentary proof of probate record, see post § 543.

¶ 673. Parol evidence of the contents of a later will, on the ground of which will probate of an earlier one is resisted, cannot be objected to by the proponents of the earlier will as not being the best evidence.—In re Hope's Appeal, 48 Mich. 518.

¶ 674. In ejectment for land purchased from heirs it is admissible, as a preliminary question, and by way of identifying their ancestor, to ask whether he left a will.—Taylor v. Youngs, 48 Mich. 268.

¶ 675. The precise character of the powers granted by a will to executors and trustees cannot be shown by parol.—Weise v. Rich, 77 Mich. 325.

§ 136. Advancements to heirs or legatees.

¶ 676. Parol evidence of a decedent's declarations prior to and after the execution of a deed of land which he certifies in a separate paper that he has given to a child as a portion of his patrimony is inadmissible; since advancements must be evidenced in writing.—Power v. Estate of Power, 91 Mich. 587.

B. WHEN SECONDARY IS ADMISSIBLE; LAYING FOUNDATION.

§ 137. Admissibility in general.

See also post ¶ 738.

Where paper may be restored, see post § 139.

Where original is invalid or deficient, see post § 140.

Original not accessible or producible, see post §§ 141, 142.

Effect of voluntary destruction, see post § 143.

Effect of failure to preserve written primary evidence, see post § 144.

Admissibility of copies forming part of pleadings or depositions, see post § 145.

Necessity and sufficiency of notice to produce or search for original, see post §§ 146, 147.

Necessity and sufficiency of foundation proofs, see post §§ 148-151.

What is receivable as secondary evidence, see post §§ 152, 153.

Admissibility of copy of a copy, see also post ¶ 766.

Proof of notice by copy, see also ante ¶ 213.

Oral statements as to contents or effect of instrument as good admissions, see post § 375.

Admissibility of testator's declarations as to contents, see post § 413.

Reasonable time to subpoena attesting witnesses so that execution of document may be proved by others, see post § 519.

As to lost lease claimed to have broken adverse possession, see also Adverse Possession ¶ 255.

Secondary evidence of execution on creditors' suit, see also Creditors' Suits § 28.

In criminal cases, see Indictment, VIII, B.

Admission of secondary evidence as harmless error or error cured by other evidence or ruling, see Harmless Error.

Mode and sufficiency of objection to secondary evidence, see Trial, V; Saving Questions.

Waiver of objection to secondary evidence, see Trial, V, C; Saving Questions.
Admissibility of secondary proofs against objection to parol evidence to change contents, see post ¶ 1208.
Parol proof of contents of lost negotiable bill or note in action or set-off based thereon, see Jud. Act, chap. XVII, §§ 55, 56; Comp. L. 1915, §§ 12543, 12544.

¶ 677. Secondary evidence may be given of the contents of court records or files that have been lost or destroyed.—Drake v. Kinsell, 38 Mich. 232; Dalton's Appeal, 59 Mich. 352; Cilley v. Van Patten, 68 Mich. 80; Cook v. Bertram, 86 Mich. 356.

¶ 678. Secondary evidence is admissible to prove a writ of attachment in collateral proceedings, where the writ is gone from the files.—Millar v. Babcock, 29 Mich. 526.

¶ 679. Parol evidence is admissible of the contents of a petition for the appointment of a guardian, the loss of such petition having been proved.—Dalton's Appeal, 59 Mich. 352.

¶ 680. Where the records and files in probate proceedings for the sale of a ward's land have been lost or destroyed, their contents may be proved as in other cases by a party not in fault.—Blanchard v. De Graff, 60 Mich. 107.

¶ 681. Where an executor's order for the sale of real estate has been lost or destroyed without the fault of those claiming title under the sale, its existence may be shown by any competent testimony.—Egan v. Grece, 79 Mich. 62.

¶ 682. Upon proof of the loss of an execution under which defendant seeks to justify a seizure, he may orally show that the execution was properly issued and levied upon the property and that notices of sale were duly posted according to law.—Freedman v. Campfield, 92 Mich. 118.

¶ 683. Parol evidence is admissible in an action on a recognizance to show the contents of a lost or destroyed indictment, which the recognizance bound the principal to answer to.—People v. Dennis, 4 Mich. 609.

¶ 684. Where the entry on a justice's docket does not show the time summons was served, and the files are lost, the time of service may be proved by the justice—the statute not requiring the time to be entered on the docket.—Van Kleek v. Eggleston, 7 Mich. 511.

¶ 685. Parol evidence was admitted in the absence of the record of the action of the joint board of school inspectors altering district boundaries, where it was apparent that some action was taken, and that the matter was for several years after such action treated as settled.—Pine River School Dist. No. 1 v. Union School Dist. No. 1, 81 Mich. 339.

§ 138. ——After failure to produce on notice.
Originals beyond state, see post § 141.
Necessity and sufficiency of notice, see post § 146.
Admissibility of copies of notices without notice, see ante § 116.
Refusal to produce as affecting right to introduce document, see post ¶ 2571.

¶ 686. A copy of written representations may be put in evidence where the original has been returned to the person making them, and he has failed to produce it on being notified to do so.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164.

¶ 687. Parol proof is admissible of the contents of a paper in the possession of the adverse party who has been duly notified to produce the same on the trial and fails to do so.—Pangborn v. Continental Ins. Co., 62 Mich. 638.

¶ 688. The books of a company sued in assumpsit for services by one who had been in its employ contained a statement, made by it, of a portion of the account claimed by plaintiff to be due to him; they were not produced on proper notice, and were taken out of the state. Held, that plaintiff could testify as to the contents of the books concerning a material point in his case.—Boglarsky v. Singer Mfg. Co., 65 Mich. 510.

¶ 689. Where the executors fail, after due notice, to produce a former will, it is provable by a copy, shown to be such by parol evidence, and the execution of the will may be shown by the same kind of evidence.—Keagle v. Pessell, 91 Mich. 618.

§ 139. Restorable papers and records.

¶ 690. The statute for restoring lost records (Comp. L. 1871, §§ 6055-6059, How. St., §§ 7639-7643) does not exclude secondary evidence of their contents, especially where the restoration is difficult.—Drake v. Kinsell, 38 Mich. 232.

§ 140. Original invalid or deficient.
Oral statements or acts where writing is essential as admissions against interest, see post § 375.

¶ 691. Where instruments have been entered on the registry of deeds, copies can be used as secondary evidence of the contents of lost or destroyed originals, even though the latter were not so executed as to entitle them to record.—Post v. Rich, 36 Mich. 16; Heinmiller v. Hatheway, 60 Mich. 391.

§ 141. Original inaccessible or beyond jurisdiction.
See also post ¶ 728.
Length of notice requisite, see post § 146.

¶ 692. The contents of a paper which is beyond the jurisdiction of the courts of this state may be shown by secondary evidence.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 693. In a suit in this state secondary evidence is admissible of a bond which, never having been in plaintiff's possession, had been sued on in Indiana, and was presumably out of the jurisdiction of Michigan courts.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 694. The books of a company sued by one who had been in its employ contained a statement, made by it, of a part of the account claimed by plaintiff to be due to him; they were not produced on proper notice, and were taken out of the state. Held, that plaintiff could testify as to the contents of the books concerning a material point in his case.—Boglarsky v. Singer Mfg. Co., 65 Mich. 510.

¶ 695. Parol evidence of the contents of an application for membership in a fraternal organization is inadmissible in the absence of a showing that the written document is lost or destroyed, and the fact that the document is outside the jurisdiction of the court does not vary the rule.—Phillips v. U. S. Benevolent Society, 120 Mich. 142.

§ 142. Public records and documents not producible.

¶ 696. The general rule in regard to proof of documents is that the original shall be produced unless required to remain in some public office. If it belongs in such a place it can be proved by an exemplification. If belonging in private hands it must be introduced in evidence, unless lost or otherwise beyond the power of parties to prove it except by secondary evidence.—Bradley v. Silsbee, 33 Mich. 328.

§ 143. Voluntary or intentional destruction.

Voluntary removal beyond state, see ante § 141.

Presumption against destroyer or spoliator of papers, see ante § 64.

¶ 696a. Where the grantee in an unrecorded deed consents to its destruction and to the conveyance of the land described therein to a third party, he is estopped from proving the contents of such deed by parol evidence in asserting title thereunder.—Gugins v. Van Gorder, 10 Mich. 523.

¶ 697. In a claim against the estate of a deceased son based on his promise to pay the claimant for supporting his father in accordance with the son's written promise to the father, secondary evidence of the contents of the written agreement between the father and the son is competent where the writing was destroyed by the son in the claimant's presence and no suspicion of fraud on the part of the claimant is shown.—Davis v. Teachout's Estate, 126 Mich. 135.

§ 144. Failure to preserve stipulated evidence or record.

¶ 698. The failure of timber owners who have contracted for its manufacture, and for the delivery of the lumber upon their docks, where the manufacturers' control over it ends, to make and preserve a tally of the lumber as per their agreement, entitles the manufacturers to introduce any other competent proof of the amount of lumber manufactured.—Welch v. Palmer, 85 Mich. 310.

¶ 698a. A society that is sued upon its own obligations cannot take advantage of its own neglect to keep records to object that record proof of its proceedings is not produced to establish its liability. The party bringing suit can resort to such evidence as is obtainable when the party sued has put it out of his power to produce record evidence.—Scott v. First Methodist Church Trustees of Jackson, 50 Mich. 528.

§ 145. Copies attached to depositions or pleadings.

¶ 699. A copy of a bill of sale attached to a deposition by the commissioner, pursuant to an interrogatory calling for the production of the original and the attachment of said copy, is competent evidence without the production of the original paper.—Nash v. Manistee Lumber Co., 75 Mich. 346.

§ 146. Necessity and sufficiency of notice to produce.

Subpoenas duces tecum to witnesses, see Witnesses, I.

¶ 700. Where one has agreed to execute and deliver a deed of certain lands as a condition precedent to the performance of a contract by the other party, he cannot prove the execution and delivery by the admission of such other party without first calling upon him to produce the deed.—Thompson v. Richards, 14 Mich. 172.

¶ 701. Evidence of the contents of a letter sent to the opposing party or his agent cannot be given unless notice has been served upon him to produce it.—Ferguson v. Hemingway, 38 Mich. 159.

¶ 702. The contents of a bill of sale in the hands of the opposing party cannot be shown until after notice to him to produce it and his neglect or refusal to do so.—Hood v. Olin, 80 Mich. 296.

¶ 703. Defendants to an action on a contract are entitled, without notice, to the production of all papers which formed any part of the contract.—De Witt v. Prescott, 51 Mich. 298.

¶ 704. Where the written contract sued upon was in defendant's possession or under its control, plaintiff was excused from producing it at the trial.—Lorscher v. Knights of Honor, 72 Mich. 316.

¶ 705. Where trover is brought for the conversion of a promissory note, plaintiff is entitled to prove its existence and contents without giving defendant notice to produce it.—Rose v. Lewis, 10 Mich. 483.

¶ 706. The rule that the original must first be accounted for and notice given to the plaintiff to produce the original before secondary evidence is admissible does not apply so as to render notice necessary where the paper to be produced is in itself a notice.—Holmes Realty Co. v. Silcox, 194 Mich. 59.

¶ 707. The contents of a mere notice may be proved by secondary evidence—by compared copy or by parol—without notice to produce the original.—Falkner v. Beers, 2 D. 117; Michigan Land & Iron Co. v. Township of Republic, 65 Mich. 628.

¶ 708. Parol evidence of contents of a notice to quit served by plaintiff in ejectment may be received where the notice retained by plaintiff has been lost, if defendant, being notified, fails to produce it at the trial.—Johnson v. Johnson, 70 Mich. 65.

¶ 709. In an action for personal injuries due to a defective sidewalk, the offer to prove the contents of a petition to the city for compensation is equivalent to a notice to produce, and secondary evidence to prove the contents of the petition is admissible where application had been made to the city clerk who could not find the petition and there was no claim of surprise or request for time to contradict the proof.—Wheeler v. City of Detroit, 127 Mich. 329.

¶ 710. It is better practice to give notice to produce desired papers in possession of the opposite party before entering upon the trial, but the reasonableness of the notice depends upon the circumstances of each case, and is a matter for the court.—Hanselman v. Doyle, 90 Mich. 142.

¶ 711. Proper practice requires reasonable notice to be given opposing counsel to produce papers before secondary evidence of their contents is admissible, and what constitutes "reasonable notice" depends upon the surrounding circumstances.—Muir v. Kalamazoo Corset Co., 155 Mich. 624.

¶ 712. Notice to produce papers is insufficient if it barely allows time to procure them by telegraphic communication with clients, unless longer notice is impracticable.—De Witt v. Prescott, 51 Mich. 298.

¶ 713. A notice to counsel to produce letters in the possession of his client in another state, and which, to meet the notice, must be forwarded by the next mail after the receipt of a telegram to mail them, is too short.—Julius King Optical Co. v. Treat, 72 Mich. 599.

¶ 714. A notice to produce certain letters, served upon counsel, on the morning of the day when copies are offered in evidence, does not warrant such secondary testimony, the counsel claiming that the originals, if any exist, are in the possession of their clients, who are absent in another state.—Mortlock v. Williams, 76 Mich. 568.

¶ 715. A copy of a postal card alleged to have been mailed to nonresident plaintiffs by defendants is not admissible in evidence where the notice to produce the original is served on plaintiffs' attorneys on the same day that production is called for, and where such attorneys disclaim any knowledge of the original.—Pitt v. Emmons, 92 Mich. 542.

¶ 716. As a basis for the introduction of secondary evidence, a notice to produce all letters and papers from a certain date to the time of trial, five years later, without indicating date or subject or referring to any particular transactions, is too vague.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

§ 147. Sufficiency of search for original.

Evidence of search, see post §§ 148-151.

¶ 717. The contents of a letter can be proved by the recollection of the recipient and by that of others to whom a letter has been shown which is identified as the one in question, if proof is made that diligent search has been made for the letter itself and that it cannot be found.—Huff v. Hall, 56 Mich. 456.

¶ 718. It is not necessary, as preliminary to secondary proof of the contents of a lost execution, to show a search among the papers of an attorney who once produced and read it on a trial before the justice in whose legal custody it then was.—Rash v. Whitney, 4 Mich. 495.

¶ 719. Under the circumstances of a particular case the defendant in a bill in equity was deemed to be the proper custodian of an unrecorded deed, and it was held that if the deed could not be found in his hands complainant might make parol proof thereof.—Holcomb v. Mosher, 50 Mich. 252.

¶ 720. The loss of a paper, which the witness says he left with another party, is not sufficiently shown to warrant parol proof of its contents, by his testifying that he has searched for and been unable to find the paper, but not stating in what particular place or places the search was made, or that he asked the custodian where the paper was, and no effort having been made to secure the testimony of the custodian, whose

home was at the same town, in another state, as that of the witness.—Darrow v. Pierce, 91 Mich. 63.

¶ 721. Parol evidence of the contents of a written instrument (a bill of sale) is inadmissible upon testimony merely tracing the writing into the possession of a third party (e. g., an insurance adjuster), and failing to disclose any further inquiry.—Tanner v. Page, 106 Mich. 155.

§ 148. Preliminary proofs for foundation.

Circumstances making secondary proof receivable, see ante §§ 137, 138.
Of search made, see also ante § 147.
Necessity and sufficiency of notice to produce or of search for original, see ante §§ 146, 147.
As to public and judicial writings and records, see post § 149.
As to deeds, contracts, and other private papers, see post § 150.
As to letters and messages, see post § 151.
Kind or competency of secondary evidence required, see post §§ 152, 153.
Order of proofs, foundation proofs before offer of evidence, see Trial, V, B.
Sufficiency of foundation proofs as court or jury question, see Trial, VI.
Right to call adverse party to disprove loss of instrument, see Jud. Act, chap. XVII, § 54; Comp. L. 1915, § 12542.

¶ 722. Secondary evidence cannot be received to prove a fact without first laying a foundation for it in accounting for the absence of that which is primary.—Gugins v. Van Gorder, 10 Mich. 523.

¶ 723. The best and most direct testimony must always be produced, and where for any reason that becomes impossible, such fact must be shown before other evidence is admissible.—Sullivan v. Godkin, 172 Mich. 257.

¶ 724. Parties relying upon parol evidence to establish the contents of a written agreement claimed to be lost should explain fully the circumstances of the loss or destruction, so as to relieve themselves from any reasonable suspicion of having connived at its loss. —Shouler v. Benander, 80 Mich. 531.

¶ 725. On offering secondary proof of the contents of an application for membership in a society, which had been sent to a place out of the jurisdiction and not lost or destroyed, the foundation should show that there is some reason for not producing the original or a copy thereof.—Phillips v. United States Benevolent Society, 125 Mich. 186. (Montgomery, C. J., and Hooker, J., dissented on the ground that under the rule in Eslow v. Mitchell, 26 Mich. 500, there are no degrees in secondary evidence requiring a copy rather than parol testimony.)

¶ 726. A party relying upon a lost document must establish its execution and its loss, and a diligent but unsuccessful search for it in the places where it is most likely to be found.—Thomson v. Flint & P. M. R. Co., 131 Mich. 95.

¶ 727. In a suit on a promissory note, it must be shown that the original note is lost or destroyed, or otherwise beyond the power of the party to produce it, before secondary evidence of its contents can be admitted.—Gelder v. Welsh, 169 Mich. 490.

¶ 728. That defendant is a director of a corporation may be proved by parol, where prior evidence is offered that the books of the corporation are not available.—Deloria v. Van Winkle, 162 Mich. 660.

§ 149. ——Public and judicial documents and records and files.

Presumption where record is not found in place, see ante ¶ 296.
Contracts filed with justice, see post ¶ 739.

¶ 729. Parol evidence that an affidavit required by law was brought to the proper office and filed by the witness is incompetent where there is no showing that the affidavit has been searched for or has been lost or destroyed.—Monaghan v. McKimmie, 32 Mich. 40.

¶ 730. Proof of the original existence of the lost files and record of guardian's proceedings in the probate court for the sale of land, held sufficient to warrant evidence of their contents.—Blanchard v. De Graff, 60 Mich. 107.

¶ 731. A justice's docket showing judgment in an attachment case, but no affidavit or bond, and showing also an execution issued, but not its return, is not competent evidence in support of an execution sale, without proof of the files in the case or of a proper search therefor.—Hogsett v. Ellis, 17 Mich. 351.

¶ 732. Proof that the return of the highway taxes for a road district, which was procured for the purpose of a former trial from the township clerk, has been lost, does not, in view of How. St., § 1416, requiring the filing of such return with the supervisor, lay a sufficient foundation for the introduction of parol proof as to its contents, unless it is shown that the return is not in the supervisor's office.—Township of Deerfield v. Harper, 115 Mich. 678.

¶ 733. Foreign statutes cannot be proved by parol without some showing why secondary evidence becomes necessary.—People v. Lambert, 5 Mich. 349; Kermott v. Ayer, 11 Mich. 181.

¶ 734. Where the making on a certain date of an order allowing a claim is testified to by the judge of probate and by a person who was present when the order was announced,

such order is presumed to have been lost from the records, and its contents may be proved by parol.—Howd v. Breckenridge, 97 Mich. 65.

§ 150. ——Deeds, contracts, notes, and private papers.

¶ 735. To prove the existence and loss of a deed in a chain of title it was relevant to show that a former register of deeds who had been concerned in making an abstract of titles to lands in the county, and had made a list or abstract of unrecorded deeds, of which a large number had accumulated in the register's office, had seen among these unrecorded deeds such a one as that said to be lost.—Raymor v. Norton, 31 Mich. 210.

¶ 736. The loss of a deed was after the lapse of nearly forty years considered sufficiently proved by testimony of a second grantee that he believed it to have been among his papers which had been casually destroyed; this grantee being an expert lawyer who had inquired into the title when he purchased, and had presumably retained his title papers.—King v. Carpenter, 37 Mich. 363.

¶ 737. Testimony by a witness who executed a deed, that he executed it in the custom house, that he looked everywhere for it where he thought it was likely to be; that after he left the custom house he "went through all the papers where it was likely to be; that he did not take it into the estates' office at all, that it never was in the estates' office that he knew of," standing uncontradicted justifies the court in holding that reasonable search had been made and that the loss of the deed had been proved.—Thomson v. Flint & P. M. R. Co., 131 Mich. 95.

¶ 738. A written contract cannot be proved by copy without first showing the loss, destruction or absence from the jurisdiction of the original.—Woods v. Burke, 67 Mich. 674.

¶ 739. Evidence that a contract was filed with a justice of the peace at the time of commencement of suit thereon, that the justice has been dead several years, and that the custodian of his docket, who is a successor in office, as well as plaintiff's counsel in the case, have been unable, after search, to find it, renders a copy of the contract admissible.—Stanley v. Anderson, 107 Mich. 384.

¶ 740. In an action by the owner of a warehouse against a railroad company for the loss of a building by fire alleged to be due to negligence of defendant in the operation of its engine while attempting to rerail a car on a sidetrack of plaintiffs, in which defendant gave notice in its plea that it would rely upon a certain contract or lease of the sidetrack which exempted it from liability, and it failed to comply with an order of discovery of the document, presumably because it was unable to produce it, but on the trial offered an application for a sidetrack signed by a former owner of plaintiffs' premises together with a form of contract or lease which its own witness admitted did not always follow the application, held that sufficient foundation was not laid for the admissibility in evidence of the application.—William R. Roach Co. v. Blair, 190 Mich. 11.

¶ 741. On an issue of nonpayment of drafts taken as payment of other paper, it was error to admit evidence of the protest, nonpayment and return of the drafts without first producing them, or accounting for their absence.—Simpson v. Waldby, 63 Mich. 439.

¶ 742. In a suit on a note alleged to have been lost, a witness stated that he had the entire care of the notes belonging to the plaintiff; that the pocketbook containing the note disappeared, and that diligent search was made for it without success. He also stated that an individual was prosecuted criminally for stealing the note, and confessed his guilt, and stated what he had done with the note. Held, that the loss of the note was sufficiently proved to allow parol evidence of its contents.—Higgins v. Watson, 1 Mich. 428.

¶ 743. A claim before commissioners on an estate was based upon contractors' proposals, the originals of which were not produced. Testimony was given that they had been left in the custody of an architect and he failed to find them. Held sufficient proof of loss to warrant secondary evidence of the proposals by copy.—McKeown v. Harvey, 40 Mich. 226.

¶ 744. In a suit on a promissory note plaintiff testified that he gave the note sued on to his Chicago attorney to prepare proof of his claim to be filed in bankruptcy against one of the signers thereof. Said attorney testified to receiving said note; that he attached it to the proof of claim in bankruptcy and withdrew it after leaving a copy that he could not find the original; that plaintiff had insistently demanded same of him; and that after a careful investigation and diligent search he and his brother signed a bond for the lost note in question. Plaintiff testified to having made repeated diligent search and inquiry in every place where the note had been or was most likely to be found, among his papers and among the papers of his Chicago attorney. Said testimony was undisputed. Two copies of said note were offered in evidence, one of which plaintiff testified he made, with the original before him, at the time proofs were prepared for the bankruptcy court, and one made by said Chicago attorney in the bankruptcy proceedings. Said attorney testified that his copies were made either from the original or

from the copy attached to the proof of claim, which copy plaintiff made. Held, said copies were properly admitted as secondary evidence.—Gelder v. Welsh, 169 Mich. 490.

¶ 745. A sufficient reason must be given for failure to produce receipts relied on as proof of payment before secondary evidence can be produced.—Van Ness v. Hadsell, 54 Mich. 560.

¶ 746. It is error to permit plaintiff in an action to enforce a lien upon logs to testify to the contents of a paper which he claims is a copy of his time book, and shows each day that he worked, and what he worked at, without proof of the loss of the paper.—Dillon v. Howe, 98 Mich. 168.

§ 151. ——Letters or messages.

Admissibility of copy without foundation where it rather than the original is the object of proof, see ante § 111.

¶ 747. A witness may not testify as to the contents of a letter received by him from a party to an action without laying a foundation to make parol proof of the contents admissible.—Underwood v. Town, 201 Mich. 55.

¶ 748. Where a party seeks, by means of a letter-press copy, to prove a letter by him to the other party, he should give evidence of the existence of the original production, and that it went into the possession of the person to whom it was addressed; and then, on such person's failure to produce it on request, its contents may be proved by the copy.—Sun Ins. Co. v. Earle, 29 Mich. 406.

¶ 749. Where the only evidence of the existence of a letter purporting to have been written by plaintiff to a third person was defendant's testimony that he knew plaintiff's handwriting, and that he had had such a letter in his possession but was satisfied it was lost, and that he had searched for it, not having stated where, a copy of such letter was inadmissible to contradict plaintiff's testimony.—Angell v. Loomis, 97 Mich. 5.

¶ 750. Before the contents of a letter can be given in evidence something more than proof that it was written (where the party to whom it was written denies having received it) must be shown.—Gage v. Meyers, 59 Mich. 300.

¶ 751. Where it is attempted to show notice by letter of additional insurance, proof that a letter was left, in the absence of the insurance agent, at his office with a person not identified, is not sufficient to warrant the reception of proof of its contents, in the face of a denial by the agent and the company of any knowledge of the letter or that it was ever received.—Sun Ins. Co. v. Earle, 29 Mich. 406.

¶ 752. Where there is prima facie proof of the loss of a letter, and there is no cross-examination as to the thoroughness of the search for it, there is no error in admitting secondary evidence of its contents against the objection that its loss has not been sufficiently shown.—Bottomley v. Goldsmith, 36 Mich. 27.

¶ 753. Testimony by the addressee of a letter that he received it and has since lost it, suffices to admit a letter-press copy.—Nowlen v. Lyon, 73 Mich. 434.

¶ 754. A sufficient foundation for the introduction of parol proof of the contents of a letter claimed to have been lost is laid by the testimony of the party to whom the letter was written that he is not in the habit of keeping his letters, and that he looked in the wastebasket for the letter, but was too late, as it, with other letters, had been destroyed.—Shrimpton & Sons v. Netzorg, 104 Mich. 225.

¶ 755. Where a witness testifies that he has not seen a certain letter since its receipt by him some twelve years previous, that his papers were afterwards destroyed by fire, except a few that he kept in a specified place, that he has searched for papers among those last mentioned, and that the one in question was not there, a sufficient foundation is laid for the introduction of parol evidence of the contents of the letter, although the witness further states that he has not made a search for that particular paper.—Burt v. Long, 106 Mich. 210.

¶ 756. A witness may testify as to the contents of a lost letter without proof that he had knowledge of the handwriting of the party claimed to have written it, where the letter has been sufficiently identified by another witness, and proof of its loss made, to allow parol proof of its contents.—Painter v. Ledyard, 109 Mich. 568.

¶ 757. Parol evidence of the contents of lost letters is admissible, where pursuant to notice to produce all letters written to plaintiff by defendant between certain dates, some letters were produced and defendant testified to other letters written by her and also that she had, at the request of plaintiff, destroyed most of the letters received from plaintiff.—June v. Labadie, 132 Mich. 135.

¶ 758. There is no error in receiving secondary evidence of the contents of a letter where an employee of the adverse party testifies that all mail for such adverse party came into her hands for filing; that she made an examination of the files of the office and was unable to find the original, and that she had never received the latter, and another employee of the adverse party also testifies that he searched the files of the office and was unable to find the original.—Holmes Realty Co. v. Silcox, 194 Mich. 59.

§ 152. Competency or propriety of secondary proofs.

See also ante ¶ 717.

Mode and requisites of certifying transcripts and certified copies of records and public files, see post § 556 et seq.

Sworn copies of documents and records, see post § 565.

Sworn excerpt from church records to show record of baptism, see post ¶ 2632.

Evidence to rebut accuracy of copy admitted in evidence, see ante ¶ 425.

Objection that testimony by person who read letter is hearsay, see post ¶ 1831.

Degrees in secondary evidence, equality of parol and written secondary proofs, see post § 154.

Sufficiency of secondary evidence to prove facts in issue, see post § 584.

Notary's certificate where notary is dead, see post ¶ 1874.

¶ 759. If the files have been lost, the calendar entries may be given in evidence to show the steps taken in the cause before judgment.—Norvell v. McHenry, 1 Mich. 227.

¶ 760. An objection to the introduction of a copy of a lost instrument, because at the close of the attestation clause it purports to be executed in duplicate, is of no force where it does not appear that any duplicate was ever intended to be made, and the party objecting never required it.—Dykes v. Wyman, 67 Mich. 236.

¶ 761. In an action by building contractors to recover for labor performed by their workmen, a time bill transcribed from the book of original entry which was made up every Saturday night from the foreman's report was offered in evidence. The foreman was dead and the book could not be found. Held, that the bill was admissible in the absence of anything tending to impeach its correctness.—McDonnell v. Ford, 87 Mich. 198.

¶ 762. A draft proved to be in the handwriting of the testator prepared for the scrivener who drew the alleged lost will and agreeing in contents with the oral testimony as to the contents of the lost will, which draft was found in the evening of the day when the will was executed on the floor of the room and near the table on which the will was executed and is in the same condition as when found, is admissible as secondary evidence of its contents.—Ewing v. McIntyre, 141 Mich. 506.

§ 153. ——Proper witnesses.

¶ 763. It is not necessary to call a subscribing witness to prove the execution and contents of a lost deed.—Eslow v. Mitchell, 26 Mich. 500; Raynor v. Norton, 31 Mich. 210.

¶ 764. In an action against a benevolent society parol testimony of a local secretary concerning the contents of an application is inadmissible as secondary evidence where it is testified that the application was received and forwarded to Canada and there is no showing that the secretary had even read the application.—Phillips v. United States Benevolent Society, 125 Mich. 186.

¶ 765. In a suit to recover outlays for building, the estimates of witnesses, who had some means of knowledge, are admissible in the absence of primary written evidence, to show what the outlays amount to.—Hillebrands v. Nibbelink, 40 Mich. 646.

¶ 766. A copy of what is said to be a copy of an original, with which it was never compared, and from which it is not shown to have been taken, has no claim of itself to be admitted as secondary evidence; but when a witness testifies from recollection that it is a copy, it should be received, the weight of evidence on that point being left to the jury.—Fowler v. Hoffman, 31 Mich. 215.

¶ 767. Notice to produce a letter written by plaintiff's physician to defendant, does not justify the latter in calling the physician to testify as to privileged communications between plaintiff and himself, over objections thereto.—Phillips v. U. S. Benevolent Society, 120 Mich. 142.

§ 154. Degrees in secondary parol or written proofs.

See also ante ¶ 725.

Proper evidence or witnesses for secondary proof, see ante §§ 152, 153.

Probative force and effect of certified and sworn copies of records and documents, see post § 566.

Weight and sufficiency of secondary evidence, see post § 584.

¶ 768. There are no degrees in secondary evidence. Where an original paper is lost, and no counterpart is presumed or required to exist, its tenor may be proved by parol as well as by copy; but the failure to produce a copy, when possible, bears on the credit to be given to the parol testimony.—Eslow v. Mitchell, 26 Mich. 500.

¶ 769. Degrees of evidence exist only in the case of documents, whose contents should be shown by the original, if possible.—Elliott v. Van Buren, 33 Mich. 49.

¶ 770. In proceedings for trespass under Pub. Acts 1903, No. 210, where the defendant claimed he wrote the land commissioner asking what claim the state had to the land, and he got a reply stating there was none, but the letter was lost it was error to reject his testimony on the ground that letter-press copies of official letters existed and were procurable, because there are no degrees in secondary evidence.—People v. Christian, 144 Mich. 247.

V. PAROL OR EXTRINSIC EVIDENCE TO VARY OR EXPLAIN WRITINGS.

A. IN GENERAL; PARTICULAR INSTRUMENTS AND RECITALS.

[Note. The "parol evidence rule," as treated in this division, is that rule or rules by which testimony or evidence extraneous to the writing in evidence is excluded when offered to vary or contradict the terms of the writing, but admitted to invalidate or wholly defeat it or to explain or apply it when incomplete or ambiguous. The rule excluding parol evidence when primary evidence of a higher and better degree is available is the "best and secondary rule," which see ante, IV. It must also be remembered that in very many cases and in the paragraphs, which necessarily have regard to the language of the opinions, the expression "parol evidence" occurs as a description of the kind of evidence adduced without any reference to either of the rules excluding parol or extrinsic evidence.]

§ 155. General rule as to contradiction or variance.

Admissibility where offered to wholly defeat instrument by showing invalidity, want of execution, or falsification of real terms, see post §§ 156-158.

Admissibility where evidence does not reach contents but relates to circumstances of making, execution, date, or consideration, see post §§ 159-163.

Admissibility to explain or complete instrument, see post §§ 164-168.

Admissibility to supply portions of agreement, see post § 169.

Admissibility of contemporaneous or prior negotiations and understandings, see post §§ 170, 171.

Admissibility of evidence as to intent or understanding of parties, see post § 172.

Particular matters and elements of obligation, agreement or condition, or warranties and defeasances sought to be changed or added, see post §§ 174-180.

Explaining terms of trade, science and art, see post § 173.

Descriptions and identifications of parties and subject or object of contract, see post §§ 182-184.

Explaining character or nature of instrument, see post § 181.

Showing deed to be mortgage, see post § 180.

Showing debt due or condition secured by mortgage, see post § 185.

Showing estates and interests transferred, see post § 186.

Applicability to particular kinds of writings of the parol evidence rule, see post §§ 187-198.

Admissibility or prior circumstances bearing on measure of damages, see post § 159; and see also Damages, XI, B.

Writings within the parol evidence rules, see post §§ 187-198.

Inapplicability of parol evidence rules where contract is in part oral or is not a complete contract, see post §§ 187-189.

Right of stranger to contradict writing by parol, see post § 199.

Inapplicability of the rule as to strangers or when issues are collateral to the writing, see post §§ 199-203.

Admissibility of parol or extraneous proofs of facts and transactions subsequent to the writing, see post §§ 204-206.

Rule rejecting parol evidence when better evidence exists in writing, see ante IV.

Instrument as best evidence of what it contains, see ante § 120.

Inadmissibility of sworn answer in chancery to contravene parol evidence rule, see Equity ¶¶ 678, 679.

Opinions and conclusions as to existence, effect and terms of contracts, see post § 213.

Weight and sufficiency of the parol evidence when admitted, see specific topics in those portions treating of "evidence."

Charging on conclusiveness of written contract when none is in evidence, see Contracts ¶ 1530.

¶ 771. Parol evidence cannot, as a general rule, be received to add to or vary the terms of a written instrument.—Sutherland v. Crane, W. 523.

¶ 772. When parties have deliberately and understandingly executed an instrument in writing they cannot afterwards be permitted to insist that it does not express their real intentions, but that a different thing was designed. It is conclusively presumed that their whole engagement, and the extent and manner of their undertaking, were reduced to writing; and no evidence is permitted tending to vary or contradict the terms of the contract, or to substitute a new and different contract for it.—Adair v. Adair, 5 Mich. 204.

¶ 773. The terms of a contract, in which the intent of the parties is clearly expressed, cannot be changed by parol evidence.—Michigan Shingle Co. v. London & Lancashire F. Ins. Co., 91 Mich. 441.

¶ 774. Parol evidence to vary or change the terms of a written agreement is inadmissible.—Goebel v. Look, 153 Mich. 204.

¶ 775. Oral testimony is inadmissible to vary or explain a written instrument, where there was enough upon the face of the papers to dispose of the question involved.—Wisconsin Fire & M. Ins. Co. Bank v. Filer, 80 Mich. 67.

¶ 776. In the absence of fraud and ambiguity, the terms of a written contract are binding on the parties and cannot be varied by parol.—Walker v. Mack, 129 Mich. 527.

¶ 777. A complainant in a bill for specific performance of a written contract could not

by parol testimony establish a different contract than the written one sought to be enforced.—Meshew v. Southworth, 133 Mich. 335.

¶ 778. In the absence of fraud, a written contract which is unambiguous, certain in its terms, and full and complete in itself, is the only contract which the court, in a suit for specific performance, can consider, and its terms cannot be varied or changed by parol evidence.—Kerwin Mach. Co. v. Baker, 199 Mich. 122.

¶ 779. It is not competent to contradict or vary by parol testimony the plain language of a written instrument like a chattel mortgage or lease.—Wade v. Strachan, 71 Mich. 459; Walsh v. Martin, 69 Mich. 29.

¶ 780. A promissory note deliberately given and taken with full knowledge of its contents and not tainted with fraud cannot be varied by parol evidence.—Hutchinson v. Hutchinson, 102 Mich. 635.

¶ 781. Parol testimony is inadmissible to vary the terms of a written contract for the sale of land.—Hutchinson v. Westbrook, 191 Mich. 484.

¶ 782. In an action on covenant for breach of warranty against incumbrances, oral evidence that grantee had assumed unpaid taxes for special improvements was inadmissible.—In re Johnson's Estate, 177 Mich. 500; Williams v. Kniskern, Id.

¶ 783. Written agreements, however explainable, cannot be absolutely contradicted by parol.—Seckler v. Fox, 51 Mich. 92.

¶ 784. A written contract is not to be varied by the parol admission of the party.—Hunt v. Thorn, 2 Mich. 213.

¶ 785. In an action on a written contract parol evidence of stipulations not in it is inadmissible.—Baker v. Morehouse, 48 Mich. 334.

§ 156. Admissibility to annul, invalidate or disprove factum of instrument.

To show that instrument was executed on unfulfilled condition, see post § 157.

To show what was true contract or that offered one was genuine, see post § 158.

Elements and proofs of fraud, duress, mistake, or other cause invalidating instrument, see Duress, Fraud; Mistake; Infants; Insane Persons, etc.

¶ 786. Parol misrepresentations are not so merged in written ones as to be excluded from evidence in an action for fraud.—Match v. Hunt, 38 Mich. 1.

¶ 787. Parol evidence may be introduced in chancery for the purpose of showing fraud, or a mistake in drawing the instrument, when the fraud or mistake is set forth in the bill, and the relief asked is based upon it; but not otherwise.—Sutherland v. Crane, W. 523.

¶ 788. Parol evidence is admissible to show that either by fraud or mistake a written contract does not express the real agreement of the parties.—Chambers v. Livermore, 15 Mich. 381.

¶ 789. Testimony that a written contract was obtained by fraud was not a violation of the rule against varying the terms of a written contract by parol.—Rambo v. Patterson, 133 Mich. 655.

¶ 790. Where the victim of a railroad accident, after settling her claim for damages and giving a receipt in full, repudiated and rescinded the settlement for fraud and brought suit for the original injury, evidence of the representations and promises under which the receipt was obtained ought not to be excluded on the ground that it tended to vary a written contract by parol evidence.—Michigan Cent. R. Co. v. Dunham, 30 Mich. 128.

¶ 791. Parol evidence is admissible to show that in a contract of sale of a piano the style and number of a different piano that was delivered to vendee until the one purchased could be delivered were fraudulently inserted by vendor's agent.—Kranich v. Sherwood, 92 Mich. 397.

¶ 792. When the question is not what the terms of a written contract are, but whether the contract as written was entered into, or whether it was obtained by fraud, or is founded in surprise, accident or mistake, these subjects of inquiry are open to parol testimony irrespective of what the writing contains.—Bush v. Merriman, 87 Mich. 260.

¶ 793. The validity of a sealed instrument may be attacked for fraud, mistake, surprise or duress even though the seal imports a consideration.—Hobbs v. Brush Electric Light Co., 75 Mich. 550.

¶ 794. A member of a bankrupt partnership having executed a written acknowledgment to one of the creditors of a debt discharged by the bankruptcy, it was held competent to show, when suit was brought for the demand, that the acknowledgment was avowedly obtained by the plaintiff and executed to him to facilitate proof of the demand against the estate in bankruptcy, and not with a view to revive the demand. Such evidence would show that the paper was never delivered to have effect as a contract.—Atwood v. Gillett, 2 D. 206.

¶ 795. Testimony that an order for a machine, which the vendee agrees not to countermand, and which provides that all oral agreements not embodied therein are waived, was given in reliance upon the statement

of the vendor as to material facts which he knew to be false, and of which the vendee was ignorant, is not open to the objection that it changes the terms of the written contract, and is therefore inadmissible.—Peck v. Jenison, 99 Mich. 326.

¶ 796. Where the fact of the giving of an order for goods is not disputed, but the giver defends upon the ground that he bargained for a quantity of goods less than that inserted in the order, which was signed upon the understanding that it was for the lesser quantity, it is competent for the giver to testify to the conversation had with the agent when the order was taken, for the purpose of ascertaining whether or not the agent deceitfully inserted in the order a larger quantity of goods than that agreed upon.—Shrimpton & Sons v. Netzorg, 104 Mich. 225.

¶ 797. Evidence of fraudulent misrepresentations, which were statements of the effect of the contract and of rights thereunder, is inadmissible as tending to vary the terms of the contract.—Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702.

¶ 798. While, where a written instrument is unambiguous, parol testimony is inadmissible to explain, change, vary or contradict its terms, yet, where the issue is one of fraud, evidence of what was said during the preparation and execution of the instrument tending to establish the fraud, is admissible.—Lake Erie Land Co. v. Chilinski, 197 Mich. 214.

¶ 799. Notwithstanding the rule that negotiations preliminary to the execution of a written contract may not be received to change or vary its terms, if misrepresentations of material facts are made to induce the contract, and do induce it, evidence of such misrepresentations may be given for the purpose of establishing fraud.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 800. The rule that parol evidence cannot be admitted to vary the terms of a written contract does not apply to a case where the defendant denies that he signed the note sued upon, that it had been altered, and that there was no consideration given for the note, and therefore the defendant was properly allowed to testify as to what occurred when the purported note was executed.—Acme Food Co. v. Tousey, 148 Mich. 697.

¶ 801. Evidence to show that an assignment of a contract was procured for the purpose of doing away with a competitor and is unlawful is inadmissible, in an action by the assignee on such contract, where there is nothing on the face of the contract or the assignment to indicate its unlawful purpose.—C. H. Little Co. v. Cadwell Transit Co., 197 Mich. 481.

§ 157. ——To show conditional execution.

See also post ¶ 1025.

Inadmissibility of evidence that one signed note on condition that he should not be held liable, see post §§ 174, 175.

¶ 802. Evidence, tending to show that for want of a concurrence in a condition attached to an order it never became a binding contract, is not objectionable as tending to vary a contract.—Aldine Press v. Estes, 75 Mich. 100.

¶ 803. Parol evidence that a written order for the purchase of goods was given with the understanding that it was to be obligatory only in case the purchaser should be allowed to cancel a similar order previously given to another person is not inadmissible as varying the terms of a written contract.—Cleveland Refining Co. v. Dunning, 115 Mich. 238.

¶ 804. Parol testimony that a stock subscription was made with the understanding that it should not be binding until the defendant had verified certain representations made to him, and that as such verification was not obtained he withdrew his subscription, is not a variance of a written agreement by parol, but rather a showing that no contract existed, and it is therefore admissible.—Ada Dairy Ass'n v. Mears, 123 Mich. 470.

¶ 805. Parol evidence is admissible to show that a promissory note unconditional in terms, was placed in the hands of the payee with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event.—Central Savings Bank v. O'Connor, 132 Mich. 578.

¶ 806. In an action on a bond, the testimony of the sureties as to conversations at the time of signing the bond, to the effect that the bond was not to be used unless a third party signed it, was competent not only as part of the res gestæ, but as defining the obligation which by the delivery of the incomplete instrument the sureties were willing to undertake; where it appeared that the city council whose duty it was to accept the bond, had constructive notice of the principal's agreement by the insertion of the name of such third party as a cosurety.—People v. Sharp, 133 Mich. 378.

¶ 807. In assumpsit against a village on municipal bonds, testimony is inadmissible to show the understanding of the aldermen in regard to the effect of the instructions as to the conditions of delivery of the bonds.—Schmid v. Village of Frankfort, 134 Mich. 619.

¶ 808. One who is sued on a contract to sell land to be paid for in part by the conveyance of other land to plaintiff may show by parol that the papers were put in a third

person's hands to be delivered when defendant's wife should sign, and when his attorney should approve them.—Dikeman v. Arnold, 71 Mich. 656.

¶ 809. Parol evidence that a note was signed by defendant comaker at the payee's request after refusing the other maker's unsecured note on the payee's promise that defendant should not be held, is not admissible to show fraud (which it does not tend to prove), nor that the note was delivered conditionally or for a specified purpose only. —Kulenkamp v. Groff, 71 Mich. 675.

¶ 810. An indorser before utterance of a promissory note, who is thereby in law a joint maker, cannot, when sued upon it, vary the terms thereof by showing that he was induced to sign it by the payee's promise that he would not be held liable theron.—Gumz v. Giegling, 108 Mich. 295.

§ 158. ——To show genuineness or true contract.

To show true consideration, see post § 161.

¶ 811. When the genuineness of a paper—as an application for insurance—is contested, the genuine paper having been drawn by the agent of the company and the statements to be embodied in it having been communicated by the applicant to the agent, the conversation between them at the time of putting it in writing is inadmissible as bearing on the question of the actual contents of the paper. —North American Fire Ins. Co. v. Throop, 22 Mich. 146.

¶ 812. In order to show mistake in the description of lots, parol evidence that the grantee's husband, he being the real purchaser, inspected the lots and estimated the frontage to a certain fence, whereas they extended beyond, is admissible although such deed is made out in the name of the purchaser's wife.—Conlin v. Masecar, 80 Mich. 139.

¶ 813. Parol evidence is admissible on the part of the defense in a bill for specific performance, to show that by fraud, mistake or surprise, the written agreement does not contain the real terms.—Lemon v. Randall, 124 Mich. 687.

¶ 814. Where in an action on a note for the purchase price of a gasoline engine defendant claimed the engine was purchased under an oral agreement with a warranty of horse power, with which warranty the engine did not comply, and defendant claimed the sale was based upon a subsequent written order, containing no such warranty, proof of the oral agreement is not excluded by the parol evidence rule.—Farmers' Supply Co. v. Inglewright, 179 Mich. 504.

¶ 815. It may be shown by parol that the date of an executor's oath on the report of a sale of real estate was a clerical error, and that the oath was taken and subscribed before the sale.—Norman v. Olney, 64 Mich. 553.

§ 159. Purpose or circumstances of contract or writing.

Circumstances of execution and date, see post § 160.

Surrounding circumstances as index of intent, see post § 166 et seq.

To show true character of instrument, see post §§ 180, 181.

Evidence as to why certain words were inserted, see post ¶ 882.

Res gestæ of formation and execution of contracts and writings, see post § 457.

¶ 816. In an action between the original parties to a note the circumstances of its issue are open to explanation.—Smith v. Van Blarcom, 45 Mich. 371.

¶ 817. In an action between original parties upon a non-negotiable note defendant may show the circumstances under which he had indorsed it to plaintiff if the evidence does not vary any positive legal agreement made by him.—Lamb v. Story, 45 Mich. 488.

¶ 818. Oral evidence is sometimes admissible to show special circumstances known to the parties to a written contract at the time it was made, in order to lay a foundation for damages.—Hopkins v. Sanford, 41 Mich. 243.

¶ 819. In an action upon a written agreement to contribute as jointly liable on a note signed by the plaintiff only, parol evidence of the purpose of giving the note is inadmissible where the purpose is stated in precise language in the body of the agreement. —Crane v. Bayley, 126 Mich. 323.

¶ 820. Where heirs have conveyed lands of an estate to the administrator so that he may sell for the benefit of the estate and account to the heirs for the proceeds, parol evidence is admissible to show the purposes for which the deed was executed, and to show what sales were made and what sums realized.—Bitely v. Bitely, 85 Mich. 227.

¶ 821. Parol evidence is admissible to show that a second mortgage was intended to be applied as a payment upon a prior one.—Blair v. Carpenter, 75 Mich. 167.

¶ 822. Parol evidence is admissible to show that a mortgage, purporting to have been given for the purchase price of land, was in fact for over twice its value, was made without consideration, for the purpose of satisfying or placating grantor's (mortgagee's) relatives and of protecting the interests of the mortgagor, and that it was agreed that it should never be enforced.—Church v. Case, 110 Mich. 621.

¶ 823. A power of attorney—"For me, in my place and stead, to do and transact all my business of every name and nature; * * * to borrow money in my name, and to make and execute all papers, notes, conveyances, and other instruments necessary to carry into effect the powers hereby granted"—is not varied by testimony that it was given at the request of a bank lending money for a mercantile business conducted in the name of the maker of the power by her husband, the terms being broad enough to include the particular business so specified.—Coldwater National Bank v. Buggie, 117 Mich. 416.

¶ 824. Where a married woman is sought to be charged for money lent to carry on a business claimed to be solely hers, but in the name of her husband, testimony of statements by her as to her understanding of the effect of a very general power of attorney executed by her to her husband is admissible as having some tendency to show that the business is in fact her business.—Coldwater Nat. Bank v. Buggie, 117 Mich. 416.

¶ 825. On a bill by a Roman Catholic bishop to enforce the specific performance of a declaration of trust in a parcel of land, a part of the funds for which had been contributed by a voluntary club of men parishioners, parol evidence that the land was purchased by the trustee and others for the purpose of providing a site for a new church building is competent and admissible for the purpose of determining the legal effect of the action of the club, and for that purpose is not objectionable as varying the terms of the trust.—Eis v. Croze, 149 Mich. 62.

§ 160. Execution and date of instrument.

Parol proof of conditions of escrow or delivery, see ante § 119.

Admissibility of parol to impeach execution or genuineness of writing, see ante §§ 156, 157.

¶ 826. Parol evidence is admissible to show the true date of the delivery of a deed.—Cook v. Knowles, 38 Mich. 316.

¶ 827. It may be shown by parol that the date of an executor's oath in the report on sale of real estate was a clerical error, and that the oath was taken and subscribed before the sale.—Norman v. Olney, 64 Mich. 553.

§ 161. Explaining or showing true consideration.

Limitation of rule as to showing true consideration where effect would be to vary the contract, see post § 162.

To show failure or absence of consideration, see post § 163.

Inconclusiveness of stated consideration, see Contracts § 143.

Relevancy and sufficiency of evidence of consideration, see Contracts §§ 141, 142.

¶ 828. The consideration of a contract, as a general rule, to which there are some exceptions on the ground of public policy, may always be inquired into.—Colman v. Post, 10 Mich. 422.

¶ 829. Parol evidence is admissible to explain the true consideration for a contract and apply the instrument to the subject-matter.—Hyler v. Nolan, 45 Mich. 357.

¶ 830. Where in trover by the buyer of a piano for its conversion by the seller, plaintiff claims to have signed the purchase contract under a mistake of fact and that no interest on deferred payments was to be paid, and both parties concede that there was a different price than that stated in the contract, oral evidence is admissible to show what the agreed price was.—Hautala v. Dover, 176 Mich. 366.

¶ 831. Where an original building contract was modified by a memorandum of the parties indorsed on the original, stating that for fear that the original contract price was insufficient to compensate the plaintiff the owner agreed to pay more, parol evidence was admissible to show that before making the modified contract the plaintiff had refused to complete the original contract, under the rule permitting the consideration of a written agreement to be proved by parol testimony.—Scanlon v. Northwood, 147 Mich. 139.

¶ 832. Parol evidence is inadmissible to vary a note so as to show a different consideration from that shown on its face.—Johnson v. Sutherland, 39 Mich. 579.

¶ 833. In an action on a promissory note, parol evidence that the note was given upon the representation that the payee had obtained a job of work from a third person for the maker is not incompetent.—Sebring v. Hazard, 128 Mich. 330.

¶ 834. It is competent to show by parol evidence that notes and a bond of indemnity given upon a purchase of property were based upon an agreement that the debts to be paid under the bond did not exceed a certain sum, and that any excess paid beyond that should be allowed by way of reduction of the notes. Such evidence is relevant to show the real consideration of the transaction, and to confine the recovery to the amount the payee is entitled to demand.—Bowker v. Johnson, 17 Mich. 42.

¶ 835. The consideration of a guaranty indorsed on a note may be proved by parol.—Jones v. Palmer, 1 D. 379.

¶ 836. The words "for value received" in a guaranty cannot exclude extraneous proof of the real consideration. Such proof does not contradict or vary the import of these words in the instrument.—Jones v. Palmer, 1 D. 379.

¶ 837. In trover by a mortgagor for goods taken and sold under the insecurity clause in a purchase-money mortgage, it appeared that plaintiff conveyed land to defendant in payment for one of the mortgage notes, which was then surrendered. Defendant then indorsed upon another of the notes an agreement that on payment of $100 within twenty days upon a third note not yet due, the indorsed note should be considered paid and should be returned; and such sum was so paid and the note returned. Held, that plaintiff might show that as an inducement to make the transfer of land and the advance payment he was assured by defendant that he would not be molested in his possession of the goods.—Woods v. Gaar, Scott & Co., 93 Mich. 143.

¶ 838. In an action to recover the balance due on a land contract which contains the purchaser's unqualified promise to pay a given amount, it is error to admit testimony that the actual agreed price of the lot was smaller and that the amount to be paid was increased for the purpose of giving the lots an inflated value.—McLeod v. Hunt, 128 Mich. 124.

¶ 839. The true consideration for a deed may be shown by parol.—Smith v. Maxey, 186 Mich. 151.

¶ 840. Parol evidence is, under the established rule in this state, competent to show the actual consideration for deeds of land where the rights of innocent purchasers for a valuable consideration are not involved.—Ruch v. Ruch, 159 Mich. 231.

¶ 841. The recital of a consideration in a deed is merely to give it effect as a conveyance; and for any other purpose parol evidence is admissible to show that it was actually more or less than the amount stated.—Strohauer v. Voltz, 42 Mich. 444.

¶ 842. The consideration to be recovered in an action for breach of warranty is the sum received by the defendant for the land, and the recital in the deed is not conclusive, but he may show that he in fact received a less sum.—Cook v. Curtis, 68 Mich. 611.

¶ 843. The recitals of the receipt of an adequate consideration in a deed are subject to denial in a suit to set aside.—Eckler v. Alden, 125 Mich. 215.

¶ 844. The expression in a deed of one consideration does not exclude proof of another, and the real, consideration.—Ruch v. Ruch, 159 Mich. 231.

¶ 845. The real consideration of a life lease, the consideration of which is expressed as being one dollar, may be shown when material.—Stotts v. Stotts, 198 Mich. 605.

¶ 846. The consideration for a deed may be shown, by oral testimony, to include chattels not mentioned therein.—Dean v. Adams, 44 Mich. 117.

¶ 847. Parol inquiry into the consideration of a deed is admissible.—Collar v. Collar, 75 Mich. 414.

¶ 848. The true consideration of a deed may always be shown where it becomes material.—Flynn v. Flynn, 68 Mich. 20.

¶ 849. Parol evidence that a bargain for an exchange of lands contemplated the payment by one party of interest on mortgages on the property conveyed by him, and the assumption of the principal only by the other party, is admissible as showing the consideration of the conveyance by the latter, although the deed to him excepted the mortgages from the covenant of warranty, without any qualification in regard to interest.—Ford v. Savage, 111 Mich. 144.

¶ 850. A grantee under a deed by which he assumes, as a part of the consideration, the payment of one-third of the indebtedness of a certain business, may show by parol, in an action by him against his grantor to recover an excess of moneys so paid, that the debts which he assumed were agreed to amount to a certain sum, while in fact they exceeded it.—Clark v. Lowe, 113 Mich. 352.

¶ 851. Parol evidence is admissible to show that the grantee in a deed agreed to pay a mortgage on the property.—Mowry v. Mowry, 137 Mich. 277.

¶ 852. It may be shown by parol that the actual consideration for a deed of property to a religious corporation for church purposes, which expressed a consideration of "one dollar and other consideration hereinafter stated," was a trust declared therein in favor of certain other denominations than that of the grantee.—White v. Rice, 112 Mich. 403.

¶ 853. Where a strip of land is deeded to a city to be used as a boulevard, oral testimony may be introduced by the representatives of the grantors to show that the consideration of the grant was that the city should not tax the abutting property for improvements.—Scovel v. City of Detroit, 159 Mich. 95.

§ 162. ——Where effect of contract would be changed.

¶ 854. Parol testimony which is not limited to showing the consideration of a written contract, but which seeks to change the scope and effect of the contract and to cast upon a party an obligation which the contract does not require of him, is properly rejected.—Foley v. Grand Rapids & I. Ry. Co., 168 Mich. 496.

¶ 855. As the effect of a conveyance of land upon which a crop of wheat is growing

is to pass to the grantee title to the wheat, such effect cannot be varied by evidence of a contemporaneous parol agreement that as a further consideration for the conveyance the grantee should harvest and market the wheat and pay the grantor one-third of the proceeds; since that would be creating a parol reservation in the deed.—Adams v. Watkins, 103 Mich. 431.

¶ 856. Parol evidence is admissible to establish an agreement by a grantee to allow the grantor, as part consideration for the deed, the privilege of sowing and raising for his own use a crop of grain upon the land conveyed; there being no parol reservation involved.—Breitenwischer v. Clough, 111 Mich. 6.

§ 163. Failure, illegality or nonexistence of consideration.

See also ante ¶ 822.

To show true consideration, see ante §§ 161, 162.

To show real object or purpose of writing, see ante § 159.

¶ 857. Parol evidence is always admissible to show that a contract apparently valid has no consideration to support it.—Jennison v. Stone, 33 Mich. 99.

¶ 858. Evidence is admissible in an action on a contract to show the nonexistence of its subject-matter, to wit, a judgment assigned but legally nonexistent.—Gibson v. Pelkie, 37 Mich. 380.

¶ 859. Failure of consideration may always be shown in a suit on a contract.—Maltz v. Fletcher, 52 Mich. 484.

¶ 860. Parol testimony is admissible to show a want of consideration.—Fire Ins. Assoc. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 861. A seal is now only prima facie evidence of consideration.—Green v. Langdon, 28 Mich. 221.

¶ 862. Any sealed instrument between party and party may be attacked for a total want of consideration.—Hobbs v. Brush Electric Light Co., 75 Mich. 550.

¶ 863. As between the immediate parties to a note parol evidence is admissible to impeach the consideration.—Kulenkamp v. Groff, 71 Mich. 675.

¶ 864. In an action between the original parties to a note evidence showing a failure of the consideration is admissible.—Buck v. First Nat. Bank, 27 Mich. 293.

¶ 865. Parol evidence showing failure of consideration for a note does not vary the written contract evidenced by the note.—Brown v. Smedley, 136 Mich. 65.

¶ 866. As against the payee of a promissory note parol evidence is admissible to show failure of consideration and is not objectionable as tending to vary the written contract evidenced by the note.—Blanchard v. Ridgeway, 179 Mich. 491.

¶ 867. In an action on an agreement to pay plaintiffs the unpaid balance on notes given to them by a third party and indorsed by the defendant, parol evidence is admissible to show that the consideration was an executory promise of plaintiffs as yet unperformed.—DeCamp v. Scofield, 75 Mich. 449.

¶ 868. In an action by the original payee of a note, parol evidence that it was signed by defendant at payee's request, after refusing the maker, on the payee's promise that defendant should not be held, is admissible to show want of consideration.—Kulenkamp v. Groff, 71 Mich. 675.

¶ 869. Parol evidence is admissible to show that part of the consideration of a note given on the purchase, by the holder of the equity of redemption, of a mortgagee's bid on statutory foreclosure, consisted of illegal attorney's fees which were included as expenses.—Macomb v. Wilkinson, 83 Mich. 486.

§ 164. Explaining or completing instrument.

See also post ¶ 959.

Showing what real and true terms were, see ante § 158.

Parol proof of surrounding circumstances for other purposes than explaining or construing language of the instrument, see ante § 159.

What ambiguity warrants resort to parol, see post § 165.

What is admissible to explain or complete, see post §§ 166, 167.

Restriction of extrinsic evidence to matters in doubt or ambiguity, see post § 168.

Parol evidence of subsequent or contemporaneous acts amounting to practical construction, see post § 205.

The doctrine that a contract deed or will is to be construed in the light of surrounding and contemporaneous circumstances is treated in Contracts, VI, A; Deeds, III, A; Wills, VI, A.

Possibility of removing ambiguity in deed by parol as making ejectment a proper remedy and barring reformation suit, see Reformation, I.

¶ 870. Where there was a want of certainty in a written instrument, and it was not clear from its terms whether the undertaking of defendants contained in it was to the plaintiffs or to third persons named, parol evidence of the circumstances attending it was held admissible, not to contradict the writing, but to aid the court in giving a true construction to it.—Facey v. Otis, 11 Mich. 213.

¶ 871. An unambiguous contract cannot be varied in its legal effect by the under-

standing of the parties at or before its execution; and where the only question is as to its legal meaning, its construction cannot be aided by oral evidence of conversations between the parties.—Johnson v. Cranage, 45 Mich. 14.

¶ 872. In suit on a written contract evidence in explanation of the circumstances of its execution, or of the sense in which certain words were used in it, is only admissible when ambiguous or equivocal words have been employed.—North American Fire Ins. Co. v. Throop, 22 Mich. 146.

¶ 873. Parol evidence is inadmissible to vary the construction of a promissory note complete in itself.—Kelsey v. Chamberlain, 47 Mich. 241.

¶ 874. Evidence outside a written instrument to explain its meaning and to arrive at the intention of the parties is only admissible when the same cannot be gleaned from the instrument itself.—Williams v. Walsh Mfg. Co., 169 Mich. 676.

¶ 875. Parol testimony is always admissible of the circumstances of the making of a written contract so far as these are necessary to enable the court to construe it properly.—Peabody v. Bement, 79 Mich. 47.

¶ 876. Parol testimony is admissible to show the circumstances under which the instrument was executed.—Fire Ins. Assoc. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 877. Where writings show plainly all the essentials of a contract for the sale of land, parol evidence of the circumstances under which they were executed is inadmissible in aid of their construction.—Mull v. Smith, 132 Mich. 618.

¶ 878. Where there is an ambiguity in a contract of guaranty rendering it uncertain whether the guaranty was a continuing one or whether it covered only one item, parol evidence is admissible to explain the ambiguity.—R. L. Polk Printing Co. v. Smedley, 155 Mich. 249.

¶ 879. It cannot be shown by parol that it was the understanding of a guarantor that a plain and unambiguous contract of guarantee was to apply to future indebtedness only.—State Nat. Bank of Albuquerque v. Wernicke, 185 Mich. 281. (Ostrander, Kuhn and Stone, JJ., dissenting.)

¶ 880. Where a contract is in writing, is very voluminous, and expressly states that it contains all the terms of the agreement between the parties, evidence is inadmissible to aid in determining what the original contract was.—John D. Gruber Co. v. Smith, 195 Mich. 336.

¶ 881. Where an agreement to execute a land contract is complete in itself and unambiguous, it is error, in a suit for specific performance, to receive evidence contradicting its provisions, or tending to show that it did not embody all the agreement of the parties.—Ogooshevitz v. Arnold, 197 Mich. 203.

¶ 882. How certain words came to be inserted in a contract cannot be shown by parol where the writing is plain and not ambiguous.—Northwestern Cooperage & Lumber Co. v. Rubinsky, 180 Mich. 413.

§ 165. ——Ambiguity or incompleteness.

Ambiguity as one of grounds for admission of parol, see ante § 164.

¶ 883. Latent ambiguity, being raised by extrinsic evidence, may be removed in like manner.—Ives v. Kimball, 1 Mich. 308.

¶ 884. An instrument in the following form: "J. G. W. bought of C. G. R., 1862, March 24th, one frame building," etc., "Received payment, $419, C. G. R.," is not conclusive evidence of the terms and conditions of the sale, and does not exclude parol evidence to show that the property mentioned was not to be delivered till paid for in the manner orally agreed upon at the time of sale.—Rowe v. Wright, 12 Mich. 289.

¶ 885. A power of attorney authorized the sale of "three certain lots of land in" a certain village, "belonging to" the person who gave the power. Held, that any ambiguity that might arise from the previous platting of one of the tracts into smaller lots would be latent merely, and might be removed by parol evidence.—Vaughn v. Sheridan, 50 Mich. 155.

¶ 886. Where an engine is sold with a guaranty that the saving of fuel shall "be equal to that claimed for the Corliss," a latent ambiguity exists which may be explained by parol evidence, as to whose claim and what claim was meant.—Wickes Bros. v. Swift Electric Light Co., 70 Mich. 322.

¶ 887. Where in proving chain of title the question in dispute is whether a quitclaim deed conveyed the fee in the land described, or a leasehold interest only, it may be proper to show that the value of the land was several times greater than the consideration stated in the deed, where the other evidence left in doubt the character of the claim conveyed.—Gilman v. Riopelle, 18 Mich. 145.

¶ 888. A., for whom B. was building a house under a contract to finish it by September 15, 1885, agreed to become responsible for lumber furnished B. by C. to a certain amount, payable when the house should be completed, and B.'s draft payable on September 15, 1885, to C., was accepted by A., with this qualification: "It is understood that the dwelling shall be completed before this

draft is paid." B. failed to complete the house at all, and A. was put to expense to finish it. A. was sued on the draft. Held, that it was competent for him to show the understanding that the house was to be completed under the building contract. That contract had to be read to explain the completion covered by the condition, which without it would be meaningless.—Ferguson v. Davis, 65 Mich. 677.

¶ 889. Where a trust mortgage is conditioned for the payment to the mortgagee, first, of three notes indorsed by the mortgagee and specifically described, and of any renewals or extensions of said notes, and of any other notes upon which the mortgagee is indorser, and, second, of three notes, amounting to a stated sum, held by a specified bank, and of a fourth note held by another bank, and of any other liabilities of the mortgagor to the mortgagee, then or thereafter incurred, for the indorsement or otherwise of said mortgagee, the intention to create two classes of creditors, and to prefer those mentioned in the first class, is entirely clear upon the face of the mortgage, and the meaning of the language used cannot be changed by parol evidence.—Dunham v. Steele Packing & Provision Co., 100 Mich. 75.

¶ 890. Parol evidence is admissible to aid in arriving at the intention of parties where equivocal words are used in a contract.—Borden v. Fletcher's Estate, 131 Mich. 220.

¶ 891. In an action for the balance due on the purchase price of beans, testimony as to the meaning, in defendant's business, of the words "he to have advance for two weeks," contained in the contract in question, was properly excluded as explanatory of an unambiguous phrase, in the absence of any showing or offer to show that the expression had any definite trade meaning.—Chase v. Ainsworth, 135 Mich. 119.

¶ 892. Extrinsic evidence was admissible to show precisely what was meant by a provision in a conveyance of land "excepting, however, from this conveyance, certain pine trees now standing on said land."—French v. Sparrow-Kroll Lumber Co., 135 Mich. 424.

¶ 893. There was no such ambiguity in a written contract for advertising as to require parol testimony to explain when the publication of the advertisement should begin, or to explain an alleged oral agreement that the contract was not to become obligatory until the goods advertised were distributed to certain retailers; where, in assumpsit thereon, it appears that such contract was a written order to plaintiff from defendant for the insertion of an advertisement on certain days of the week during one year, in a certain space, for which defendant agreed to furnish copy, and to pay plaintiff at a certain rate per line monthly.—Mali & Express Co. v. Wood, 140 Mich. 505.

¶ 894. A receipt for $50 signed by vendors, who were the owners as heirs of an undivided interest in land, reciting that it was first payment of $11,000, the purchase price of such land, the balance to be paid as soon as vendors perfected title, and containing an agreement to perfect title and to give vendee a warranty deed thereto as soon as the purchase price was tendered, was a clear and unambiguous agreement for the sale of real estate, and, in an action for a breach thereof, oral evidence was not admissible to vary the same by showing that the contract was conditioned upon procuring the transfers from the other heirs.—Miller v. Smith, 140 Mich. 524.

¶ 895. It is apparent that a written contract does not contain all the agreement, where such contract established an agency for the sale of wagons, names the terms of payment therefor, and contains an order for "complete" wagons, and refers to them as to be shipped, and where, under such contract, action was brought for the price of wagons shipped a long time before the contract was made to a prior agent in the buyer's town, and claimed to be turned over under the contract to such buyer, and where such buyer offers in defense that such wagons were not "complete," and therefore, seller had not performed; and accordingly parol testimony is admissible to explain what was intended by the contracting parties, even though such contract stipulates that it and the accompanying order constitute the only agreement made in relation thereto, "verbal statements contrary notwithstanding."—Harrison Wagon Co. v. Brown, 145 Mich. 621.

¶ 896. A written farming contract referring to certain necessary buildings on the premises, when in fact none such were there is so incomplete that parol evidence is admissible to show that an oral promise was made to erect them.—Beld v. Darst, 146 Mich. 143.

¶ 897. A guaranty attached to a bill of goods which is insufficient in itself to constitute an agreement will not be regarded as the entire contract between the parties so as to exclude oral evidence of the original agreement.—Richey v. Daemicke, 86 Mich. 647.

¶ 898. In a suit against the guarantors on a promissory note, where the letters which passed between the parties construed with defendant's letter of guaranty expressly purport to contain all the elements of the agreement theretofore made, such agreement is not subject to change by parol testimony.—R. L. Polk Printing Co. v. Smedley, 155 Mich. 242.

¶ 899. Contract of enrollment and for a course of correspondence instruction examined, and held to be a complete memorial

of the agreement of the parties, precluding parol evidence as to what defendant's agent said concerning its legal effect and as to the liability of defendant to continue the correspondence course.—International Text-Book Co. v. Marvin, 166 Mich. 660.

¶ 900. Where a person contracts for an agreed compensation to bore a test well for oil and minerals a certain diameter and a certain depth, to provide the necessary casing and equipment and to use methods in casing such as are usually employed in oil fields, and the owner agrees to pay an additional sum if it is necessary to withdraw the casing, the contract is unambiguous and all the work necessary in putting in the casing is included therein, and evidence is inadmissible as to a usage and custom in oil fields as to the price charged for "rimming out" a bore to make it large enough to receive a casing.—Hanna v. Smith, 173 Mich. 483.

§ 166. ——What admissible generally, custom and usage.

Inadmissibility of contemporaneous oral or written agreements, see post § 170.
Inadmissibility of prior contemporaneous negotiations, letters or statements, see post § 171.
Inadmissibility of parties' intent or understanding, see post § 172.
Admissibility for particular purposes, see post §§ 169, 172-186.
Validity, requisites and effect of customs and usages, see Customs.
Inadmissibility of custom against law, see Customs §§ 3, 4.
Effect of customs in construing contracts, see Customs § 11.
Implication that known and established customs and usages are part of contract terms, see Contracts § 165.
Admissibility of plat in aid of description in deed which is in evidence, see also Deeds § 58.

¶ 901. Where the language used in an instrument is of doubtful meaning, evidence of the surrounding circumstances, and of what was said by the parties interested, is competent to determine its real meaning, but the secret intention of either party cannot be shown.—Dunham v. Steele Packing & Provision Co., 100 Mich. 75.

¶ 902. Parol to show that an illiterate order for "Two square feeting schafts 4 ten hoe drills" was meant to order two shafts for ten-hoe drills, is admissible, in a suit against the purchaser, to rebut the effect that said order might otherwise have upon his contention that drills of the same kind previously purchased were defective.—Stoddard Mfg. Co. v. Miller, 107 Mich. 51.

¶ 903. Proof of custom is allowable to establish the meaning in a contract of a word of doubtful signification.—Bancroft v. Peters, 4 Mich. 619.

¶ 904. Where a letter evidencing employment as a broker, contains the expression "you may have ten days from this date in which to place the stock," evidence as to what was meant by such words is inadmissible, such not being within the rule rendering admissible evidence of usage.—Obenauer v. Solomon, 151 Mich. 570.

¶ 905. A general custom of the hay trade known to both parties to a contract for the purchase of hay, with reference to which they contracted, as to whose duty it was to pay for the baling, may be shown, where the terms of the written contract are ambiguous.—Saginaw Milling Co. v. Schram, 186 Mich. 52.

¶ 906. Where a contract for the purchase of hay is ambiguous as to who was to pay for the baling, the seller may show under a notice of recoupment that the plaintiff failed to comply with a well-known trade usage to provide for the baling.—Saginaw Milling Co. v. Schram, 186 Mich. 52.

§ 167. ——Admissibility of particulars of other contracts.

¶ 907. It is not a presumption of law, applying to the interpretation of a distinct contract apart from others, that the same parties will always make the same terms for their contracts. Each contract must stand by itself unless they are actually connected or referred to in the course of dealing. Therefore the exclusion of evidence showing the time of performance of previous contracts between the same parties, as a criterion to determine what would have been a reasonable time for delivery, was not error.—Hinman v. Eakins, 26 Mich. 80.

¶ 908. In the construction of railroad trackage and terminal leases held from a union depot company the correspondence and circumstances attending the adjustment among the several lessees of their rights, and especially the successive drafts of an agreement among them by which they unified their leasehold rights into a union terminal, are admissible; where it thereby appears that constructions contended for are rebutted by the fact that appropriate language was proposed and rejected in making such drafts.—Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215.

¶ 909. The terms of a former contract are admissible in a suit on a later one when the parties contracted the second time in the light of the former contract and a knowledge of it is essential to understand the later contract.—Welling v. Strickland, 161 Mich. 235.

¶ 910. Where a contractor for the performance of certain work at a fixed price sublets a portion of the work, evidence of the cost of doing the work retained by the contractor is admissible as bearing upon the

question of what contract was in fact made between the contractor and his subcontractor as to the compensation of the subcontractor.—Carpenter v. Lennane, 166 Mich. 610.

§ 168. ——Restriction of parol to matters in doubt or incomplete.

Admissibility of parol evidence to prove matters supplementary or complementary of agreement but not part of it, see post § 169.

Inefficacy of custom against terms of contract, see Customs § 12.

¶ 911. Where a written contract contains an uncertain clause capable of being made certain by parol evidence, evidence of subsequent conversations between the parties is admissible to explain its intended bearing upon the contract, but not to vary the terms of such contract.—Jenkinson v. Monroe Bros. & Co., 61 Mich. 454.

¶ 912. Imperfect writings and such as do not embrace the whole agreement between the parties may be supplemented by parol evidence so long as the portion not contained in the written part of the contract does not conflict with that which is written, or materially add to or vary its terms.—National Cash Register Co. v. Blumenthal, 85 Mich. 464.

¶ 913. The rule that where a writing does not embody all the terms of a contract between the parties an additional agreement may be shown by parol, does not permit contradicting the terms of so much of the contract as is reduced to writing.—Hutchison Mfg. Co. v. Pinch, 107 Mich. 12.

¶ 914. Where an order for the purchase of machinery for a mill provided merely that it was to be paid for "when the mill was fixed and gave good results," parol evidence was admissible to show an agreement by the vendor to set up the machinery and repair the mill within a specified time, but not to show that he represented such machinery would not require more power to operate it than machinery then in use by the vendee would.—Hutchison Mfg. Co. v. Pinch, 107 Mich. 12.

¶ 915. The circumstances attending the execution of a deed may be shown by parol for the purpose of ascertaining the intent of the parties, where the deed is ambiguous, but not for the purpose of varying the terms of the grant by adding thereto or taking therefrom.—Powers v. Hibbard, 114 Mich. 533.

¶ 916. When a chattel mortgage is certain in all respects except the time of payment, parol evidence admitted to show date of maturity is limited in its effect to the one question.—Crowley v. Langdon, 127 Mich. 51.

¶ 917. Evidence of a usage is admissible in connection with an informal contract void of details, in order to explain doubtful provisions of the writing, but not for the purpose of varying or contradicting the well-expressed intention of the parties.—Saginaw Milling Co. v. Schram, 186 Mich. 52.

¶ 918. In an action for the value of land which defendant agreed to convey to plaintiff in exchange for land to be conveyed to defendant testimony as to negotiations between the parties is properly admitted to give a history of the transaction, and cannot be given for other purposes.—Dikeman v. Arnold, 83 Mich. 218.

§ 169. Complementary and supplementary portions of agreements.

What regarded as incomplete, see ante § 165.

Language purporting to be complete and exclusive of other agreements, see ante § 165.

Restriction of evidence to purpose of completing or supplying lack, see ante § 168.

Parol proof of other contracts and agreements between parties but independent of one in suit, see post § 202.

Best evidence where contract is partly written and partly oral, see ante § 128.

¶ 919. Where only part of a transaction appears from the written documents the circumstances are admissible to show the whole transaction.—Wisconsin M. & F. Ins. Co. Bank v. Manistee Salt & Lumber Co., 77 Mich. 76.

¶ 920. Where, pursuant to an oral agreement, a will and contract not containing all the arrangements of the parties have been executed, the whole agreement may be put in evidence, and the parties are not confined to the writings which form only a part of it.—Bird v. Pope, 73 Mich. 483.

¶ 921. A building contract referred to plans and specifications to be thereafter signed. They were not in fact signed, although agreed upon. Held, that in an action on the contract the unsigned specifications were admissible, as well as testimony showing "what kind of a front the building was to have," and other evidence of what had been agreed on. It was in explanation of the contract and not in contradiction of it.—Maxted v. Seymour, 56 Mich. 129.

¶ 922. Where letters composing the contract in question for compensation to be paid in obtaining subscriptions, did not contain a stipulation that the company in question should be organized to take over the brewery which was the subject of the transaction, or that its owners should transfer it to the company, it was competent to supply the omission by oral testimony.—Locke v. Wilson, 135 Mich. 593.

¶ 923. Where a written agreement clearly does not contain the entire contract of the parties, oral testimony may be introduced

to prove what the whole contract was.—Beld v. Darst, 146 Mich. 143.

¶ 924. Where, in a written contract for the installation of a heating plant in a residence, the degrees of temperature to which the plant is guaranteed to heat the rooms is inadvertently omitted from the schedule provided therein, such omission may be supplied by parol evidence.—Sparks v. Lord, 198 Mich. 415.

§ 170. Contemporaneous oral or written agreements.

Contemporaneous negotiations, letters and statements, see post § 171.
Particulars of other contracts as evidence to explain one in question, see ante § 167.
Merger of prior warranties in written one, see also post § 179.
Independent contemporaneous agreements, see post § 202.
Subsequent modifying agreements, see post § 204.

¶ 925. Prior or contemporaneous parol agreements cannot be shown to contradict or vary the terms of a written agreement.—Kulenkamp v. Groff, 71 Mich. 675; Nichols v. Crandall, 77 Mich. 401; Hoag v. Graves, 81 Mich. 628; Fire Ins. Assoc. v. Wickham, 141 U. S. 564.

¶ 926. The parol agreements which preceded a contract, being merged in it, cannot be shown to vary its terms or effect.—Savercool v. Farwell, 17 Mich. 308; Martin v. Hamlin, 18 Mich. 354.

¶ 927. A written contract is presumed to contain the whole of the agreement of the parties, and all parol contemporaneous agreements are merged therein.—M. Rumely & Co. v. Emmons, 85 Mich. 511.

¶ 928. A prior parol agreement is inadmissible when the writing expressly declares that there are no oral arrangements that apply thereto.—Carney v. Hotchkiss, 48 Mich. 276.

¶ 929. An indorser cannot defend on evidence of an oral agreement made at the same time as the indorsement, introduced to change its legal import and convert it into an undertaking resting on outside conditions.—Ortmann v. Canadian Bank of Commerce, 39 Mich. 518.

¶ 930. One cannot defend against his promissory note by showing an oral contemporaneous agreement to reduce the note from an absolute and specific undertaking, according to its terms and legal import, to a defeasible engagement. Such a defense is an offer to prove that the consideration of the note was the delivery of two policies of insurance, and the payment, with interest and without delay, litigation or expense, of a loss upon another policy, which policy was only paid at the end of a year, and without interest, and to show that the note was delivered for this purpose only and not as an absolute unconditional promissory note.—Hyde v. Tenwinkel, 26 Mich. 93.

¶ 930a. Parol evidence of what was said when a guaranty was executed is admissible to show whether it was limited or continuing, that being doubtful and the evidence being in aid and not in contradiction of the writing.—Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385.

¶ 931. The terms of a written lease may not be varied by parol testimony of a prior or contemporaneous verbal agreement as to the making of repairs.—Grashaw v. Wilson, 123 Mich. 364.

¶ 932. Any parol understanding of the parties prior to a written agreement even though it may have induced the making of the contract cannot be permitted to vary the plain terms of the written agreement.—Gates v. Detroit & M. R. Co., 147 Mich. 523.

¶ 933. Where defendant has contracted to convey a right of way to complainant, a railway company, and the contract contains a provision that complainants shall have three crossings over a belt line road to be built by defendant, but contains no provision that defendant shall have crossings over complainant's road, evidence is inadmissible, in a suit by the railway company to enforce the performance of the contract, to show that there was a prior parol agreement that defendant should also have such rights.—Chicago, K. & S. Ry. Co. v. Lane, 150 Mich. 162.

¶ 934. Written contracts defining the rights of the parties thereto cannot be varied, modified or contradicted by any contemporaneous oral agreement on the same subject.—Skeels v. Starrett, 57 Mich. 350.

¶ 935. Evidence of contemporaneous understandings is inadmissible to vary a written contract.—Cline v. Hubbard, 31 Mich. 237.

¶ 936. The rule applies in equity as well as at law that evidence of a contemporaneous understanding cannot be received to vary a written contract.—Martin v. Hamlin, 18 Mich. 354; Gram v. Wasey, 45 Mich. 223.

¶ 937. Evidence of a parol agreement alleged to have accompanied the delivery of a deed, stipulating that, upon certain conditions, the deed should be redelivered to the grantor, was held incompetent, there being no proof of fraud or any other circumstance which could prevent the operation of the deed as an absolute conveyance.—Beers v. Beers, 22 Mich. 42.

¶ 938. Where a contract for the performance of work in finishing articles to be manufactured for a building contained no time of performance, evidence that the parties contemporaneously agreed by parol that they should be furnished at a certain time is not admissible, as it would be varying the terms of the written contract.—Stange v. Wilson, 17 Mich. 342.

¶ 939. The grantee of a deed cannot show that, previous to its execution, it was agreed that the land should be surveyed, and, if it fell short of a certain quantity, the value of the deficiency should be indorsed on the purchase-money mortgage.—Martin v. Hamlin, 18 Mich. 354.

¶ 940. One cannot contradict his bill of sale by showing a contemporaneous parol contract inconsistent with its terms.—Brewster v. Potruff, 55 Mich. 129.

¶ 941. After the execution and delivery of a contract for the sale of logs, and a subsequent discovery that an agreement for the retention of title in vendors until the logs were paid for had been omitted through a mistake, it was orally agreed that the contract should be treated the same as if it contained said agreement. Thereupon the vendees, before the separation of the parties, and pursuant to the conditions of the contract, executed and delivered their notes for the purchase-price of the logs. The logs were delivered to the vendees, and after manufacturing a portion into lumber they sold the same to a third party, from whom it was replevied by the original vendors, who on the trial of the replevin suit sought to show said oral agreement. Held, that the giving of the notes was a part of the contract, and necessary to its completion; and that the whole proceeding must be regarded as a part of one and the same transaction, and as falling within the rule that written instruments are not to be changed or varied by contemporaneous parol agreements.—Cook v. First National Bank, 90 Mich. 214.

¶ 942. Where a written proposal which was accepted in writing covered the whole ground of pleadings between the parties, parol evidence of the arrangement is inadmissible.—Simonds Mfg. Co. v. Riddle, 73 Mich. 497.

¶ 943. A specific order for certain goods providing that they should be paid for in ten days and guaranteed by a third party cannot be varied by another contemporaneous agreement by which the purchaser becomes the general agent for the goods of the seller which provides that payment shall be made on all goods within thirty days.—Toombs v. Stockwell, 127 Mich. 379.

¶ 944. Under a contract for the sale of fruit containing only the terms, "sight draft, with bill of lading attached," it was not only competent, but proper, for the parties to determine by an oral agreement upon whom such drafts should be drawn, and where they should be presented; and parol testimony to that effect did not tend to vary the contract.—Town v. Jepson, 133 Mich. 673.

¶ 945. A written contract whereby the complainant is to convey patent rights to the defendant to belong to them exclusively and in return to be employed by defendant for five years at a stated salary and at the expiration of five years to receive one-half interest in increased capitalization based on the increased earnings of the corporation, is construed to give absolute title in the patent to the defendant corporation and to preclude evidence of a contemporaneous oral agreement that the right of property is to terminate in five years.—Church v. Anti-Kalsomine Co., 138 Mich. 211.

¶ 946. Parol evidence as to another contemporaneous agreement that the dwelling house and certain fields were not included in a written lease of a farm on shares, was incompetent in an action for the breach of such lease.—Thayer v. Gibbs, 140 Mich. 60.

¶ 947. Where a written building contract makes no requirement of the contractor to put asbestos on pipes, evidence is inadmissible to show that prior to signing of the contract the parties had an oral understanding that the contractor was so to do.—Wenzel v. Kieruj, 168 Mich. 92.

¶ 948. Where a written memorandum of agreement does not contain the entire contract between the parties, prior and contemporaneous agreements and talks may be shown in order to show what the whole contract was.—Stahelin v. Sowle, 87 Mich. 124.

¶ 949. Where logs are sold by written contract, and there is a controversy respecting the quantity delivered, and it appears that the logs were scaled by a certain third person as they were delivered, held to be competent for the vendor to show that at the time of the sale it was orally agreed between himself and the vendee that such third person should scale the logs.—Mason v. Phelps, 48 Mich. 126.

¶ 950. An oral agreement upon a scaler for logs sold is not an amendment or alteration of the written contract; it merely designates a person as the mutual agent or servant of the parties to see to the performance.—Mason v. Phelps, 48 Mich. 126.

¶ 951. Where papers are executed and delivered in performance of part only of an oral agreement, leaving some distinct portion untouched and unperformed, so much of the oral agreement as is left unperformed is not merged in the written agreement, and parol evidence to show what the actual agreement

was is not then excluded.—Doty v. Martin, 32 Mich. 462.

§ 171. Prior or contemporaneous negotiations, letters or statements.

To affect instrument with mistake or fraud, see ante § 156.

Parol to identify partner fraudulently concealed and protected, see post ¶ 1097.

Subsequent agreements and negotiations, see post, V, C.

Prior oral warranties on sale with written warranty, see also post § 179, ¶ 1039.

Prior negotiations and agreements as secondary evidence, see ante § 127.

Merger and extinction of earlier agreements and understandings in written agreement, see Contract § 265.

Nonmerger of fraudulent statements in resultant contract, admissibility to defeat instrument, see ante § 156.

Admissibility of evidence of negotiations and conversations to prove terms of oral contract, see Contracts § 315.

¶ 952. All prior talk between the parties is merged in a written contract entered into by them.—Brigham v. Martin, 103 Mich. 150.

¶ 953. Negotiations preliminary to the execution of a written instrument may not be received to change or vary its terms.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 954. Correspondence preliminary to a contract cannot be put in evidence in an action thereon if the contract covers the same ground as the correspondence and is complete in itself.—Wonderly v. Holmes Lumber Co., 56 Mich. 412.

¶ 955. Where a written agreement is made in express terms for the satisfaction of certain claims held by one party against the other, a letter previously written by the former to the latter, and containing a statement of the amount paid out by the former for the benefit of the latter, is not admissible to vary the express terms of the agreement.—Fraser v. Fraser's Estate, 42 Mich. 275.

¶ 956. In an action to recover for extra services claimed to have been performed in carrying out a written contract, a letter written prior to the date on which contract was entered into is not admissible to vary the terms of the contract by showing that the items claimed as extras were intended to be within the terms of the agreement.—Hapke v. Davidson, 180 Mich. 138.

¶ 957. Letters antedating and leading up to the making of a contract are inadmissible to vary the terms of the written contract.—Haas v. Malto-Grapo Co., 148 Mich. 358.

¶ 958. A written contract consisting of a proposal and acceptance, to furnish a heating plant to warm the building in question to a fixed temperature, could not be varied by parol evidence that the proposal was based upon the defendant's statement and understanding that he should build a stone wall under the building.—Mouat v. Montague, 122 Mich. 334.

¶ 959. In the absence of fraud, mistake or ambiguity in a contract, parol evidence of conversations and negotiations prior to its executions are inadmissible.—Sax v. Detroit, G. H. & M. R. Co., 129 Mich. 502.

¶ 960. Testimony respecting an oral conversation before a written contract was made is incompetent and inadmissible to vary the terms of the written contract.—Wallace v. Kelly, 148 Mich. 336.

¶ 961. In an action for extra services claimed to have been rendered in the performance of a written contract, prior conversations between the parties are inadmissible for the purpose of varying the written instrument.—Hapke v. Davidson, 180 Mich. 138.

¶ 962. Parol evidence of contemporaneous transactions is inadmissible to vary the terms of a written contract.—Wellman v. O'Connor-Martin Co., 178 Mich. 682.

¶ 963. A resolution of the governor and judges that a certain lot be assigned to a person named, their parol declarations that it had been conveyed, and parol proof that their records had been inaccurately kept, and many grants had been made and deeds given which did not appear thereon, were all held incompetent evidence in opposition to a subsequent conveyance by them.—Scott v. Detroit Young Men's Society's Lessee, 1 D. 119, writ of error dismissed, 5 How. (U. S.) 343, 12 L. ed. 181; and see Ready v. Kearsley, 14 Mich. 215.

¶ 964. Discussion in a board of directors preliminary to an appointment by them, and for the sole purpose of reaching a determination, cannot be put in evidence to fix the terms of agreement with the person appointed.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

¶ 965. Where in a letter that is part of correspondence making a contract of sale of land it is stated that the deed "would contain our usual mineral reservations, which included all stone," which can only be explained by previous oral conversations in reference to the form of deed, evidence of such conversations is admissible to ascertain what the contract was intended to contain.—Butler v. Iron Cliffs Co., 96 Mich. 70.

¶ 966. Conversations and negotiations preliminary to an agreement, though merged in it, may still be admissible, not for the purpose of explaining its terms but to throw light upon the question of its execution and

upon other questions connected therewith.—Wilbur v. Stoepel, 82 Mich. 344.

¶ 967. Contemporaneous conversations are admissible to add to a contract for sale and delivery of axles the particular specifications to be met of which the written agreement is silent.—Liggett Spring & Axle Co. v. Michigan Buggy Co., 106 Mich. 445.

¶ 968. Where a certified check is turned over to the payee with a letter referring to a previous arrangement and specifying the conditions upon which it may be cashed, and said payee replies by letter taking note of said conditions, oral testimony sufficient to show to what said writings referred, and precisely what the parties contemplated, is properly admitted in a suit to enjoin the payment of said check.—Preston v. National Bank of Ionia, 169 Mich. 571.

¶ 969. Where a written order for purchase signed by the vendees only does not contain all the material representations made by vendor's agents to induce vendees to buy, parol evidence to show such representations, not conflicting with the order as written, is admissible.—Palmer v. Roath, 86 Mich. 602.

§ 172. Intent or understanding of parties.

See also ante ¶¶ 871, 947.

Language admitting of proof of understanding, see ante § 165.

To show meaning of terms of trade, science and art, see post § 173.

Expressed intent as test in construction, see Contracts § 146.

¶ 970. Where there is no ambiguity on the face of an instrument, extrinsic evidence is not admissible to show an intent other than that expressed.—Wisconsin Fire & M. Ins. Co. Bank v. Filer, 80 Mich. 67; Forbes v. Darling, 94 Mich. 621.

¶ 971. Parol testimony is admissible to show that a written instrument does not express the real intent of the parties.—Burns v. Caskey, 100 Mich. 94.

¶ 972. Where in summary proceedings for possession written notice to quit is served on defendant by complainants' agent, parol evidence that the agent stated to defendant that he need pay no attention to the notice is inadmissible.—Pittsburgh & L. S. Iron Co. v. Kirkpatrick, 92 Mich. 252.

¶ 973. In an action for a breach of covenant parol proof is inadmissible to show that an existing incumbrance was agreed to by the parties to be regarded as in fact no incumbrance.—Edwards v. Clark, 83 Mich. 246.

¶ 974. In an action for a breach of covenant, where the premises in the lessee's possession had been conveyed with covenants against incumbrance, it cannot be proved by parol that it had been agreed by the parties that the lease should not be regarded as an incumbrance.—Edwards v. Clark, 83 Mich. 246.

¶ 975. Where a building contract is unambiguous in its terms, and specifies the kind of materials to be used, and that the work is to be done in a good and substantial manner, letters and conversations between the parties, prior to the time that the contract was reduced to writing, are not admissible in evidence to show that the building was to be a cheaply constructed one.—Eaton v. Gladwell, 108 Mich. 678.

¶ 976. Where a written agreement provides for the payment of a "reasonable amount" for making certain collections, evidence that one of the parties, at the time of the execution of the writing, suggested that a specified percentage be inserted in lieu of such provision, is inadmissible upon the question of reasonable compensation.—Tanner v. Page, 106 Mich. 155.

¶ 977. In an action between the parties to a lease for slander of title based on defendant landlord's statement that lessee had no right to sublet for a saloon, parol evidence is inadmissible to show that contemporaneously with the execution of the lease, providing in terms that the lessee might sublet for "business purposes," there was an oral agreement that he should not sublet for a saloon.—Harrison v. Howe, 109 Mich. 476.

¶ 978. Parol evidence is admissible to show, in an action upon a promissory note, the understanding upon which an indorsement was made reciting the receipt of money "to be indorsed on interest."—Rawlings v. Fisher, 110 Mich. 19.

¶ 979. The doctrine of the inadmissibility of evidence to vary and contradict the terms of a written contract is inapplicable to a contract of agency to sell land containing a provision for the furnishing by the owner of an abstract and tax history showing "clear title" to the premises, so as to render admissible evidence that the owners at the time of the execution of the agency agreement told the agent of a reservation of mineral rights in a deed conveying the land to such owners and also evidence that such agent stated at such time that the title was all right and that it was not necessary to make any reference to the reservation in the contract.—Appleby v. Sperling, 194 Mich. 681.

¶ 980. A witness may explain what he meant by a certain statement made by him in a letter which is in evidence.—Steele v. Kellogg, 163 Mich. 132.

§ 173. Terms and words of trade, science and art.

To explain "reasonable amount," see ante ¶ 976.
To explain "business purposes," see ante ¶ 977.
To explain "to be indorsed on interest," see ante ¶ 978.
To explain "clear title," see ante ¶ 979.
Usage as to measuring "figure work" in printing, see post ¶ 1020.
As to meaning of "mill tally," see also post ¶ 1021.
To explain illiterate or ungrammatical words, see ante ¶ 902.
Inadmissibility to restrict or narrow inclusive terms, see also post ¶¶ 1099, 1101, 1106.
Parol to show normal or usual under terms of contract extending beyond normal trade limits, see also Contracts ¶ 722.

¶ 981. Where, as security, an assignment is made of $150,000 of good and collectible accounts, now existing or hereafter to be acquired, parol evidence is admissible to show in what sense the parties used the word "accounts," and what they understood to be included therein; and to such evidence and the surrounding circumstances a court of chancery will look in determining said questions.—Preston Nat. Bank v. Smith Middlings Purifier Co., 102 Mich. 462.

¶ 982. In an action to recover the balance due upon a contract for the sale of chemical retorts, parol evidence was admissible to show that the contract did not necessarily call for a gas-tight retort, where it appeared that the term "retort" as used in chemistry and the arts, was susceptible of different constructions.—MacKinnon Boiler & Machine Co. v. Central Michigan Land Co., 156 Mich. 11.

¶ 983. Where upon a bill of lading to the order of the consignee, the shipper has indorsed the words, "B. L. attached to draft," the bill is ambiguous so as to make the introduction of parol evidence admissible to explain its meaning.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 984. A steam road roller in crossing an electric railway track in the country on a highway crossing was struck by a car going at a high rate of speed. In a resulting action for damages a rule of the company as to the speed of cars entering curves was in evidence, and the superintendent testified that a slight curve shown upon a diagram of the scene was not called a curve within the meaning of railroad curves and within the meaning of the rule. Held, he was testifying to a fact as to the application of the defendant's rules to a certain condition and was not erroneously attempting to give the meaning of the word "curve" in the rules.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 173 Mich. 1.

§ 174. Changing, restricting or extending liability.

See also ante ¶ 931.
Showing suretyship or secondary liability, see post § 175.
Changing conditions and warranties, see post §§ 178, 179.
Changing time, place, manner, or rate for performance or payment, see post §§ 176, 177.
Making absolute transfer defeasible or conditional, see post § 180.
Changing character of instrument or parties, see post §§ 181, 182.
Showing obligation or condition of mortgage, see post § 185.
Evidence to extend or modify contract to adopt, see also Adoption ¶ 7.

¶ 985. One cannot defend against his promissory note by showing an oral contemporaneous agreement to reduce the note from an absolute undertaking to a defeasible engagement.—Hyde v. Tenwinkel, 26 Mich. 93.

¶ 986. Parol evidence is inadmissible to change the terms of a promissory note deliberately given and taken by the parties with full knowledge of its contents and not tainted with fraud by showing that it was taken as a mere memorandum.—Hutchinson v. Hutchinson, 102 Mich. 635.

¶ 987. A contemporaneous oral agreement is inadmissible to change the legal effect of an indorsement.—Ortmann v. Canadian Bank of Commerce, 39 Mich. 518.

¶ 988. Thirteen defendants signed a subscription paper for the purchase of a stallion for $2,600, each to have a share of $200, and stated in the paper that they would jointly sign notes for the purchase price. The notes were subsequently signed. Held, in a suit on the notes, parol evidence was not admissible to show that the defendants were only severally liable, and each to the extent only of $200.—Rumsey v. Fox, 158 Mich. 248.

¶ 989. Where a note provides for interest it is implied that it shall bear interest from date, and to dispute it would be to vary the terms of the instrument by parol.—Webber v. Webber, 146 Mich. 31.

§ 175. ——Showing suretyship or secondary liability.

Making absolute obligation defeasible or conditional, see ante § 174.
Right of parties among themselves and collateral to the paper to show mutual relations and rights, see post § 201.

¶ 990. Parol evidence is inadmissible to change the character of a bond by making the principal obligors stand as sureties; since in the case of bonds the relations of the obligors between themselves is not collateral to the bond.—Coots v. Farnsworth, 61 Mich. 497.

¶ 991. Parol proof is admissible that a signer of a joint and several note is a surety only.—Stevens v. Oaks, 58 Mich. 343.

¶ 992. The form of a note in being several as well as joint does not exclude proof that one of the signers is a surety only, who is bound by the obligation in the form he adopted.—Stevens v. Oaks, 58 Mich. 343.

¶ 993. In action by the payee a joint maker of a promissory note cannot limit his liability to that of an indorser by parol testimony that he signed as a surety, and that by an agreement of the agent of the payee who took the note he was to be released unless notified of its nonpayment.—Aultman & Taylor Co. v. Gorham, 87 Mich. 233.

¶ 994. In an action against one who indorsed a note before utterance, thereby becoming a joint maker, evidence that he was induced to sign the note by the promise of the payee that he should not be held liable thereon is inadmissible, as tending to vary the terms of a written contract by parol evidence.—Gumz v. Giegling, 108 Mich. 295.

¶ 995. Parol evidence is admissible in an action by the payee upon a promissory note to show that the defendant who indorsed the note before delivery was, as between the maker and himself a surety, and that the payee knew it.—Hitchcock v. Frackelton, 116 Mich. 487.

§ 176. Time, place or manner of performance, payment or discharge.

Language admitting of parol, see ante § 165.
Adding fixed time where no time was fixed, see also ante ¶ 938.
Providing for indorsement of credit, see also ante ¶ 939.
To show specifications and details, see also ante ¶¶ 965, 967.
To show right to allowance for premium or exchange on money, see also post ¶ 1120.
As to time of payment when none is specified, see also post ¶ 1121.
Parol proof of execution on condition that comaker should not be held liable, see ante § 157.

¶ 996. Where a written agreement to furnish merchandise does not state when it is to be furnished, evidence of a contemporaneous parol agreement fixing the time is inadmissible.—Coon v. Spaulding, 47 Mich. 162.

¶ 997. Oral evidence is inadmissible to show that a mortgage stating no time of payment, and therefore in legal contemplation due at once, is really payable at a future time.—Bearss v. Preston, 66 Mich. 11.

¶ 998. A note payable on demand cannot be changed by evidence aliunde that it was not intended to become due until some time in the future.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

¶ 999. The plain terms of a note payable on demand cannot be varied by evidence aliunde that the note was not intended to become due until some future time.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

¶ 1000. Parol evidence is inadmissible to introduce conditions or modifications of the terms of a promissory note for a certain amount, payable at a certain time, which has been delivered into the hands of the payee to take effect presently as the obligation of the maker.—Central Savings Bank v. O'Connor, 132 Mich. 578.

¶ 1001. Where a draft had been accepted with the qualification, "It is understood the dwelling shall be completed before this draft is paid," it was proper in suit thereon to show the understanding that the house was to be completed under a certain building contract.—Ferguson v. Davis, 65 Mich. 677.

¶ 1002. Parol evidence is admissible to show an agreement that the chattel mortgage debt in which no due date is specified becomes due in three, six and nine months where the words of the mortgage clearly imply an extension of a term of credit.—Crowley v. Langdon, 127 Mich. 51.

¶ 1003. In a suit by a railway company to enforce the specific performance of a contract to convey land for a right of way, the evidence showed that, prior to the execution of the contract relied on, two others were prepared, containing a time limit within which the complainant was to construct its road on the land in question, that they were rejected by the complainant company, and, thereupon the contract in question was prepared, omitting the time limit, and executed by the parties. Held, that defendants could not by parol testimony insert a time limit in the contract.—Chicago, K. & S. Ry. Co. v. Lane, 150 Mich. 162.

¶ 1004. Where a written contract is free from ambiguity it is not competent to show by parol that payment was to be made in some other way than that specified therein.—Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213.

¶ 1005. Oral testimony to show the agreement upon terms of payment not specified in a written option, is incompetent, where such written option is unambiguous.—Kibler v. Caplis, 140 Mich. 28.

¶ 1006. Where land is bought by written contract and a note is given for part of the price named therein, it cannot be shown in defence to the note that the parties to the land contract had an oral arrangement by which the purchaser might keep the contract and pay the note or give up the contract and thus discharge his liability on the note.—McEwan v. Ortmann, 34 Mich. 325.

¶ 1007. A deed expressly stipulated that the grantee should pay off a certain mort-

gage on the premises. Held, that an oral agreement between the parties that the grantor should advance the moneys to pay it would be inconsistent with the terms of the deed, and that the grantee could not recover upon it against the grantor.—Unger v. Smith, 44 Mich. 22.

¶ 1008. Where, in a written agreement for the sale of an interest in, and for the operation of, a hotel, payment in a certain time for such interest is unambiguously provided for, it cannot be shown by parol that payment was to be made out of the profits, or in any other way or time than as specified in the writing.—Smith v. Kemp, 92 Mich. 357.

¶ 1009. Where a mortgagee has sold two of three mortgage notes and, as recited in the assignment, has assigned a corresponding interest in the mortgage, the assignee cannot show by parol that his notes were intended to have priority.—Jennings v. Moore, 83 Mich. 231.

¶ 1010. Note for purchase price of stock cannot be varied by showing payee's contemporaneous parol agreement to credit on note damages sustained by maker if other stock previously sold to him for breeding purposes should prove to be barren.—Phelps v. Abbott, 114 Mich. 88.

¶ 1011. In an action on a promissory note given by the indorser of another note upon which a judgment had been rendered and execution levied on the indorser's property, and signed by other persons for the alleged accommodation of the maker, evidence that the attorney for the payee had agreed for a stipulated percentage to collect the amount of the second note from the maker of the first note if the defendants would sign the second note, and that the second note was merely for accommodation was incompetent as an attempt to reduce a written agreement from an unqualified undertaking to a conditional, defeasible agreement by proof of a contemporaneous oral contract.—Holland City State Bank v. Meeuwsen, 192 Mich. 326.

¶ 1012. A written contract for the purchase of a musical machine, containing definite terms of payment, signed by the defendant without reading it, cannot be varied by parol testimony that he was to have had the machine on commissions.—Price v. Marthen, 122 Mich. 655.

¶ 1013. Parol evidence is admissible to show that a contract between a logger and a sawyer contemplated that notes were to be received in payment of a saw bill, the written contract being silent as to some of the terms of the agreement to such extent that a casual inspection indicated that it did not contain the whole contract of the parties.—Germain v. Central Lumber Co., 120 Mich. 61.

¶ 1014. The contract of agency between plaintiff and defendant provided that plaintiff, the principal, would accept farmers' notes which defendant should take in payment for plaintiff's goods sold by him. Defendant was allowed to testify that when signing the contract he asked why this provision was inserted in the contract, and that plaintiff company's agent answered that the company would always take notes for their goods, that he would be present personally to make settlement, and would take notes for other drills rated good if taken on their blanks. Held, that such testimony, being an attempt to vary by parol the terms of a written contract, is inadmissible.—Superior Drill Co. v. Carpenter, 150 Mich. 262.

¶ 1015. In an action upon a promissory note given for a chattel mortgage and note, parol testimony is inadmissible to show an agreement that the note should become void if the maker of the chattel mortgage and note should be forced into bankruptcy.—Central Savings Bank v. O'Connor, 132 Mich. 578.

¶ 1016. A written contract to deliver timber at certain rates is not varied by parol testimony of an understanding between the parties that it was to be measured at the ports of destination.—Gillett v. Bowman, 43 Mich. 477.

¶ 1017. Where a contract for the sale of goods is not ambiguous, a party thereto may not testify that the place of delivery was to be the place designated by the purchaser, where such testimony is not based on any usage of trade.—Althouse v. McMillan, 132 Mich. 145.

¶ 1018. Where an employment of a broker for the sale of lumber states that the terms of shipment are to be the "removal of the lumber as fast as five hundred thousand feet is cut and piled on the dock," parol evidence is permissible to show what dock was intended.—Obenauer v. Solomon, 151 Mich. 570.

¶ 1019. Where a contract employing a broker is silent as to the place at which the broker should notify the principal of the finding of a purchaser, evidence as to the place at which notice was to be given is not inadmissible as tending to vary the terms of the writing.—Obenauer v. Solomon, 151 Mich. 570.

§ 177. Compensation or rate of payment.

To show true consideration, see ante § 161.

¶ 1020. In an action involving a contract with a municipal corporation to do its printing at a certain per cent, below the statutory rates for legal notices, it being further provided that no constructive charges should be allowed, evidence of a printer's usage allowing double measure in paying for "figure-work," such as advertisements of tax sales,

was held to be inadmissible.—Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 116.

¶ 1021. Where a contract provided that plaintiff should be paid for cutting and delivering logs at a certain rate "per thousand feet, board measure, according to the mill-tally thereof," it was proper to admit testimony showing that "mill-tally" included mill-culls as well as merchantable lumber.—Corneil v. New Era Lumber Co., 71 Mich. 350.

§ 178. Attaching or discharging conditions.

Language admitting of parol, see ante § 165.
Making absolute obligation conditional or defeasible, see also ante § 174.
Reducing absolute to conditional note, see also ante ¶ 930.
Adding or qualifying warranties, see post § 179.
Showing real condition of mortgage, see post § 185.

¶ 1022. Conceding the delivery of a contract or obligation and that it was at one time effective evidence is not admissible to the effect that it is to have a different effect from that stated therein or to modify or nullify the character of the obligation itself upon certain conditions.—Smith v. Mathis, 174 Mich. 262.

¶ 1023. Parol evidence is inadmissible to show a contemporaneous agreement reducing a note from an absolute specific undertaking to a defeasible engagement.—Sheffler v. Sherman, 167 Mich. 42.

¶ 1024. Parol evidence is inadmissible to vary the construction of a promissory note payable out of the maker's estate so as to be payable only on a condition that a payee would survive.—Kelsey v. Chamberlain, 47 Mich. 241.

¶ 1025. An agreement relating to the sale and exchange of lands cannot be varied or modified by parol testimony showing that it is conditional on obtaining the signature of the wife of a party, or the approval of his attorney.—Dikeman v. Arnold, 71 Mich. 656.

¶ 1026. Parol evidence is inadmissible to change the terms of a written lease made by indorsement on an expiring lease, but not embodying all the old lease's provisions, as claimed.—Walsh v. Martin, 69 Mich. 29.

¶ 1027. Parol evidence was admissible to show an agreement with an insurance agent in regard to incumbrances made at the time of application, where the application is by reference made part of the policy, and which agreement estopped company from claiming forfeiture.—Copeland v. Dwelling-House Ins. Co., 77 Mich. 554.

¶ 1028. Where certain of the creditors under a trust mortgage are sued upon their note given for part of the debtor's mortgaged goods sold by the trustee, they cannot vary the note by showing an oral contemporaneous understanding with the trustee for its total or partial nonenforcement on the expectation, if realized, that the remaining goods would pay the other creditors.—Atkinson v. Weidner, 79 Mich. 575.

¶ 1029. A note absolute in form, given for the purchase price of animals, cannot be varied by evidence of a contemporaneous parol agreement by the payee to credit on the note the amount of damages sustained by the maker if other stock previously sold to him for breeding purposes should prove to be barren.—Phelps v. Abbott, 114 Mich. 88.

¶ 1030. An order by a merchant for the shipment to him of a cash register, to be paid for as stated in the order, which provided for the retention of title by vendor until such payment was made, was a complete contract, and is not subject to modification by evidence of a contemporaneous oral agreement to the effect that vendee should receive the machine on five days' trial, and, if not satisfactory to him at the end of that time, that he might return the machine.—National Cash Register Co. v. Blumenthal, 85 Mich. 464.

¶ 1031. Where a contract to furnish goods requires them to be manufactured and shipped within a reasonable time after the vendor is informed as to the goods required, it is incompetent to show by parol that the vendor agreed to keep goods on hand ready for immediate shipment.—Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147.

¶ 1032. A written agreement between the manufacturer and the buyer of a machine which is held to supplant and supersede a previous agreement between the seller and the buyer of the machine, whereby the buyer was given seven months' time in which to test the machine and return, if unsatisfactory, cannot be varied by parol evidence to the effect that the agent of the manufacturer stated at the time of the second agreement that whatever agreement was entered into between the manufacturer and the buyer should in no way affect the rights of the buyer against the seller.—James Leffel & Co. v. Platt, 126 Mich. 443.

¶ 1033. In an action for the price of one seed drill and for breach of a contract to purchase drills from the plaintiff only, which contract is in writing and contains a provision that it shall not be varied except by writing signed by the plaintiff, it is error to admit testimony that the plaintiff's agent agreed to furnish an agent to set up the machine and assist in selling.—Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473.

¶ 1034. Where a construction contract is silent on the subject, it cannot be shown by

parol that the contractor was to heat the building during the cold weather.—Johnson v. O'Neill, 181 Mich. 326.

¶ 1035. A chattel mortgage and accompanying note, when absolute in form, cannot be varied by parol so as to show that the chattels for which they were given could be returned by the mortgagor if they did not comply with the representations of the seller. —Solomon v. Stewart, 184 Mich. 506.

¶ 1036. Testimony that the defendant in trover for selling mortgaged chattels, in excess of the amount required to satisfy the indebtedness secured, bought the property outright and in good faith, was properly excluded as constituting a variance of a written instrument plain and unambiguous in its terms.—Haynes v. Hobbs, 136 Mich. 117.

¶ 1037. A grantee in a quitclaim deed cannot show, to change its terms, a contemporaneous oral agreement by which the grantor is to refund a proportionate share of the purchase-price in case of the failure of the title to part of the land then in dispute. —Putnam v. Russell, 86 Mich. 389.

¶ 1038. In an action for the price bid for lands sold at an administrator's sale the probate proceedings and arrangements preliminary to the sale were pertinent in explaining the true state of facts and were admissible in evidence therefor, where the notice of sale called for a clear title but the land was mortgaged, and it was claimed that bids were made on an agreement to allow deduction of the amount of incumbrance.—Stebbins v. Field, 43 Mich. 333.

¶ 1038a. In a suit for the specific performance of a contract for the sale of realty evidenced by a memorandum in writing signed by the vendor and accepted by the vendee acknowledging the receipt of a sum to apply on the purchase price and providing for the conveyance and the payment of the price, which memorandum is within the statute of frauds (Comp. L. 1897, § 9511) evidence is not admissible to show that it was agreed by parol when the memorandum of agreement was entered into that if the vendor could not give good and clear title within a certain time the deal should be called off.—Smith v. Mathis, 174 Mich. 262.

§ 179. Adding or qualifying warranties.

See also ante ¶ 782.

Language admitting of or calling for parol, see ante § 165.

Attaching or discharging conditions, see ante § 178.

To show that incumbrance was not to be considered as such, see ante ¶¶ 973, 974.

¶ 1039. Where, on the purchase of a steam threshing machine and engine, a written warranty was given by the vendor, the vendee, in a suit to recover the purchase-price, cannot be allowed to prove a prior oral warranty as to the power of the engine to run a specified separator which was not contained in the written warranty.—Nichols, Shepard & Co. v. Crandall, 77 Mich. 401.

¶ 1040. Parol evidence of a warranty not contained in a written contract is inadmissible.—Hallett v. Gordon, 122 Mich. 567.

¶ 1041. Parol evidence is not admissible to add to an unambiguous writing facts which may aid the implication of a warranty.—McCray Refrigerator & C. S. Co. v. Woods, 99 Mich. 269; Detroit Shipbuilding Co. v. Comstock, 144 Mich. 516.

¶ 1042. Parol evidence is not admissible to show an express warranty beyond that contained in the formal written contract of sale.—Hall v. Duplex-Power Car Co., 168 Mich. 634.

¶ 1043. Where a written agreement for the sale of personal property is silent on the subject of warranty no express warranty can be proven by parol.—Bayer v. Winton Motor Car Co., 194 Mich. 222.

¶ 1044. Where a contract of sale consists of a written offer and an oral acceptance, parol evidence is admissible to show that a warranty constituted a part of the contract. —Potter v. Shields, 174 Mich. 121.

¶ 1045. Where a contract of sale is in writing and appears to be a complete and certain agreement and contains no warranty, an express warranty cannot be added by parol; and if it contains a warranty, parol evidence is not admissible to vary what the writing specifies.—Potter v. Shields, 174 Mich. 121.

¶ 1046. In a written contract of sale all prior negotiations and representations are merged, and evidence of a parol warranty and of a breach thereof are inadmissible.— Baird v. Grand Rapids Furniture Co., 98 Mich. 457; D. M. Osborne & Co. v. Wigent, 127 Mich. 624.

¶ 1047. Where a contract for the sale to a firm of butchers of a patent refrigerating process contains no warranty as to its preserving qualities, the vendees cannot, in a suit to recover the contract price, show by parol testimony that at the time the contract was made the vendor expressly warranted that the apparatus would preserve fresh meats for a stated time, and that it failed to fulfil the warranty.—McCray Refrigerator & C. S. Co. v. Woods, 99 Mich. 269.

¶ 1048. Where a windmill is sold by written contract warranting that it shall be erected in a good and substantial manner, and that all repairs caused by defective manufacture shall be furnished free of

charge for one year, evidence of conversations between vendee and vendor's agent tending to show prior oral warranties is inadmissible, as is also a circular issued by vendor in regard to its windmills.—Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281.

¶ 1049. In an action for the purchase price of a cash register on a written order, parol evidence is not admissible to show a warranty by the salesman that the machine could not be manipulated by a dishonest clerk and no such warranty can be implied.—Hallwood Cash-Register Co. v. Millard, 127 Mich. 316.

¶ 1050. A warranty that seed drills were as good as certain other named drills cannot be added by parol to a sale of drills, which is in writing and provides that it shall not be varied except by a writing signed by the seller.—Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473.

¶ 1051. In an action on a promissory note given for the price of a steam boiler, purchased under a written contract, evidence of the claim of the purchaser that he was induced to make the purchase by the false and fraudulent representations of plaintiff that it would have a greater capacity, furnish more steam, and be more economical than the boiler which it replaced, amounts at most to evidence of a parol warranty, and is properly excluded where no warranty is found in the written contract.—Detroit Shipbuilding Co. v. Comstock, 144 Mich. 516.

¶ 1052. A vendor's agent made an oral agreement to sell a hoist to defendant vendee. The hoist was examined by the vendee's agent. Vendor's agent then reported the sale to his principal, who wrote a letter confirming the sale, and stating that the agreement was to sell the hoist "as it now stands on the river front." The vendee replied that vendor's understanding of the agreement was correct. In a suit for the purchase price, held, the vendee could not introduce evidence of an oral warranty of the hoist made by the vendor's agent.—Union Trust Co. v. Detroit River Transit Co., 162 Mich. 670.

¶ 1053. In a suit in trover for seizing plaintiff's threshing machine, where plaintiff under a special count claims damages for loss of prospective threshing profits, it is error to admit evidence as to the statements made by defendant vendor's agent as to the profits plaintiff would make from said machine, where the contract of sale and mortgage between plaintiff and defendant is in writing and contains no warranty as to profits.—Truman v. J. I. Case Threshing Mach. Co., 169 Mich. 153.

¶ 1054. Evidence as to representations that a tractor engine had sufficient power to haul six gang plows with breaker bottoms, a packer and a drill, that it would haul the same at a specified rate, and that it would plow a specified amount of ground per hour at not exceeding a certain cost, held inadmissible to vary a written contract of sale.—John D. Gruber Co. v. Smith, 195 Mich. 336.

¶ 1055. Admission of parol testimony of the warranty of suitableness of articles sold under a written contract is not error, because such warranty would be implied by the contract itself.—Tufts v. Verkuyl, 124 Mich. 242.

¶ 1056. A written agreement by which the defendant promises to pay $25.00 per month for information on market changes and conditions, for services in placing orders for goods, and for attending to any business sent by him is not subject to modification by testimony that the plaintiff in a preliminary conversation guaranteed a saving of $5,000 through the proposed services.—R. K. Carter & Co. v. Weber, 138 Mich. 576.

¶ 1057. A written guaranty cannot be added to orally.—Otto v. Braman, 142 Mich. 185.

¶ 1058. Defendant wrote to plaintiff asking if it wished to purchase a load of rye. Plaintiff called defendant by telephone and a sale was agreed upon. Plaintiff then sent defendant a confirmation of sale agreement, which specified fully the terms of the sale and stated that defendant guaranteed the grade of the rye. Thereafter, defendant shipped the rye. In a suit for breach of the warranty of quality, held, the defendant could not put in evidence the oral conversations of the parties to vary or explain the guaranty clause contained in the written confirmation agreement.—Stockbridge Elevator Co. v. Booth, 165 Mich. 212.

¶ 1059. Parol evidence of prior representations by the seller in the absence of fraud, is not admissible to alter or vary a written contract for the purchase of personal property with a specific express warranty.—Mishler v. International Harvester Co. of America, 188 Mich. 104.

¶ 1060. Where a contract for the sale of automobiles provides that they are "to stand sold as they are, that such contract shall constitute the entire agreement between the parties and that it shall not be modified by any verbal agreement or in any way except in writing by the parties attached or indorsed hereon," parol evidence to vary the terms of the contract or to prove any implied warranty is inadmissible.—Detroit Trust Co. v. Engel, 192 Mich. 62.

¶ 1061. In ejectment, a warranty deed cannot be varied by a parol agreement by which the plaintiffs are attempting to show tnat the warranty did not apply to a one-fourth interest held by another heir believed to be dead at the time of the deed.—Dye v. Thompson, 126 Mich. 597.

¶ 1062. In an action on covenant for breach of warranty against incumbrances, oral evidence that grantee had assumed unpaid taxes for special improvements was inadmissible.—In re Johnson's Estate, 177 Mich. 500; Williams v. Kniskern, Id.

¶ 1063. That a lease for a term of years was subject to a decision adverse to the lessor in a pending action affecting his title, cannot be shown by parol in an action by the lessee against the former for breach of the covenant for quiet enjoyment.—Wolf v. Megantz, 184 Mich. 452.

§ 180. Attaching defeasance or condition to absolute transfer.

Reducing absolute obligation to conditional or defeasible one, see also ante § 174.
Making purchased chattels returnable against absolute purchase money note and chattel mortgage, see ante ¶ 1035.
Making absolute agreement for land purchase conditional, see ante ¶¶ 1037-1038a.
To show true character of instrument, see post § 181.
To impress deed absolute with character of mortgage, see Mortgages, II, B.
To show that absolute transfer of goods is chattel mortgage, see Chattel Mortgages § 5.

¶ 1064. A promissory note containing, immediately after the statement of the sum agreed to be paid, the words "being balance due on one span of horses bought of him [the payee], said horses to be holden to him as security for payment of this note," is not so certain and unambiguous as to import a mortgage rather than a conditional sale; and parol evidence that the title to the team was not to pass until they were paid for is admissible as explanatory of the doubtful language.—Kendrick v. Beard, 81 Mich. 182.

¶ 1065. A bill of sale absolute on its face may be shown by parol evidence to have been given as a security.—Seligman v. Ten Eyck's Estate, 74 Mich. 525; Pinch v. Willard, 108 Mich. 204.

¶ 1066. Where the real agreement was a parol trust for the payment of debts, and only a formal assignment was reduced to writing, it, being merely an incident of the contract, is open to parol evidence that it was made upon an oral understanding that the assignee should collect them and hold their proceeds in trust for assignor's creditors.—Matthews v. Forslund, 112 Mich. 591.

¶ 1067. An assignment absolute in form but for security may be shown to be such.—May v. Genesee County Savings Bank, 120 Mich. 330.

¶ 1068. In an action to recover money, collected on a mortgage that had been assigned by plaintiff to defendant, evidence is admissible tending to show whether the assignment was absolute or not, and on what consideration it rested.—Hill v. Goodrich, 39 Mich. 439.

¶ 1069. One who has given a written assignment, absolute in form, of a particular payment described in a mortgage, and has also given the accompanying note, can nevertheless show by parol that the transfer was not unqualified, but was made as security for repayment of money borrowed from the transferee.—Hyler v. Nolan, 45 Mich. 357.

¶ 1070. In proceeding against an estate to recover money realized from a judgment which had been assigned by plaintiffs to decedent, parol evidence is admissible to show that it was actually collected for the benefit of the assignors.—In re Elder's Appeal, 39 Mich. 474.

¶ 1071. Parol evidence is admissible in a court of law to show that a bill of sale, absolute on its face, was intended as a mortgage.—Fuller v. Parrish, 3 Mich. 211.

§ 181. Nature or character of instrument.

To show purpose or circumstances surrounding writing, see ante § 159.
To show character, capacity and identity of parties, see post § 182.
Parol evidence to show absolute deed to be mortgage, see Mortgages, II, B.
Parol to show bill of sale or other transfer to be chattel mortgage, see Chattel Mortgages § 5.

¶ 1072. Parol evidence is admissible to show the true character of a mortgage, and for what purpose and consideration it was given.—Cutler v. Steele, 93 Mich. 204.

¶ 1073. It is not admissible to show that an agent of the principal told the defendant that a contract was one of agency, the issue being that it was also a sale agreement and the contract being unambiguous in that respect.—Aspinwall Mfg. Co. v. Johnson, 97 Mich. 531.

¶ 1074. A quitclaim deed cannot by parol agreement be converted into a warranty deed.—Cartier v. Douville, 98 Mich. 22.

¶ 1075. Where the testator executed two deeds and a will at the same time, and the deeds were undelivered, but instructions were given to one of his sons with whom he lived, to take the key to the drawer where the deeds were deposited after his death and have them recorded and have the will probated, extrinsic evidence was not admissible to show that it was the testator's intention to have the deeds operate as a will.—Dodson v. Dodson, 142 Mich. 586.

¶ 1076. Where the question involved is whether a contract between a piano dealer and defendant was a chattel mortgage or a consignment for sale, defendant not being

a manufacturer or dealer in pianos, evidence as to a prior question of the parties as to how defendant was to secure the pianos to be consigned is admissible as illustrating the meaning of contract, and in no way contradicting it.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 1077. An unambiguous written contract of joint purchase renders inadmissible evidence as against the vendor as to an oral arrangement and agreement with each of the vendees.—Pettyplace v. Groton Bridge Mfg. Co., 103 Mich. 155.

¶ 1078. Parol evidence is admissible to determine the nature of the contract of irregular indorsers.—Barger v. Farnham, 130 Mich. 487.

¶ 1079. In replevin to recover goods taken possession of under a chattel mortgage, plaintiff is not entitled to show by parol that the notes secured by mortgage were executed simply as a guaranty.—Sheffler v. Sherman, 167 Mich. 42.

¶ 1080. Parol evidence is inadmissible to change the character of a bond, or the relations of its signers as principals and sureties.—Coots v. Farnsworth, 61 Mich. 497.

¶ 1081. Where the owner of logs sent to a sawyer two letters, one offering to sell the logs for a certain sum per 1,000, payments to be made in advance in negotiable paper, the other, dated a day later, offering to buy back the lumber cut from the logs at the price per 1,000 that was paid for them, to pay a specified sum for the sawing, and to take care of the sawyer's paper whether or not the logs were delivered as agreed, and where both offers were accepted in writing, held, that it was competent for the sawyer to show by parol that the transaction was not a purchase and a resale, but a mere security for advances.—Germain v. Central Lumber Co., 116 Mich. 245.

§ 182. Capacity, character and identity of parties.

See also ante ¶ 870, post ¶ 1126.

Showing execution conditioned that executing party should not be liable, see ante § 157.

Changing character of liability on negotiable instruments from primary to secondary, see ante § 175.

To show on whom drafts should be drawn, see ante ¶ 944.

To show relations of the parties collateral to commercial paper or its obligations, see post § 201.

To change relation of parties to bonds, see also ante ¶ 1080.

To show relative estates and interests of the parties, see post § 185.

To prove or disprove that grantees were husband and wife, see post § 186.

Prior agreements on scalers or the like, see also ante § 170, ¶¶ 949, 950.

Admissibility of parol evidence to identify corporation with irregular or variant name used in instrument, see also Corporations ¶ 78.

Parol evidence to identify corporation with name comprising initials, see Corporations ¶ 79.

¶ 1082. The rights and liabilities of parties to commercial paper appear on its face: and where there is nothing to show that it was signed by an agent, or for whom the agent acted, parol proof to that effect is inadmissible.—Finan v. Babcock, 58 Mich. 301.

¶ 1083. Parol evidence is admissible to show that the payee of a promissory note who has received the money upon it was trustee simply for another, and that the money so received by him was in that capacity.—Catlin v. Birchard, 13 Mich. 110.

¶ 1084. One who executes a contract of purchase, and gives back a purchase-money mortgage expressly making himself personally liable, and containing no reference to representative capacity, cannot show by parol evidence, to avoid liability for a deficiency on foreclosure of the mortgage, that he was acting, to the knowledge of the mortgagee, as agent of others interested with him, with the intention of conveying to them the property purchased.—Lewis v. Weidenfeld, 114 Mich. 581.

¶ 1085. Parol evidence is admissible, as between the original parties to a note, to show that the maker, who, in signing the note, added "Agt." to his name, executed the note in a representative capacity, and that the payee so understood.—Keidan v. Winegar, 95 Mich. 430.

¶ 1086. In an action in a firm's name by a general agent of the firm, for the amount of a written order for goods, it is admissible to show that the agent, not the firm, is the real party in interest.—Bronson v. Herbert, 95 Mich. 478.

¶ 1087. A lease to B. with S. and C. as sureties cannot, by parol evidence that the lessor knew that the three had formed or were about to form a partnership to carry on business in the leased premises, be so varied in its terms as to permit the firm to sue for a breach.—Burwitz v. Jeffers, 103 Mich. 512.

¶ 1088. Parol evidence is admissible to show whether a corporation or an individual is liable on an accepted order for paving addressed to and guaranteed by the corporation, but signed by the individual without any designation of agency, and containing a marginal provision in which the individual agrees to pay for all material furnished by the party giving the order.—Armstrong v. Andrews, 109 Mich. 537.

¶ 1089. Where the trustees of a religious society have mortgaged its property without signing the mortgage in proper form, parol evidence is admissible to charge the society as the principal in the mortgage.—Scott v. First Methodist Church Trustees of Jackson, 50 Mich. 528.

¶ 1090. Where a note is unambiguous, being in form that of a corporation, evidence to explain away or modify its terms, so as to render the officer who signed it liable, is inadmissible.—Falk v. Moebs, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319.

¶ 1091. Where a note is signed "Peninsular Cigar Co. [a corporation], Geo. Moebs, Sec. and Treas.," and is payable to and indorsed by "Geo. Moebs, Sec. and Treas.," the note and indorsement are the corporation's, there is no individual liability on the indorsement, and the indorsement, being unambiguous, cannot be explained by parol.—Falk v. Moebs, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319.

¶ 1092. Oral evidence is inadmissible to vary a written contract by showing that what purports to be a bank president's individual guaranty was in fact the contract of the bank.—First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

¶ 1093. When a chattel mortgage is given by one member of a partnership in his own name, and there is nothing on its face to indicate that it was intended to secure a partnership debt on partnership property, parol evidence is inadmissible to show that it was the partnership mortgage and not that of the person executing it.—Jones v. Phelps, 5 Mich. 218.

¶ 1094. Parol proof that commercial paper was signed by an agent, or for whom the agent acted, is inadmissible where nothing of the kind appears on the face of the paper.—Finan v. Babcock, 58 Mich. 301.

¶ 1095. Where a patent has been issued to one as the person to whom lands were reserved in a treaty with a tribe of Indians, it is competent for another claimant to show that the patentee is not the person intended and that such claimant is.—Stockton v. Williams, W. 120; Stockton v. Williams, 1 D. 546; Campau v. Dewey, 9 Mich. 381.

¶ 1096. The firm of Nelson Morris & Co. of Chicago was discontinued, and its business taken over by plaintiff, Morris & Co., a New Jersey corporation. The new company in using certain printed surety blanks of the old company was accustomed to blot out the word "Nelson." Defendant signed one of the blanks as surety, and upon being sued offered to prove that the word "Nelson" was in his blank when signed, and was afterwards blotted out by plaintiff. Court permitted plaintiff to prove by parol that Morris & Co. was the one intended by the parties, and directed a verdict for plaintiff. Held, the admission of such evidence and the direction were reversible error.—Morris & Co. v. Lucker, 158 Mich. 518.

¶ 1097. Where, in an action against a partnership, fraud in attempting to conceal the name of the real partner and to screen him from liability is charged, evidence of conversations had with either party in interest, before the partnership agreement, which throws light upon the actual nature of the transaction, is admissible; and the rule as to merger of prior negotiations does not apply.—Webb v. Johnson, 95 Mich. 325.

§ 183. Identification of subject or object or debt.

See also ante ¶ 829.

Ambiguities calling for parol, see ante § 165.

Identification of parties, see ante § 182.

¶ 1098. It is always competent to show by any relevant testimony what items enter into a settlement when an item sued for is claimed to be barred by such settlement.—Hicks v. Leaton, 67 Mich. 371.

¶ 1099. A contract of settlement unambiguous and complete in itself, and clearly importing that the parties intend thereby to settle all their differences "of whatever name or nature," cannot, no fraud or mistake being claimed, be varied by parol testimony restricting the matters covered.—Freeman v. Freeman, 68 Mich. 28.

¶ 1100. Parol evidence is not admissible to vary the terms of a separation contract purporting to make a complete division of property between husband and wife by showing that it was not a complete division.—Carpenter v. Carpenter, 154 Mich. 100.

¶ 1101. An assignment of a certificate of enlistment and the City of Detroit bounty "and all other local bounties" to be paid thereon was held not to be conclusive between the parties, but to be open to oral explanation that at the time of enlistment and assigning the amount of the city bounty was paid without intent to pass a later bounty.—Roberts v. Field, 27 Mich. 337.

¶ 1102. Testimony as to what interest was supposed to be conveyed in a sale is proper to identify the subject of the sale if it does not contradict the writings.—Harrison v. Ingersoll, 56 Mich. 36.

¶ 1103. Parol evidence may be resorted to for the purpose of identifying the subject-matter of a contract, but it must not contradict or vary the plain terms of the writing.—Lawrence v. Comstock, 124 Mich. 120.

¶ 1104. An unambiguous description of logs in a chattel mortgage cannot be extended by the parol testimony of the mortgagor or

mortgagee, in a contest with third persons, so as to cover logs not mentioned in such description.—Whitney v. Hall, 82 Mich. 580.

¶ 1105. In an action upon defendant's undertaking to indemnify plaintiff for signing a bond, parol testimony is admissible to identify a judgment as rendered upon such bond in an action where the complaint shows a copy of the bond set out at length as the only cause of action relied on.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 1106. Parol testimony is not admissible to show that certain lumber cut to required lengths, in a dry kiln in the basement of a building and designed for the completion thereof, was not included in a chattel mortgage on "all lumber" or building material in or about such building, and did not pass by an assignment by the mortgagor of all her interest and title to all of the lumber mentioned and an assignment by the owner of his equity in said lumber.—Lawrence v. Comstock, 124 Mich. 120.

¶ 1107. It is competent to show by parol that a mortgage given to secure the payment of a specified sum of money was in fact given to protect the mortgagee as a surety for the mortgagor upon a promissory note for the same sum, and made at the same time the mortgage was given. The effect of such proof is not to contradict or vary the mortgage, but to identify the demand to which it refers.—Kimball v. Myers, 21 Mich. 276.

¶ 1108. Where a contract for the sale of carriage axles provides that specifications are to be furnished, and that the axles shall be, interchangeable with samples sent, but does not describe the axles, evidence of the conversation between the parties at the time of the execution of the contract is admissible for the purpose of ascertaining their intention.—Liggett Spring & Axle Co. v. Michigan Buggy Co., 106 Mich. 445.

§ 184. Situs and boundaries of land.

Best evidence of identity and location of described lands, see ante § 105.

Parol evidence in aid of writing in locating boundary, see also Boundaries § 17.

Admissibility of declarations as to boundary over objection that document is varied by parol, see also Boundaries ¶ 98.

Evidence relevant or sufficient to establish boundaries, see Boundaries.

Construction and effect of descriptions, calls, courses and distances, see Deeds, III; Boundaries.

¶ 1109. In ejectment, parol evidence may be resorted to to aid the court in applying the deed to its proper subject-matter, where there is ambiguity.—Tuthill v. Katz, 163 Mich. 618.

¶ 1110. The title to property claimed under a recorded plat cannot be unsettled by the testimony of a surveyor who had scaled the plat that the scale was incorrect.—Twogood v. Hoyt, 42 Mich. 609.

¶ 1111. Where lots have been conveyed by reference to a plat which states that they are of a certain width, the testimony of the surveyor who originally scaled the plat is inadmissible to show that some of the lots are of less width on the plat.—Twogood v. Hoyt, 42 Mich. 609.

¶ 1112. Where the boundary of the land was described by course and distance terminating at a post, and neither any mark indicating such boundary, nor any post indicating its termination, can be found on the land, and no evidence was introduced showing where the post was originally placed, parol evidence that a line found marked upon trees variant from the call in the patent was the actual line surveyed, run and marked as such boundary by the government surveyor, is inadmissible.—Bruckner's Lessee v. Lawrence, 1 D. 19.

¶ 1113. Parol evidence of the existence of certain marked trees and monuments not called for in the survey of a road is inadmissible to establish, by those marks and monuments, a line of the road variant from that called for by the courses and distances, by which alone such line is designated in the survey.—Moore v. People, 2 D. 420.

¶ 1114. Parol evidence of the circumstances surrounding the giving of a deed, and collateral facts, may be received to show which of the two sections coming within the terms of a grant was intended by the grantor.—Ives v. Kimball, 1 Mich. 308.

¶ 1115. Land was described as the east half of the northwest quarter of section twenty-one, in the township of Logan, being township twenty-six south of range three. There was no township twenty-six south in Logan, and there were two sections twenty-one—one in township six south, and the other in township seven south. It was held that parol evidence might be received to show on which of these two sections land was intended to be conveyed by the deed.—Ives v. Kimball, 1 Mich. 308.

¶ 1116. Where a mortgage describes the land as all of block B., parol testimony of the understanding of the parties as to what was to be included is inadmissible; e. g., it cannot be shown that the mortgagor pointed out to the mortgagee the boundaries of the lands to be included, and informed him that certain lands were not to be included in the mortgage.—Thompson v. Smith, 96 Mich. 258.

¶ 1117. A description of land contained in a contract for commissions between the owner and a real estate dealer may be shown by said dealer to be erroneous, and the land in question may be identified by parol evi-

dence in a suit for damages brought by said dealer for the owner's refusal to accept a buyer secured by said dealer, where the description employed is an improbable one, indicating a probable mistake.—Brittson v. Smith, 165 Mich. 222.

§ 185. Obligation and condition of mortgage.

Parol to identify from among several the particular debt secured, see also ante ¶ 1107.

Admissibility of the notes to show amount secured by chattel mortgage, see Chattel Mortgages § 22.

¶ 1118. In defense to a bill to foreclose a mortgage of lands purporting to secure a sum of money, the mortgage cannot be shown by parol to have been given to secure, not the payment of money, but the performance of a parol agreement for the payment of certain debts of the mortgagee and to aid in his support.—Adair v. Adair, 5 Mich. 204.

¶ 1118a. Where a bill is filed to foreclose a mortgage conditioned for the payment of a certain sum of money, it is competent to show in defense, by parol evidence, that the mortgage was given to indemnify sureties in a recognizance of bail, and that the liability of the sureties had been discharged without their being damnified.—Colman v. Post, 10 Mich. 422.

¶ 1119. The recital in a bond of defeasance that the obligor will reconvey such interest as he has now acquired cannot be contradicted by parol.—Jeffery v. Hursh, 58 Mich. 246.

¶ 1120. Where a mortgage was given to secure a debt that was payable in Canada, and the parties made an agreement in writing whereby the debt was made payable in fixed sums in American currency, it could not be shown in defense to a demand for payment according to the terms of the agreement that there was a parol understanding that the debtor was to have the benefit of any future decline in gold.—Oliver v. Shoemaker, 35 Mich. 464.

¶ 1121. A chattel mortgage stating no time of payment, in legal contemplation is due at once, and hence cannot be orally shown to be due at a later time.—Bearss v. Preston, 66 Mich. 11.

¶ 1122. In a suit to foreclose a mortgage executed by defendant and his wife to complainant and expressed as being for security of a note bearing even date executed by defendant to complainant, it may be shown by parol that the note was really executed to a third person, and that complainant took the mortgage to secure his indorsement of it.—Cutler v. Steele, 93 Mich. 204.

¶ 1123. An understanding of the parties that a chattel mortgage was to be security for the amount named as the consideration will not control a plain intent that it should also secure future advances. Citizens' Sav. Bank v. Kock, 117 Mich. 225.

¶ 1124. Though a mortgage, on its face, is for the payment of a specific sum of money to an individual, to wit, a sum evidenced by a promissory note to the mortgagee, parol evidence is admissible to show that it was really intended to secure a debt for merchandise and advances to be made from time to time by a firm of which the mortgagee was a member, and that payments by the mortgagor were to be credited on his general indebtedness, and not on the mortgage note.—Johnson v. Bratton, 112 Mich. 319.

¶ 1125. One of four mortgages for equal sums given by the four children respectively to their widowed mother in return for the conveyance of all her interest in the estate of the deceased father and husband cannot be varied by parol evidence to show that it was agreed that each mortgagee should pay equally whatever demands for money their mother should make.—Holmes v. Holmes, 129 Mich. 412.

§ 186. Estates and interests transferred.

Language admitting of parol, see ante § 165.

To raise quitclaim to warranty deed or the reverse, see ante § 181.

To show patent rights transferred by writing, see also ante ¶ 945.

¶ 1126. The terms of a deed must be given their legal effect, which the parties or their privies cannot contradict by parol evidence in any collateral matter. This applies to the grantee's name, which is part of the deed, and to the interest conveyed, which, in a deed to several persons, is the same to each if not otherwise designated.—Jacobs v. Miller, 50 Mich. 119.

¶ 1127. Where a conveyance is to two persons without stating their respective interests, their true interests may, as between themselves, be shown.—Harrison v. Ingersoll, 56 Mich. 36.

¶ 1128. Where a conveyance or deed to two or more persons does not state the interest of each, the presumption that their estates are to be equal may be overcome by parol evidence.—Hill v. Reiner, 167 Mich. 400.

¶ 1129. Where a conveyance is to two persons as executors of the estate of Jas. W. Sanborn, and the habendum grants and confirms unto them, "their heirs and assigns forever," extrinsic evidence is inadmissible to show that it was the intention of the grantees to secure the title for the estate; for to admit such evidence would be to allow a secret and undisclosed intention of the grantees to change the legal effect of a conveyance.—Sanborn v. Loud, 150 Mich. 154.

¶ 1130. The estate conveyed by a deed describing the grantees as husband and wife cannot be shown by oral evidence to be an estate in common.—Jacobs v. Miller, 50 Mich. 119.

¶ 1131. One who claims by deed from a survivor of two grantees in a deed may show by parol that the grantees are husband and wife, though the deed to them does not so state.—Dowling v. Salliotte, 83 Mich. 131.

¶ 1131a. Parol testimony is admissible to show that joint vendees of land are husband and wife where the fact of such relationship is not stated in the contract.—Aplin, Auditor-General v. Fisher, 84 Mich. 128.

¶ 1131b. That a man and woman named in a deed as grantees, were in fact husband and wife may be shown by parol in order to establish an estate by the entirety.—Hawley v. Dibble, 184 Mich. 298.

¶ 1131c. The heirs of a man named in a deed in which the grantees were described as husband and wife, cannot show by parol in order to defeat the estate by an entirety, that the grantees did not sustain such relation to each other.—Hawley v. Dibble, 184 Mich. 298.

¶ 1132. Parol evidence is inadmissible to vary or contradict the unambiguous terms of a written lease of a cellar by showing that a "consent" to use of adjoining sidewalk space was part of the lease rather than a mere license incident to it.—Brown v. Schiappacasse, 115 Mich. 47.

¶ 1133. Declarations by the lessor that the lands should belong to sons of the life tenant after the latter's death, have no effect to change the unambiguous terms of the life lease, since such declarations would mean only that he intended to convey, by will or otherwise, the remainder to them.—Hamilton v. Wickson, 131 Mich. 71.

§ 187. Writings and written provisions within the rule.

Applications of the rules to contracts in general, see ante §§ 155-186.
Application of rule to sealed agreements, see also ante ¶ 793.
Admissibility of parol evidence that sealed instrument or note had no actual consideration, see ante § 163.
Contemporaneous independent and collateral agreements, see post §§ 201-203.
Written contract carried into new agreement by parol, see post § 203.
Subsequent parol agreement modifying or changing written one, see post § 204.
Orders and bills of sale not amounting to complete contracts, see post § 188.
Letters and noncontractual writings passing between parties, see post § 189.
Receipts for payment and receipts embodying contracts, see post §§ 190, 191.
Bills of lading and shipping papers, see post § 192.
Wills and codicils, see post § 193.
Legislative and judicial records and instruments, see post §§ 194-198.
Entries on books of account, see also post ¶ 2036.
Parol proof of contract of carriage where tickets were subsequently issued, see ante ¶ 648.
Limits of admissibility where contract is partly in writing, see also ante § 169.
Parol evidence to explain plats, see also Dedication ¶ 93.

¶ 1134. Until a written contract becomes complete by the signatures of both parties agreeing to the same thing no one is bound, and the negotiations are open to proof.—Aldine Press v. Estes, 75 Mich. 100.

¶ 1135. Business correspondence from which the terms of a contract are gathered is the best evidence as to any guaranty implied therein, and if such guaranty is implied parol evidence denying it is inadmissible.—Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29.

¶ 1136. Where a vendor of a chattel takes a non-negotiable note for the purchase price in which he reserves the right to retake the chattel on default and retain what has been paid, or collect the note, his assignment of the note by delivery and indorsement does not of itself assign this right, and in an action brought against him on the note by the indorsee he can show all the facts connected with the indorsement to fix and determine its character and extent, whether absolute or merely for collection.—Lamb v. Story, 45 Mich. 488.

§ 188. ——Orders and bills of sale.

See also ante ¶ 647.
Parol to add warranty to sale by written offer and oral acceptance, see ante ¶ 1044.

¶ 1137. The rule against parol evidence to modify written agreements does not apply to a mere order, withdrawn before acceptance, and accompanied by oral agreements varying from its terms.—Weiden v. Woodruff, 38 Mich. 130.

¶ 1138. A simple bill of sale does not embody the preliminaries nor the essential terms of a contract in such a way as to exclude parol evidence. It is designed merely to show the transfer of title.—Picard v. McCormick, 11 Mich. 68.

¶ 1139. A written order for a windmill, containing certain stipulations, was given upon the strength of representations made by the agent of the manufacturers and contained in a printed circular. Held, in an action for the price of the mill, that the order did not constitute such a contract as

would exclude evidence of these oral and printed representations, and not only were these admissible in evidence, but also the representations and declarations of the plaintiffs' agents when afterwards sent to remedy defects in the mill.—Phelps v. Whitaker, 37 Mich. 72.

¶ 1140. A written order for the insertion in a designated paper, published by the person to whom the order is given, of an advertisement for a given time, at a stated price, which the person ordering agrees to pay at a specified date, contains all the indicia of a contract, except that it is not executed by both parties, and parol evidence of a contemporaneous agreement that, if the advertisement did not suit, it could be discontinued at any time, is inadmissible to vary the terms of the order.—Cohen v. Jackoboice, 101 Mich. 409.

¶ 1141. A proposal to furnish all of the scrap iron "which we may receive for the period of 60 days" at designated prices signed by the offerer and accepted by the offeree constitutes a complete contract and cannot be varied by evidence that the real contract was oral or testimony limiting the quantity of iron to the amount furnished during the preceding 60 days.—Helper v. MacKinnon Mfg. Co., 138 Mich. 593.

§ 189. ——Letters and noncontractual writings.

Letters amounting collectively to contract, see ante § 187.

¶ 1142. A firm of attorneys, suing for their fees, sought to prove a contract for their services by correspondence, and showed that defendant or his attorney had authorized them to see what could be done in effecting a compromise with creditors and to notify him by letter; that they had written to him accordingly, and had received a reply. Held, that defendant could not show that he was influenced to write the reply by some undisclosed purpose, or that expressions in it were used in a foreign or hidden sense, or that it was meant to convey any other meaning than that to be naturally ascribed to it by the recipients under the circumstances.—Trowbridge v. Dean, 40 Mich. 687.

¶ 1143. A written communication from one establishment of a firm to another, requesting the latter to carry out certain directions, which in fact embodied the substance of an arrangement made by the writers with a third party for chartering his vessel, cannot be considered such a written agreement as will exclude parol evidence of additional oral stipulations not contained in it, in an action upon the agreement for the charter.—Loud v. Campbell, 26 Mich. 239.

§ 190. Receipts and written acknowledgments.

Receipts embodying contract, see post § 191.

Shipping receipts and bills of lading, see post § 192.

Receipts as admissions against interest, see post § 380.

¶ 1144. A mere receipt is not conclusive, but may be explained by oral evidence.—Rowe v. Wright, 12 Mich. 289; Roberts v. Field, 27 Mich. 337; Hart v. Gould, 62 Mich. 262; and see Lawrence v. Griswold, 30 Mich. 410.

¶ 1145. Passing receipts in full does not conclude the parties from disputing a pretended settlement.—Vyne v. Glenn, 41 Mich. 112.

¶ 1146. A receipt of payment is mere matter of evidence.—Johnson v. Continental Ins. Co. of New York, 39 Mich. 33.

¶ 1147. A receipt is always subject to parol explanation.—People v. West, 146 Mich. 537.

¶ 1148. The circumstances attending the execution of a receipt in full of all demands may be given in evidence to show that by mistake it was made to express more than was intended, and that the creditor had in fact claims that were not included.—Fire Ins. Assoc. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 1149. While a receipt, unexplained, may be evidence of the amount received, it is mere evidence and can be contradicted or explained by parol testimony.—Title Guaranty & Surety Co. v. Aetna Indemnity Co., 167 Mich. 535.

¶ 1150. A receipt by a ward for property held by his guardian is no more conclusive than any other receipt.—Powell v. Powell, 52 Mich. 432.

¶ 1151. A receipt or acknowledgment of payment is not conclusive so as to shut out evidence of a protest under which it was given.—McAllister v. Engle, 52 Mich. 56.

¶ 1152. In an action by a borrower to recover from a loan agent the amount of commissions which the latter had withheld on delivering the money, the plaintiff is entitled to show how defendant obtained the receipt which he gave for the money, and that he gave it under protest.—McAllister v. Engle, 52 Mich. 56.

¶ 1153. Pending divorce proceedings it was agreed that, in case an absolute decree were granted, the husband should pay the wife a certain sum as permanent alimony, and after the decree she signed a receipt for such sum as in full satisfaction of all claims "whatsoever" against him. Held, that in an action by her upon a certain demand against

him she had a right to explain the receipt, and to show that she did not understand she was receipting for anything but her alimony. —Letts v. Letts, 73 Mich. 138.

¶ 1154. A receipt for a payment made recited "as per B. L., to be furnished by me." Held, that it was competent to show that this conclusion was added after the receipt was signed, and that no agreement was made to furnish a bill of lading.—Cullen v. Detroit Tug & Wrecking Co., 99 Mich. 23.

¶ 1155. In a suit upon a promissory note bearing date May 31, 1894, parol evidence was admissible to show the understanding upon which an indorsement was made June 28th, reciting the receipt of money "to be indorsed on interest from January 1, 1894, until June 1, as far as interest calls."—Rawlings v. Fisher, 110 Mich. 19.

¶ 1156. In a suit for the purchase price of a printing press, the plaintiff vendor testified that the contract of sale was unconditional while the vendee testified that he was to keep the press only if it proved satisfactory. The press was installed in defendant's plant, and at the request of plaintiff for payment defendant paid seventy-five dollars of the five hundred dollars purchase price and took a receipt, which plaintiff signed and which stated that the seventy-five dollars was to apply on the purchase price provided the press proved satisfactory. Plaintiff testified that he signed the receipt hurriedly without noting its contents. Held, plaintiff might introduce evidence to contradict said receipt and show that the sale was unconditional.—Paddock v. Hatch, 169 Mich. 95.

§ 191. ——Containing contract or recital of contract.

Shipping papers and bills of lading, see post § 192.

¶ 1157. When a receipt also embodies a contract, parol evidence is inadmissible to vary or contradict it.—Fire Ins. Assoc. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 1158. A mere receipt for part payment of the purchase price of land orally sold, stating such price, describing the land, and adding "the balance to be paid in fifteen days from date, provided the title is proved good and on the delivery of good and sufficient warranty deed, possession of said premises this day surrendered" to the vendee, is not a written agreement of sale excluding oral proof of the bargain, and it may be shown that the vendee agreed that a mortgage on the premises should be paid out of the purchase money.—Bailey v. Cornell, 66 Mich. 107.

¶ 1159. Logs in the possession of a boom company were sold so that title vested in the vendee, who subsequently obtained from the vendor a paper in the form of a receipted bill of parcels, reciting payment, guaranteeing title, and directing the boom company to deliver up the logs. Held, that without a new consideration the paper could have no independent force, but must be considered as intended merely to aid the vendee in obtaining the logs; and that parol evidence was admissible to show that there was no new consideration or agreement.—Bell v. Utley, 17 Mich. 508.

¶ 1160. Mutual receipts evincive of a complete settlement between the parties signing them are within the rule excluding parol evidence to show that items covered by their language were not to be included. —Pratt v. Castle, 91 Mich. 484.

§ 192. Bills of lading and shipping receipts.

Evidence to explain abbreviation "B. L. attached to draft," see ante § 173.

Evidence to explain bill of lading, see also Bills of Lading ¶ 3.

¶ 1161. A bill of lading, so far as it is an undertaking to transport and deliver the goods as therein stipulated, cannot, in the absence of fraud or mistake, be varied or altered in its terms by parol, where it forms the basis or subject-matter of an action between the parties.—Gibbons v. Robinson, 63 Mich. 146.

¶ 1162. Although a bill of lading specifies the amount of property received, it is, like other receipts, open to explanation, and the carrier is at liberty to show that the actual amount which came to his hands is different from that stated.—Strong v. Grand Trunk R. Co., 15 Mich. 206.

¶ 1163. A bill of lading in writing, in so far as it is a contract of shipment and not a mere receipt for the goods, cannot be varied by prior or contemporaneous oral agreements between the parties.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 1164. Where a bill of lading is, as to any element of the contract, ambiguous, parol evidence is admissible to show what the agreement was in that respect.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 1165. Where a bill of lading is on its face ambiguous, it is competent to receive evidence of the circumstances surrounding the making of the contract, including the position of the parties and the things said and done by them.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 1166. In the absence of fraud, the printed matter in an express receipt governs and cannot be varied by a parol agreement. —Sloman v. National Exp. Co., 134 Mich. 16.

§ 193. Wills and codicils.

Necessity that will be in writing, see Wills, IV, A.

Admissibility of parol evidence extraneous to will in interpretation of same, see Wills, VI, A.

§ 194. Private corporation's or association's records and papers.

Applicability of best evidence rule to corporate transactions, see ante § 125.

Resort to minutes of illegal corporate meeting in construction of minutes of later meeting, see Corporations ¶ 677.

¶ 1167. The rule excluding oral evidence to affect a written contract does not apply to a corporate resolution appointing an officer, so as to exclude evidence to show the actual establishment of contract relations under it.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

§ 195. Legislative and official records and writings.

Official certificates, records and writings as documentary evidence, see post, VIII, C.

Verity imputed to public records, see Records.

Going behind statute rolls to interpret or invalidate acts, see Statutes, I, V.

Conclusiveness of legislative journals against parol evidence, see Statutes, I.

¶ 1168. Parol evidence is inadmissible to contradict a record, but may be introduced to show facts not in the record; and the rights of creditors or third persons cannot be prejudiced by the neglect of an official clerk to do his duty in properly recording actual proceedings.—Taymouth Township v. Koehler, 35 Mich. 22.

¶ 1169. The township record cannot be contradicted by parol, but parol evidence is admissible to show facts omitted.—Taymouth Township v. Koehler, 35 Mich. 22.

¶ 1170. The township record of a tax levy cannot be contradicted by parol.—Michigan Land & Iron Co., Ltd. v. Township of Republic, 65 Mich. 628.

¶ 1171. Where the record of an annual school district meeting is manifestly incomplete and is not signed, it is competent to show in aid thereof that the meeting was adjourned to a particular day.—Buckeye Township School Dist. No. 2 v. Clark, 90 Mich. 435.

¶ 1172. In an action by a school-teacher on a contract purporting to be signed by two members of the board, the record of the meeting of the board, kept by the director, cannot be contradicted by parol proof.—Cowley v. School District No. 3, 130 Mich. 634.

¶ 1173. Where the law requires the municipal action of a city council to be recorded, such records are the only lawful evidence of the action, and cannot be contradicted or supplemented by parol testimony.—Stevenson v. Bay City, 26 Mich. 44.

¶ 1174. While parol evidence is not admissible to contradict the record of the proceedings of the common council, it is admissible to show facts omitted from such record; since the failure of the clerk to properly enter such proceedings cannot affect the rights of individuals who have acted upon the faith of the action of the council, in fact duly taken, but not recorded.—Wheat v. Van Tine, 149 Mich. 314.

¶ 1175. Where a municipal board is required by statute to keep a record of its proceedings, parol evidence of an oral order given by the board to a city officer is inadmissible.—Davis v. City of Jackson, 61 Mich. 530.

¶ 1176. An oral proposition was made to a common council and acted on. Held, that its recital in the council records would not preclude oral testimony as to what it really was, nor of subsequent conversations in regard to it between the man who made it and members of the council.—Long v. City of Battle Creek, 39 Mich. 323.

¶ 1177. The rule that the records of a municipality are not impeachable by parol does not prevent proof that there was a purpose of using public money for private purposes when raised by a bond issue, though the record showed a regular proceeding to issue the bonds; since the fact to be proved to wit, the purpose, is not one required to be of record, the rule does not apply.—Bates v. City of Hastings, 145 Mich. 574.

¶ 1178. Parol evidence is admissible by way of explanation to show that certain bills, approved by a village council with full knowledge of their contents, included the expense of a certain street improvement for the making of which no record authority appears, since what the council could authorize it could ratify, and the allowance of such bills was a sufficient ratification.—Wheat v. Van Tine, 149 Mich. 314.

¶ 1179. Where the validity of a tax and of a deed based thereon is involved, it is admissible to show the payment of unlawful additional compensation to certain judges out of the tax-levy and their receipt of the money, where the records show the tax was raised for the purpose of such payment.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

§ 196. ——Election records, ballots and papers.

¶ 1180. The intention of the voter must be ascertained from the ballot; and if that

fails to express the intention, extraneous evidence cannot be allowed to explain it.—People ex rel. Attorney General v. Tisdale, 1 D. 59; People ex rel. Lake v. Higgins, 3 Mich. 233; People ex rel. Williams v. Cicott, 16 Mich. 283; People ex rel. Keeler v. Robertson, 27 Mich. 116, 129; People ex rel. Tobey v. McNeal, 63 Mich. 294.

¶ 1181. Parol evidence is admissible to show what a ballot was as cast, but not to show a different intent than it expresses: so held where a slip containing the name of one candidate and pasted over another name was unintentionally detached by the inspectors in counting the vote.—People ex rel. Tobey v. McNeal, 63 Mich. 294.

¶ 1182. The board of supervisors acted on a local option petition and submitted the issue to the people at an election. The record of the proceedings of the board was fair on its face, but parol testimony was at hand to show that the clerk did not, as required by section 2502, 1 Comp. Laws 1897, sign the record before final adjournment of the board, but signed it in a subsequent term of office. Held, this parol testimony was not admissible to contradict the record so as to invalidate the election.—Derosia v. Loree, 158 Mich. 64.

§ 197. ——Title records.

¶ 1183. It is admissible in rebuttal of fraud to show by parol that title was not in a certain person as appeared from the deed records because the deed, recorded later than its date, had really passed direct from a vendor to the purchaser's grantee in pursuance of a resale made by the purchaser and an agreed substitution of the name of the second purchaser for that of the first purchaser as the grantee.—Musselman Grocer Co. v. Casler, 138 Mich. 24.

§ 198. Judgments and judicial records and writings.

Verity imputed to judgments, see Judgments, VII; Former Adjudication.

Verity imputable to returns to writs, see Judgments, VII; Process, II; Attachment § 75; Executions, IX.

Evidence to show what matters were decided or involved in a former adjudication, see Former Adjudication, VII.

Impeachment of judgments collaterally by evidence to disprove or contradict jurisdiction, see also Judgments, VII; Foreign Judgments.

To show that judgment assignor, not judgment assignee was real person entitled to proceeds, see ante ¶ 1070.

As to mistake in report of executor's sale, see also ante ¶ 815.

Conclusiveness of guardianship letters against contradiction by parol, see Guardianship, II.

¶ 1184. Under court rules requiring the clerk to indorse on every paper filed the date of the filing, such filing mark becomes a part of the record of the court and cannot be contradicted by parol.—Sweet v. Gibson, 123 Mich. 699.

B. AS TO STRANGERS OR WHEN ISSUES ARE COLLATERAL.

§ 199. As to strangers to the writing.

Best evidence rule where contract is collaterally in question, see also ante § 127.

¶ 1185. A stranger to an instrument is not estopped from contradicting it by parol testimony, even of a party thereto, in order to prevent a fraudulent operation of it upon his interests.—Highstone v. Burdette, 61 Mich. 54.

¶ 1186. Where a father made an oral agreement with his son-in-law for his support, and afterwards his son made a written contract with the son-in-law for such support, in the absence of his father, which contract the father claims not to have authorized, and that it was not in accordance with the terms of the oral agreement, the father, in a suit with a third person involving the validity of the written contract and its binding effect upon the father, may show what the agreement was as he made it, and that it has not been fulfilled by the son-in-law.—Doyle v. Dobson, 74 Mich. 562.

¶ 1187. In an action by the owner of property against a broker, who had sold property under a contract wherein it was agreed that the property should not be sold for less than $35,000, on the issue of consideration of a sale made by the broker, evidence of the value of certain property taken in part exchange was admissible even though there were recitals in the deed that the consideration amounted to $35,000, such recital not being conclusive as between the owner and broker.—Yore v. Meshew, 146 Mich. 80.

¶ 1188. Evidence tending to show that the sale of a saloon was bona fide and not the creation of an agency, is admissible in an action against a saloon keeper and his bondsmen for an unlawful sale made by the ostensible buyer, where it is claimed that the saloon was sold and the power of attorney given to the buyer to facilitate conducting the business under the seller's license; though such evidence tends to contradict the power of attorney.—Hilliker v. Farr, 149 Mich. 444.

§ 200. Relation of issues to the writing; collateralness.

[Note. In numerous cases objection that evidence was obnoxious to the rule against parol was avoided by the fact that the evidence did not tend to affect the contents of the writing or its legal effect, but tended to prove some external

facts, like execution or consideration, or some collateral facts supplementary of or destructive of the writing. See generally ante §§ 156-186.]

Parol proof of surrounding circumstances when offered for other purposes than to explain or construe language of the writing, see ante §§ 159-163.

To show relative interests and estates of co-parties, see ante § 185.

Relation of parties to commercial paper among themselves, see post § 201.

Parol evidence of other contracts between parties, see post § 202.

Right to retake chattel and collateral assignment of note for price, see also ante ¶ 1136.

Showing want of consideration to rebut plaintiff's claim of ownership under deed, see ante ¶ 398a.

¶ 1189. In an action for breach of the covenant of seizin, in a warranty deed, evidence is admissible to show that grantor's attention was called to the fact that certain fences did not seem to be on the line, and that he represented that as soon as the grain was cut, he would have them moved onto the line, since, though this occurred before the deed was executed, it does not tend to dispute the deed.—Dubay v. Kelly, 137 Mich. 345.

¶ 1190. In a suit for commissions for effecting an agreement for an exchange of real estate, plaintiff introduced in evidence the written contract of sale between defendant and the buyer. Defendant did not claim that said written agreement was not a completed instrument and duly delivered. Held, it was error to permit defendant to state the meaning and effect of said agreement for the purpose of showing that the minds of the parties had not met.—Crane v. Ross, 168 Mich. 623.

§ 201. Relations and rights of parties to commercial paper.

As to adverse party in interest claiming under the paper, see ante §§ 174, 175.

To show true character of instrument or signature thereon, see ante §§ 181, 182.

¶ 1191. The relations and liabilities of the parties to accommodation paper may be shown by parol evidence, and it may be shown that a person who is apparently liable only secondarily on the instrument is in fact the principal debtor.—Lamberson v. Love, 165 Mich. 460.

¶ 1192. Although the legal effect of successive indorsements upon a note is to make the indorsers liable to each other in the order of time in which they sign their names, parol evidence is admissible to show that all the indorsers were accommodation indorsers, and were, by agreement among themselves, cosureties, and so liable to contribution.—Farwell v. Ensign, 66 Mich. 600.

¶ 1193. Successive indorsers of a note payable to a corporation of which they were members may be shown by parol agreement between themselves to have been cosureties.—Farwell v. Ensign, 66 Mich. 600.

¶ 1194. In an action upon a note plaintiff may show why earlier notes—out of which the one in suit arose—for the alleged balance due him from defendant were, for purposes of discount, made nominally by plaintiff to defendant's order. As between each other it was competent to show who was principal and who surety.—Eastman v. Cleaver, 72 Mich. 167.

¶ 1195. In an action by the payee upon a promissory note parol evidence is admissible to show that the defendant, who indorsed the note before delivery, was, as between the maker and himself, a surety, and that the payee had knowledge of the fact.—Hitchcock v. Frackelton, 116 Mich. 487.

¶ 1196. Where a person's signature appears on a note with that of the maker he may show by parol proof that he did not sign as comaker but as surety when suit is brought thereon by the payee.—Clare County Sav. Bank v. Featherly, 173 Mich. 292.

¶ 1197. Set-off against a note may be shown by parol.—Brown v. Smedley, 136 Mich. 65.

¶ 1198. Where suit is brought by the payee against the makers and surety of a note to recover thereon, evidence to the effect that the payee agreed to keep insured certain goods covered by a chattel mortgage held by him as security for the note in consideration of the surety's signature, is admissible as establishing a parol collateral agreement.—Clare County Sav. Bank v. Featherly, 173 Mich. 292.

§ 202. Other contracts or writings between the parties.

Parol evidence of matters collateral to the contract, see ante §§ 200, 201.

Prior agreements tending to prove authority or power to contract, see also Contracts ¶ 1259.

¶ 1199. Parties to contracts may come to an independent agreement upon details as to the execution thereof at the time of contracting as well as afterwards.—Gillett v. Bowman, 43 Mich. 477.

¶ 1200. A written contract does not preclude proof of any distinct parol agreement made at the same time that does not vary the written contract, and is not inconsistent with it.—Blackwood v. Brown, 34 Mich. 4.

¶ 1201. Parol evidence is admissible to show an additional agreement entered into under a contract, the written form of which does not purport to contain all the terms.—

Electrical Appliance Co. v. Standard Elec. Co., 151 Mich. 662.

¶ 1202. Where a vendee has orally assumed certain obligations relating to property, not included in his deed or bill of sale, they may be shown orally in a suit based in part upon these obligations and in part upon obligations set forth in the deed. The rule excluding parol evidence modifying a written instrument does not apply in such a case.—Trevidick v. Mumford, 31 Mich. 467.

¶ 1203. A verbal agreement was made, in performance of which a written contract was assigned in writing. The contract and assignment were put in evidence, but did not purport to set up the agreement. Held, not to be a case for the exclusion of parol evidence as to what the agreement was.—Richards v. Fuller, 37 Mich. 161.

¶ 1204. Where the consideration both for land and for timber previously cut therefrom was that expressed in a deed of the land, which deed made no reference to the timber, testimony of a parol agreement between the parties as to the timber is admissible, as the latter, being personalty, did not pass by the deed.—Fitzpatrick v. Hoffman, 104 Mich. 228.

¶ 1205. Evidence that at the time of the execution of a contract for the cutting of the timber upon certain lands the owners of the land said one of them would look after the business for both, is not open to the objection that it tends to vary the written contract by parol testimony.—Saxton v. Pells, 98 Mich. 340.

¶ 1206. A stipulation discontinuing a pending suit "without costs to either party," but not purporting to embody the terms of the settlement between the parties, does not preclude the introduction of parol evidence to show that, as a condition to the discontinuance, one of the parties was to pay the counsel fees of the other.—Patek v. Waples, 114 Mich. 669.

¶ 1207. Where an agreement to purchase assets of an insolvent at a fixed price was entered into with certain creditors of the insolvent with the understanding that they would prorate in the amount the purchaser would be compelled to pay above the fixed price, and where the assets were purchased at the price fixed, and thereafter the purchaser was obliged to pay an additional amount, parol testimony of such agreement was proper in an action to recover the amount so paid, as against objection that it varied the written contract evidenced by the notes.—Buhl v. Mechanics' Bank of Detroit, 123 Mich. 591.

¶ 1208. Verbal testimony of the contents of a lost letter of countermand to the effect that goods in question were not to have been shipped later than one week after the order was given, was not subject to objection on the ground that the order on which suit was brought, was a written one, expressing no time for shipment and not subject to countermand.—Conkling v. Nicholas, 133 Mich. 651.

¶ 1209. One Warren was indebted to plaintiff. He gave to plaintiff a notice to his employer, the defendant, to pay his wages to plaintiff "until further notice." Later Warren served defendant with notice to pay his wages to plaintiff no longer. Plaintiff then served notice upon defendant that Warren had at the time of giving the first notice orally agreed to assign all his future wages to plaintiff until plaintiff's entire claim against Warren was paid. Defendant, after Warren's second notice, paid the wages to Warren. Held, it was error for the court to refuse plaintiff permission to show by oral evidence the terms of Warren's agreement of assignment on objection that it varied the original order.—Weinberg v. Stratton, 163 Mich. 408. (Stone and Blair, JJ., dissenting.)

¶ 1210. Where the heirs at law of a deceased person enter into a written contract with the widow for the purchase of her dower interest, an oral agreement among such heirs as to the amount of the contract price to be paid by each is not inadmissible in an action by the heirs against one of their coheirs as varying terms of the written agreement.—Stevens v. Jackson, 180 Mich. 131.

§ 203. Oral contracts involving written ones.

¶ 1211. An oral contract made on an oral understanding that it shall conform to the terms of a written paper does not differ from any other oral contract, and may be shown to agree with or differ from the writing according to the facts.—Arbuckle v. Smith, 74 Mich. 568.

¶ 1212. Where one who has taken a written lease for five years of a hotel and of certain rooms in the basement subsequently agrees orally with his lessor to fit up another room in the basement in consideration of being allowed to occupy it until his written lease expires, and does so fit it up, he may, in summary proceedings taken by the lessor on the ground that such parol agreement is void, testify, as bearing upon said agreement, to conversation between the lessor and himself in regard to such room prior to the execution of the written lease.—Brant v. Vincent, 100 Mich. 426.

C. AS TO SUBSEQUENT FACTS AND TRANSACTIONS.

§ 204. In general; subsequent acts and modifications.

Parol to prove oral contracts agreed to have same terms as written one, see ante § 203.

Subsequent parol modification of discharge of written contract, see Contracts § 264.
Merger and extinction of earlier agreements and understandings in written agreement, see Contracts § 265.
General rule as to modification of contracts in writing by subsequent oral agreement, see Contracts, VIII; Frauds, Statute of; Releases.

¶ 1213. The admission of evidence of a parol arrangement of a character not required to be in writing is not objectionable on the ground that it varies a prior written contract on the same subject; the written contract and the subsequent oral contract may both be valid so far as they are not inconsistent, and so far as they are inconsistent the one latest in time will control.—Seaman v. O'Hara, 29 Mich. 66.

¶ 1214. Evidence of a later parol agreement altering disposition of articles sold by written contract, held admissible.—Summers v. Wagner, 87 Mich. 272.

¶ 1215. Where a written lease provides for the division of grain grown upon shares by a certain method, which is not followed, it is competent for the tenant to show, in a suit to recover an alleged excess of grain received by the landlord, that the landlord assented to the division as made.—Freese v. Arnold, 99 Mich. 13.

¶ 1216. Where the question was whether the writing sued upon was a binding contract or was conditioned in part on the closing of a collateral contract, evidence relating to subsequent negotiations between the collateral parties was properly admitted to aid in determining such question.—Ortmann v. Fletcher, 117 Mich. 501.

¶ 1217. Where under an arrangement between the heirs of a deceased mother, who held a chattel mortgage on the stock of goods of one of her sons as security for her indorsements of his notes, which are held by another son, who has been appointed special administrator of her estate, the goods are turned over to the administrator, and the mortgagor assumes the care of his aged father, and the administrator agrees with the owner of the store in which the business was being carried on to pay the balance due for rent, plaintiff may, in an action upon said agreement, testify to statements made to him by the mortgagor relative to the family understanding, which were afterwards confirmed in detail by defendant in a conversation with plaintiff, such testimony being competent as tending to show the release of the original debtor from liability for the rent.—Grieb v. Comstock, 99 Mich. 520.

¶ 1218. A royalty and sales contract calling for a specific royalty on patented heaters, having been supplanted by a new written agreement giving a specific royalty on certain catalogue numbers and a specific discount on purchases besides a percentage on sales by the licensee, does not exclude extrinsic evidence of a later oral agreement making a new discount rate, without any percentage on sales by the licensee, where after the making of the second written agreement the licensee made a new catalogue with different numbers and prices from that on which the writing was based, and in consequence the oral agreement was made and used as a basis of settlement.—Mouat v. Bamlet, 123 Mich. 345.

¶ 1219. An oral agreement by the mortgagor and a trustee and preferred creditor under a trust mortgage, with another trustee that if the latter would accept the trust, the bank of which he was president should share equally with the preferred creditor, is not void as varying a written instrument where it was made after the preferred creditor had accepted the trust.—Wolff v. Alpena Nat. Bank, 131 Mich. 634.

¶ 1220. Under a contract for the delivery of fruit, it was competent to prove that, after the contract was entered into, the method of shipment was altered by verbal agreement.—Town v. Jepson, 133 Mich. 673.

¶ 1221. Where a mortgage on a stock of goods provided that the mortgagor should keep the interest of the mortgagee in the goods insured against loss by fire and that in default, within a specified time, it would be lawful for the mortgagee to effect such insurance and the premium paid should be a lien added to the amount secured, held that an oral contract for the taking out of a policy of insurance to protect the mortgagor's interest, as well as that of the mortgagee, was not void as changing the terms of the mortgage by oral testimony.—Seaman v. Rindge, Kalmbach, Logie & Co., 195 Mich. 417.

¶ 1222. Plaintiff sold goods for a period of years to defendant. In making shipments the invoices of the plaintiff stated that no discounts were allowed other than those specified therein. Defendant's clerk testified that he called up the plaintiff by telephone and asked why the prices in the invoices were higher than those made, including discounts, by one Berger, plaintiff's salesman, and that the plaintiff told him to go ahead and arrange it with Berger, and that would be all right. Held, such parol evidence was not open to the objection that it modified the terms of a written contract.—Marx v. King, 162 Mich. 258.

¶ 1223. In a proceeding to cancel a deed on failure of grantees to comply with a written agreement, which was the consideration of the deed, to support grantors and to make certain payments, proof of a subsequent oral agreement by grantors as to constructing a house on the land cannot be admitted in evi-

dence and used.—Ebling v. Ebling, 176 Mich. 602.

§ 205. ——Practical construction by parties.

General rule as to practical construction of contract or deed by parties thereto, see Contracts §§ 161, 162; Deeds § 15.

¶ 1224. Where, after the execution of a written contract by one party, the other interlined an additional agreement to be performed by the party so signing, held, in a suit involving the rights of the parties under the contract, that evidence of subsequent conversations and agreements between them regarding such disputed clause was admissible so far as tending to show a final settlement and interpretation of an open and disputed question not settled by the contract as originally executed; the question of the authority to make the change and of its subsequent ratification being in issue.—Jenkinson v. Monroe Bros. & Co., 61 Mich. 454.

¶ 1225. Parol evidence to show the interpretation by the parties, the circumstances under which made and the subsequent acts of the parties relative thereto, is admissible in aid of the construction of a contract by which a village agreed to take water from a spring owned by a private party, the terms of which were of doubtful meaning.—Gregory v. Village of Lake Linden, 130 Mich. 368.

¶ 1226. Evidence as to the construction placed on the terms of an ambiguous contract by the parties thereto, held admissible under a notice of recoupment.—Saginaw Milling Co. v. Schram, 186 Mich. 52.

§ 206. Acts of waiver, election, acceptance or estoppel.

Relevancy and sufficiency of evidence of waiver, election, estoppel, and acceptance, see Election and Waiver § 18; Estoppel, III, C; Contracts §§ 319, 320, 330; Agency § 68. See also specific topics referred to in places mentioned and other topics treating of waiver, estoppel or acceptance in respect to particular things.

Parol evidence of promise tolling limitations, see Limitations, VII.

¶ 1227. Parol evidence is admissible to prove the exercise by a party of his option to waive a written stipulation or condition in his own favor.—Cobbs v. Fire Ass'n of Philadelphia, 68 Mich. 463.

VI. OPINIONS AND CONCLUSIONS.

A. CONCLUSIONS OR FACTS AND NONEXPERT OPINIONS.

§ 207. General rule as to admissibility.

[Note. When the question is not as to the competency or propriety of opinion evidence as such but as to its probative tendency or relevancy to the issues, the matter has been treated in the specific topic dealing with the issue. For example the relevancy or sufficiency of opinion evidence of damages or values has been treated in Damages, XI, B; and in Values, but the competency of opinions and the qualifications of the witness have been treated in this topic, post §§ 224, 250, 263, 286-291, 296.]

Opinions on ultimate question at issue to the jury, see also post § 211.

Conclusions of law, see post § 212 et seq.

Admissibility because of other evidence, see post § 208.

Exclusion because of available direct evidence, see post § 209.

Hypotheses and conjectures, see post § 210.

Proper matters and facts for deductions and conclusions, see post §§ 211-240.

Questions for experts or nonexperts respectively, see post §§ 241-247.

Knowledge or observed facts as basis for nonexpert opinions, see post §§ 248-252.

Basing opinion on comparisons, see post § 253.

Observed facts narrated to jury as basis for lay opinions, see post §§ 248-252.

Limits and restrictions on expert testimony, see post §§ 254-269.

Weight and effect of nonexpert testimony, see post § 599.

Motions to strike out answers amounting to conclusions or voluntary opinions, see Trial, V, C.

Probativeness on question of skill or care of fact that advice or opinion was previously given as to proper mode of operation, see Negligence, V.

Admission of improper conclusion or opinion as harmless error, see Harmless Error.

Rules as to conclusions and nonexpert opinions in trials for crime, see Indictment, VIII, B.

¶ 1228. A question calling for the conclusion of the witness upon matters of fact should be excluded.—Anderson v. Thunder Bay River Boom Co., 61 Mich. 489.

¶ 1229. A question calling for a conclusion of the witness upon facts not the subject of expert testimony, and concerning which it is the jury's province to draw inferences, is improper.—Lemon v. Chicago & G. T. R. Co., 59 Mich. 618.

¶ 1230. It is error to permit a witness to testify to his conclusion based upon facts in evidence before the jury from which they are as competent to draw a conclusion as is the witness.—Jones v. Village of Portland, 88 Mich. 598; Tice v. Bay City, 78 Mich. 209; Dundas v. City of Lansing, 75 Mich. 499.

¶ 1231. Where facts are presented from which the jury may draw a conclusion, it is not error to exclude the answer of a witness giving his conclusion or opinion based on such facts.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 1232. The answer of a witness to a question, which would be only a conclusion about which she could not know, and as to which she had already testified concerning her belief, is properly excluded.—Ketchell v. Keene, 171 Mich. 108.

¶ 1233. Opinion evidence is admissible as a rule only in the examination of experts.—Grand Rapids & I. Ry. Co. v. L. Starks Co., 172 Mich. 270.

¶ 1234. Where the opinion of a witness would be admissible in support of an action, it would be equally admissible against it if it were the other way.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99.

¶ 1235. The opinion of a surveyor that an application for a drain is a fair appearing paper is not admissible, the question in issue being whether certain alterations therein had been made before or after it was signed.—Brown v. Kennedy, 132 Mich. 464.

§ 208. Opinions made admissible by other testimony.

Admissibility of expert testimony to rebut other opinions, see post § 255.

¶ 1236. In a suit by plaintiff carrier for negligently setting fire to its car, defendant's agent, an experienced potato loader who had placed a stove therein to keep the potatoes from freezing, testified as to the manner in which the stove had been set up and then over objection was permitted to express his opinion that he did not see how it was possible for the car to catch fire from the stove. Plaintiff's witness had already been allowed to state his opinion that the fire could not have resulted if the stove had been properly set up. Held, since the plaintiff had opened the field of opinion testimony, the admission of the testimony of defendant's agent did not constitute reversible error.—Grand Rapids & I. Ry. Co. v. L. Starks Co., 172 Mich. 270.

§ 209. Direct evidence excluding opinions.

See also post ¶ 1338.

Inadmissibility of opinion as to road location where better evidence is available, see ante ¶ 625.

Exclusion of opinions on obvious facts, see post § 211.

Exclusion of opinions on unquestioned facts, see post § 211, ¶ 1249.

Competency of inference and conclusion when direct evidence is available, see also Carriers ¶ 241.

¶ 1237. Actual average daily receipts do not measure the value of scientific or professional services, to the extent of excluding competent opinions as to what they are worth.—Thomas v. Caulkett, 57 Mich. 392.

¶ 1238. In trover for the conversion of timber, testimony of defendant's agent as to the amount actually purchased from an alleged licensee was not conclusive, in view of testimony that all of the timber taken under such license was sold to defendant; and therefore the testimony of estimators as to the amount of timber taken off was proper.—Snyder v. East Bay Lumber Co., 135 Mich. 31.

§ 210. Hypotheses, probabilities and speculations.

See also post ¶¶ 1295, 1296.

Supposititious motives and reasons, see post § 232.

Medical testimony that injury could be produced in given manner, see post § 257.

Medical prognosis, see post § 257.

Estimates of quantity, value, cost, or damages, see post § 224.

Necessity for observed facts narrated to jury as basis for lay opinion, see post §§ 248-252.

Form and propriety of hypothetical questions to experts, see post § 299 et seq.

Form of experts' opinions as expressing conjecture or surmise rather than opinion, see post § 305.

Evidence that rescissive action would have been taken if facts were known as irrelevant to issue of making contract, see also Corporations ¶ 216.

¶ 1239. An inquiry of one of the defendants in an action of trover as to the probability of their having delivered the goods by mistake to some one else is one calling for mere speculation, and its exclusion is not error.—Bissell v. Starr, 32 Mich. 297.

¶ 1240. A witness who has simply observed a phenomenon unattended by any indications as to the circumstances of its appearance cannot be asked his opinion as to what those circumstances were likely to be; if, however, there are such indications, it is proper to admit his opinion as to the action of the circumstances, after the indications themselves have been proved, and the witness is shown to have had some basis of observation on which to found his opinion. But the opinion should be strictly confined to the particular facts.—Underwood v. Waldron, 33 Mich. 232.

¶ 1241. Testimony that a witness thinks that a certain fact exists cannot be regarded as conclusively establishing the fact, unless no reasonable conclusion other than that stated by the witness can be drawn from the facts given as the basis for his belief.—Myers v. Hinds, 110 Mich. 300.

¶ 1242. One who, during a certain year, has twice detected another in erroneous or fraudulent weighing of hides sold to him cannot, because thereof, give his opinion that such action continued throughout the period of seven years preceding such year.—Reid v. Ladue, 66 Mich. 22.

¶ 1243. In an action against an attorney upon his alleged agreement to prosecute plaintiff's suit and pay the costs, receiving half the recovery if successful, the attorney testified that after he had obtained judgment for plaintiff in the circuit court, and after the defendant in that case had announced its intention to remove the case to the supreme court, he and his client agreed that if he failed in the higher court he was to have no fees but was not to be liable for costs; also, that when the case was removed he declined to prosecute it if he was to be liable for costs in case of failure, and that he told his client he could then discontinue without paying costs. Held, that it was competent for him to prove by the officers of the defendant in that case that defendant would have allowed such discontinuance.—Wildey v. Crane, 69 Mich. 17.

¶ 1244. In an action for slander it is proper to prove the defendant's admission that she "supposed she had repeated the story." It is an admission and not a mere supposition.—Burt v. McBain, 29 Mich. 260.

§ 211. Admissible deductions, opinions and observations.

As to particular matters and issues, see post §§ 212-240.

Matters proper for lay witnesses and experts respectively, see post §§ 241-247.

Hypothetical question propounding direct issues in case, see post § 304.

Proof of declarations or statements by substance without exact words, see post § 345.

¶ 1245. In an action for assault and battery consisting in unwarranted and excessive force, whether the force used to remove plaintiff was or was not excessive, being a question for the jury, cannot be proved by an opinion on that direct question.—Zube v. Weber, 67 Mich. 52.

¶ 1246. The opinion of a witness as to the truth of an alleged libelous charge that plaintiff's father and mother were starving in a certain attic is inadmissible, that being a question for the jury to determine from the facts given in evidence.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

¶ 1247. In an action by an assignee in bankruptcy to recover assets fraudulently received from a bankrupt and used by defendants in their business, while it is competent to show the efforts made by the sheriff by virtue of writs to find property of the bankrupt, where he had testified that he had levied upon all the property of the bankrupt he could find, it was error to permit him to testify that he became satisfied that the bankrupt had no further property upon which he could levy and he decided he had none, inasmuch as it virtually was his opinion and conclusion.—Arnold v. Harris, 142 Mich. 275.

¶ 1248. In an action for damages for personal injuries sustained by the giving way of a handhold on defendant's car when plaintiff was leaving the car which was stopping on signal, it is not error for the court to refuse to receive testimony offered by the defendant as to the purpose the handhold was intended to serve, the use of the appliance being absolutely obvious.—Gerlach v. Detroit United Ry., 171 Mich. 474.

¶ 1249. In an action for the purchase-price of a machine, where the defense is a breach of warranty that the machine would do as good work as a certain other one, it is proper to ask a witness whether it did as good work as said other; the comparison being one which any one familiar with the use of such machines and had seen the two work could make, and it being unquestioned that the witness was qualified in this respect.—McCormick Harvesting Mach. Co. v. Cochran, 64 Mich. 636.

§ 212. Legal rights, duties and liabilities.

Particular facts involving conclusions of law and conclusions on ultimate issues, see also post § 213 et seq.

Stated opinions of attorneys general or other public officers as evidence, see ante ¶ 377.

Right of agent or principal to testify as to his authority, see Agency, also § 40.

¶ 1250. Where a mining company was sued for a fatal injury to the employee of one who had entered into a mining contract with the company, and the terms of the contract, usage and the understanding of the parties were shown, held, that the contractor could not be asked whether it was not his business to be on the lookout for danger, as this was not a question of fact.—Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

¶ 1251. In seeking to hold a bank president for moneys lent by him as such to an irresponsible person, and on his own representations to the cashier that he was himself interested with the borrower and would see the money repaid, the bank president's own opinion as to his own liability is immaterial and inadmissible as evidence.—First Nat. Bank of Sturgis v. Reed, 36 Mich. 263.

¶ 1252. Quære, whether witnesses can be allowed to state their views as to the materiality of facts withheld from insurers at the time of the execution of the policy.—Hill v. Lafayette Ins. Co., 2 Mich. 476.

¶ 1253. One who, when sued on a note, claims it was obtained by fraud, may be asked on cross-examination to point out the circumstances that constituted the alleged fraud, since this does not ask him to draw a conclusion from the facts, but to state what facts operated on his mind and produced the fraud complained of.—Mace v. Kennedy, 68 Mich. 389.

¶ 1254. In an action against a bank for not presenting promptly a draft drawn by plaintiffs upon their debtor in favor of a collection agency, testimony by one of the plaintiffs that the draft was not to be collected by the collection agency unless it was impossible to collect it through the bank is not objectionable as involving a conclusion of law.—Finch v. Karste, 97 Mich. 20.

§ 213. Existence, effect and terms of agreements.

Instrument as best evidence of what it contains, see ante § 120.

Defining word "curve" as used in railroad rule book, objection that it varied meaning by parol, see ante ¶ 984.

Testimony of party as to who was other party, whether corporation or individuals, see also Corporations ¶ 404.

¶ 1255. Where the fact of a sale of goods is not disputed, but the controversy is as to its terms, the testimony of the agent who made the sale that he sold the goods to the defendant for a price named is not incompetent as stating a conclusion of law.—Dennis v. Leaton, 72 Mich. 586.

¶ 1256. Where the dispute is as to whether goods were sold on time or for cash, evidence of what the vendee expected or would expect under certain circumstances in regard to the plaintiff's giving time on the order is immaterial.—Julius King Optical Co. v. Treat, 72 Mich. 599.

¶ 1257. Where, in a suit upon an insurance policy, the question whether plaintiff was or was not insured is one of law and fact, it is error to permit plaintiff to testify that he believed in good faith that he was insured.—Dove v. Royal Ins. Co., 98 Mich. 122.

¶ 1258. In an action involving the genuineness of a note alleged to have been executed by a mother, since deceased, in favor of her daughter, testimony of a witness that deceased had no opportunity to sign the note upon the day of its date is inadmissible though witness might testify to facts which would show that there was no such opportunity.—Mack v. Cole's Estate, 130 Mich. 84.

¶ 1259. When the facts are not disclosed, testimony that a person purchased an article, is a conclusion.—Ensign v. Dunn, 181 Mich. 456.

¶ 1260. After suit had been begun by a firm in justice's court and before judgment, one of the firm assigned to the firm's attorneys all his "right, title, and interest in or to the claim" sued upon. Execution having issued, and the constable having neglected to pay over the moneys collected, the assignees brought suit on the constable's bond, and the assignor, testifying in the latter suit, was asked whether at the time the former suit was brought the money belonged to him or to the partnership. This was objected to as calling for a conclusion of law. Held, that it should have been excluded.—Montgomery v. Martin, 104 Mich. 390.

¶ 1261. In assumpsit for gravel sold and delivered, answers by an agent of plaintiff as to whether defendant agreed to pay a certain price therefor should not be rejected as conclusions where the facts were fully gone into by both parties relating to their conversations and agreement.—Detroit River Transit Co. v. Aldrich, 176 Mich. 357.

¶ 1262. A question asked a purchaser of property under a contract of conditional sale, as to when he was to take title, is not objectionable on the ground that it calls for a conclusion as to the effect of a contract; it merely asks for the terms of an agreement.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 150 Mich. 311.

¶ 1263. In an action on an undertaking for costs in a chancery cause a question to the register whether he ever accepted the bond as a compliance with the order requiring security for costs, was properly excluded as asking for an opinion or intention, it not being disputed that the register did actually receive the undertaking.—Skinner v. Lucas, 68 Mich. 424.

¶ 1264. In so far as witnesses undertake to testify that a verbal order for a car lot of coal ordered delivered by the seller to the purchaser by an order of the former to the railroad company to deliver was a delivery and acceptance by the buyer under an existing custom, they assume to testify to legal conclusions.—Calvert v. Schultz, 143 Mich. 441.

¶ 1265. The question what money a foreign certificate of deposit payable in "currency" is to be satisfied with is one of law, and it is not competent for a witness, without referring to any local custom or usage, to testify concerning it as an expert.—Phelps v. Town, 14 Mich. 374.

¶ 1266. A party to a writing cannot testify as a witness what he understood as its meaning where the suit is not one to correct the instrument, since it would be testimony to a conclusion of law.—Crane v. Ross, 168 Mich. 623.

§ 214. Ownership or title.

See also ante ¶ 1260.

That one "bought" or "purchased" property as conclusion, see ante § 213.

¶ 1267. In a suit for rent defendant was asked how he claimed the land, and replied, "I considered it mine." Held incompetent.—Hogsett v. Ellis, 17 Mich. 351.

¶ 1268. A party owning property consisting of chattels and choses in action may

testify to the fact of ownership where it is material.—Cilley v. Van Patten, 68 Mich. 80.

¶ 1269. A question that only raises a question of law—such as whether estimates of timber belong to the man who had them made and who paid for them, or to the landlookers—is properly excluded, even though asked upon the subject of custom.—Webster v. Sibley, 72 Mich. 630.

¶ 1269a. A witness, who has testified to conversations with one in possession of logs during the handling and scaling of them, which conversations tended to show that witness was acting under directions of D., as owner of the logs, may be asked if he ever heard the possessor "say anything about owning the logs"; since this would tend to show that the possessor did not dispute D.'s ownership, although ordinarily a witness could not so testify because ownership was the very question at issue.—Stanton v. Estey Mfg. Co., 90 Mich. 12.

¶ 1270. A witness who has been shown a lease of a hotel from a father to his son cannot testify as a conclusion based wholly thereon, in a suit in which the question in issue is who is proprietor of such hotel, that they told him that the son ran the hotel.—Marquet v. LaDuke, 96 Mich. 596.

§ 215. ——By gift.

¶ 1271. It is not a conclusion of law to testify that one's husband gave certain chattels to the witness as a gift.—Davis v. Zimmerman, 40 Mich. 24.

¶ 1272. An administrator's statement that he failed to charge himself in his final account with money found in a crock because the money was given to him, is merely a conclusion and does not rise to the dignity of testimony showing the requisites of a valid gift.—Casserly v. Casserly, 123 Mich. 44.

§ 216. Demand, presentment or refusal.

¶ 1273. Where the testimony of a notary was taken on commission to show the presentment and dishonor of a note, and notice by him to the parties, and he only stated in reply to the interrogatories that from entries in his register it appeared that the note was dishonored and notice given, but did not say who presented the note for payment, or who served the notice, it was held that this reply was not admissible in evidence.—Bliss v. Paine, 11 Mich. 92.

¶ 1274. In trover for conversion it was proper that the answer "Yes, sir," to the question "Did you then demand the box?" should go to the jury, if not objected to at the time, as evidence of a demand, without detailing the conversation.—Bissell v. Starr, 32 Mich. 297.

¶ 1275. In replevin against a sheriff who had attached mortgaged goods a question whether or not a demand was made at a stated time for the joint possession of mortgaged goods is not objectionable as calling for a conclusion of the witness.—Rosenfield v. Case, 87 Mich. 295.

§ 217. Partnership, agency or authority.

Authority and duty as conclusion of law, see also ante ¶ 1254.

¶ 1276. In an action to charge defendants as partners it is error to include testimony by one defendant as to the nature of the relationship on the ground that it involves a conclusion of law.—Scholtz v. Freud, 128 Mich. 72.

¶ 1277. In an action to recover for commission as real estate agent, where defendant denied that plaintiff had acted for him, it was not error to refuse to permit plaintiff to answer a question as to whom he was acting for in the sale, as a real estate agent; as under the circumstances the question called for a statement of plaintiff's undisclosed purpose, and not for a statement of fact.—Downing v. Buck, 135 Mich. 636.

¶ 1278. Where, in an action against a firm on a note issued by one of the partners in the firm name, as payment for goods received by him before the other partner was taken in, the former was asked by the plaintiff, on direct examination, whether he had authority from the firm to sign checks and notes, an answer was properly excluded as involving a conclusion of fact and law.—Michigan Shoe Co. v. Paul, 149 Mich. 695.

¶ 1279. In an action against joint defendants upon an implied warranty it is admissible to allow one of the defendants to testify as to his authority to bind the other, though he must state facts and not conclusions.—De Witt v. Prescott, 51 Mich. 298.

¶ 1280. Upon the question whether an employee of defendant foreign corporation was such an agent thereof as to make a service of summons upon him binding on the company, it is not error to refuse to allow the witnesses of defendant to state whether or not the said employee was an agent of the company, where they are allowed to state in detail what he did and what he was authorized to do.—Arnold v. Huber Mfg. Co., 166 Mich. 190.

¶ 1281. In an action for commissions as an insurance agent, where the question as to whether certain managers of a branch office had authority to bind the company by a contract was in dispute, it was error to permit plaintiff to testify to the statements of one of such agents that he and another had such authority; as thereby plaintiff was permitted to testify to a conclusion upon the main controversy in the case.—Gore v. Canada Life Assur. Co., 119 Mich. 136.

¶ 1282. The effect that a conversation testified to had or ought to have had in inducing a party to form an opinion that a certain person was another party's agent is for the jury to determine, not for the witness.—Thompson v. Clay, 60 Mich. 627.

¶ 1283. In an action by a carpenter against an officer of a company to recover for services alleged to have been rendered to such officer, in which the defense was that plaintiff was hired to work for the company, held that an answer to a question asked the defendant as to whether when he made the bargain with plaintiff, and said he would do so and so, he was speaking as an individual or as an officer of the company, was properly excluded, as such fact should be shown by the conversation of the parties and the surrounding circumstances.—Harmon v. Parker, 193 Mich. 542.

§ 218. Existence and contents of records.

¶ 1284. The testimony of a member of the township board who examined books of the treasurer as to the amount found due from him is admissible, in a suit on his bond, to show how much he owes the township.—Township of Otsego Lake v. Kirsten, 72 Mich. 1.

¶ 1285. The county clerk may testify from examination of the journals that what appeared to be a record was not signed by the chairman and clerk of the board and that they were the only entries on the subject.—Hoffman v. Pack, Woods & Co., 114 Mich. 1.

¶ 1286. In an action on a beneficial certificate defended on the ground that the deceased was not a member, a question asked of the clerk of the supreme secretary as to what he had to say so far as his duties were concerned and so far as he had come in contact with the association's records as to whether or not the deceased was ever a member of the defendant organization does not come within the rule permitting a witness who has examined the record to testify as to the absence of entries thereon.—Wagner v. Supreme Lodge Knights and Ladies of Honor, 128 Mich. 660.

§ 219. Public interest, uses and necessities.

Opinion evidence as to necessity of bridge over a stream, see also Bridges ¶ 90.

¶ 1287. A witness of the neighborhood of a proposed street opening cannot testify, basing it on the situation existing, whether the opening would give a direct route into a city as soon as possible and whether it was necessary.—City of Detroit v. John Brennan & Co., 93 Mich. 338.

¶ 1288. Opinions of witnesses as to the necessity of taking property for a proposed improvement in a highway, are inadmissible.—City of Grand Rapids v. Coit, 149 Mich. 668.

¶ 1289. In proceedings to condemn land for the opening of a street, the opinion of a witness as to the necessity for the proposed improvement is inadmissible.—City of Grand Rapids v. Bennett, 106 Mich. 528.

§ 220. Causes and effects.

Cause or effect of personal or property injuries, see post § 221.

Mental influences and conditions and consequences, see post § 231 et seq.

Subjects for lay and expert testimony respectively, see post § 242.

¶ 1290. In an action for injuries to horses caused by negligent overdriving, where the evidence shows that the top of the carriage was covered with mud, a witness accustomed to driving may state that in ordinary driving mud would not fly on the top; the testimony tends to show the rate of speed.—Laird v. Snyder, 59 Mich. 404.

¶ 1291. A person driving a team across a railway track may be a competent witness as to what frightened the team while crossing.—Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589.

¶ 1292. Testimony that "I know there must have been wood in the engine by the sparks," should be stricken out, as it is not for a witness, but for the jury to draw inferences from facts.—Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163.

¶ 1293. In an action to recover damages for personal injuries sustained in an automobile collision, where the defendant was called by plaintiff for cross-examination, the question "Your car came around there with such force that the rear wheel hit the Fountain street curb, didn't it?", held properly admitted, over objection that it called for a conclusion.—Snyder v. Mathison, 196 Mich. 378.

¶ 1294. The question whether a dam would have gone out had it not been for the high state of the water is properly excluded as calling for a conclusion of fact within the jury's province.—Darling v. Thompson, 108 Mich. 215.

¶ 1295. In an action involving the location of a certain boundary line, several surveyors having testified, it is not reversible error to exclude testimony by one of them as to what effect it would have on the other boundary lines if a certain line were accepted, where the effect was easily deducible from the other testimony.—Freda v. Olschefski, 131 Mich. 201.

¶ 1296. In an action on an insurance policy where the issue was whether insured committed suicide or was murdered, it is error to permit witnesses to give their opinion, based on the position of the body and the conditions surrounding it, as to whether

the body had fallen there or had been placed there by other parties, or whether a man shot in a cutter could have fallen out of it and been in the position in which the body was found, since these were conclusions to be drawn by the jury.—Furbush v. Maryland Casualty Co., 131 Mich. 234.

§ 221. ——Injuries to person and property.

Subjects for expert testimony, see post § 257.
Medical testimony as to how given condition or injury might have occurred, see post § 257.
Inspection of injury by jury as improper evidence, see post § 575.

¶ 1297. The cause of an accident is not a subject for opinion evidence, where all the surrounding circumstances are before the jury, from which they are to draw such legitimate conclusions as the proof warrants.—Riffel v. Union Truck Co., 180 Mich. 673.

¶ 1298. Opinion evidence as to the cause of an accident is inadmissible where the facts are fully in evidence and the conditions are not such as to call for knowledge different from that possessed by ordinary persons.—Levyn v. Koppin, 183 Mich. 232.

¶ 1299. A witness accustomed to take care of and manage a horse may state what effect overdriving had upon it, and also the consequent depreciation in its value.—Laird v. Snyder, 59 Mich. 404.

¶ 1300. In an action against physicians for malpractice where the claim was that by the use of unnecessary force they wrenched the knee and injured it by breaking or partially rupturing a ligament, the plaintiff may testify to her symptoms and feelings, and may testify as to where her pains were but could not testify as to what caused the pains, and could not therefore say that the pain was caused by the rupture of the ligament.—Spaulding v. Bliss, 83 Mich. 311.

¶ 1301. A witness cannot give his opinion that the fire by which plaintiff's property was destroyed came from fires set on defendant's land.—Smaltz v. Boyce, 109 Mich. 382.

¶ 1302. Testimony by the plaintiff that he had no use of his injured foot is admissible, even though it is followed by a statement with a full description of its condition, whereby it appears conclusively that he could use it; the question being as to the credibility and not its competency.—McDonald v. City Elec. Ry. Co., 144 Mich. 379.

§ 222. Identity or resemblance of things or persons.

Person or corporation as contracting party, see also ante ¶ 1283.
Testimony of printer of original blank as to printed additions on note, see Alteration of Instruments ¶ 39.

¶ 1303. Identification of a lot as the one referred to in a lost document states only a conclusion, if the witness cannot give the description, and it is insufficient to show the contents of the paper.—Taylor v. Adams, 58 Mich. 187.

¶ 1304. In an action for false imprisonment against an officer who sought to justify an arrest by the resemblance between plaintiff and a photograph of the person alleged to have committed the offense, the opinions of third persons given after the arrest as to such resemblance are inadmissible, where both plaintiff and photograph are in court.—Filer v. Smith, 96 Mich. 347.

§ 223. Distances, directions and boundaries.

Relative field for lay and expert opinions, see post § 245.
Conclusion that boundary was agreed to, see post ¶ 1359.
Relevancy and sufficiency of evidence as to boundaries, see Boundaries.

¶ 1305. What a witness supposes as to the location of a disputed division line, or what he supposes the general understanding to be as to such location, is inadmissible, especially where it appears from his testimony that he knows nothing about the line.—Beecher v. Galvin, 71 Mich. 391.

¶ 1306. After a surveyor had testified that he could not and did not find an original quarter post when making a survey, the question whether in his judgment the quarter post had ever been located and established under the original government survey was held inadmissible as calling for an opinion, and not for any fact within the witness' knowledge. Boundary lines cannot be established or disturbed by the mere opinions of surveyors.—Burt v. Busch, 82 Mich. 506.

¶ 1307. In testifying surveyors should be confined to statements of facts, and not be permitted to express conclusions or presumptions.—Clarke v. Case, 144 Mich. 148.

¶ 1308. The opinion of a surveyor as to a certain supposed monument found by him is a conclusion of the witness and inadmissible as evidence.—Clarke v. Case, 144 Mich. 148.

§ 224. Estimates of quantity, value, cost, or damages.

Best evidence of lumber scale or tally, see ante § 107.
Admissibility of estimates as secondary evidence of amounts originally shown by writing, see ante § 153 ¶ 765.
Proofs of direct nature sufficient to exclude opinions, see ante § 209.
Estimates of speed, see post § 225.
Comparisons of differing systems of scaling, see ante ¶ 437.
Sufficiency of knowledge to support estimate, see post § 250.

Questions for experts, see post § 263.
Admissibility of computations of present worth of money, see also Damages § 331.

¶ 1309. Testimony as to the quantity of logs taken from a mill pond to the effect that the witness went to the pond and made a careful estimate of the logs which was from 50,000 to 60,000 feet, is not objectionable as a mere guess.—Clink v. Gunn, 90 Mich. 135.

¶ 1310. In trover for hay which had not been weighed at the time of conversion, but which had been cut from a given acreage, a witness who has shown himself competent to testify may be asked to state the average crop per acre for that season upon the premises in question.—Isaacs v. McLean, 106 Mich. 79.

¶ 1311. A witness who had not counted the broken bolts of a boiler, but who showed sufficient knowledge to enable him to estimate the number, was properly permitted to give such estimate.—Woods v. Chicago & G. T. R. Co., 108 Mich. 396.

¶ 1312. Complainant sued defendant for causing the ice in a river to back up so as to interfere with complainant's water power and to recover as damages the extra amount of coal and labor which complainant was compelled to employ to make up for the loss of its water power. Complainant's witness testified in detail as to the amount of coal used under the conditions complained of as compared with other times. He did not keep an exact account of just the amount of coal and labor expended solely in making up for the deficit caused by defendant's wrongful act, but gave figures calculated to afford a basis of estimate. Held, it was not improper to permit plaintiff to give his opinion as to the proportion of the coal and labor employed in overcoming the situation created by defendant's wrongful act.—Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78.

¶ 1313. Where machinists, testifying to the reduced value of an engine after an injury, speak from experience and examination, and give reasons for their opinions, it cannot be objected that their testimony is speculative and incompetent.—Moore v. Township of Kenockee, 75 Mich. 332.

¶ 1314. In an action of deceit over the sale of stock, a witness may give his opinion as to the value of the stock where it has no market value.—Steele v. Kellogg, 163 Mich. 132.

¶ 1315. Testimony as to the value of a vessel before and after sustaining the injury in suit, by one who knew her condition well enough to speak upon the subject was competent; but speculation by one who made no inspection was not proper.—Michaud v. Grace Harbor Lumber Co., 122 Mich. 305.

¶ 1316. In an action by a husband for negligence causing his wife's death, the opinion of witnesses as to the value of her services is admissible.—Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582.

¶ 1317. In an action for wrongful death of a boy 11 years old thrown from a wagon which he was driving alone, testimony of the value of the boy's services by witnesses acquainted with him is properly admitted.—Miller v. Township of Meade, 128 Mich. 98.

¶ 1318. Where a contract for grading a roadbed leaves the engineer of the railroad discretion to change the line at will, and the change has been made, a contractor suing for work done, etc., may ask a witness what in his opinion would have been the cost of constructing the road on the original line in the face of an objection that it was impossible for any man to go there three years after the work was done and tell what it was worth.—Bush v. Brooks, 70 Mich. 446.

¶ 1319. In an action for damages to a dock owner, resulting from the construction of a bridge near by which tended to prevent vessels from stopping at the dock, it is admissible for the plaintiff, after showing such interference, to give a general estimate of the annual damage caused him thereby.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 1320. It was not error for the owners of property examined by them in a damaged condition, it being wearing apparel and the like comprised in baggage, to state in money the amount of the damage; lay witnesses are competent to state a conclusion on observed facts when by the words and gestures of the witness the jury cannot be put into a position of equal vantage with the witness for drawing it.—Withey v. Pere Marquette R. Co., 141 Mich. 412.

§ 225. Speed or motion.
Admissibility of testimony from experiment or comparison, see post §§ 249, 253.
Question as one for experts or lay witnesses, see post § 247.
Qualifications of experts, see post § 282.

¶ 1321. Passengers in an electric car may testify as to how fast the car was going when the accident occurred.—Goodes v. Lansing & S. Traction Co., 150 Mich. 494.

¶ 1322. In an action against a railroad company for an injury received by a passenger in one of its trains from the improper loading of flat cars attached to a passenger car, the testimony of witnesses as to the rate of speed at which the train was running is competent, even if of little value.—Keating v. Detroit, B. C. & A. R. Co., 104 Mich. 418.

¶ 1323. The driver of a horse and light wagon who is endeavoring to pull a horse, which has been frightened by an automobile,

off a street car track, is competent to testify that a car coming from the direction she was facing did not slacken its speed from the point at which she first saw it until it struck the horse.—Walter v. Detroit, J. & C. Ry. Co., 101 Mich. 181.

§ 226. Structural and physical conditions and mechanics.

As to what caused dam to give way, see ante ¶ 1294.

Interference, hindrance and obstruction as conclusions, see post § 227.

Field and respective limits of lay and expert opinions, see post § 246.

Subjects for experts, see post § 265.

¶ 1324. In an action for injury from nonrepair of bridge, testimony by one witness that "it was a very poor, shackly bridge," and by another that from his "personal knowledge the bridge was in good repair," was admissible.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 1325. A witness acquainted with the facts may express an opinion whether a drain is too small to carry the water conveyed into it by an artificial cut, and whether it was large enough before the cut was made to convey the water naturally coming to it.—Osten v. Jerome, 93 Mich. 196.

¶ 1326. Asking a witness what, if any, defect he noticed in a cattle guard does not call for a conclusion.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 1327. In an action for personal injury caused by a chip flying from a hammer which plaintiff was using, opinion testimony as to the length of time the hammer had been in the process of chipping is a matter of opinion.—Dompier v. Lewis, 131 Mich. 144.

§ 227. Interference, hindrance and obstructions.

As to wheel striking curb, see ante ¶ 1293.

¶ 1328. Whether an erection actually obstructs passage on a way is a question properly put to eyewitnesses familiar with the road, and cannot be determined in all cases by any mere description by metes and bounds without a personal knowledge of the effect upon the convenience of travel.—Clark v. Lake St. Clair & Up-River Ice Co., 24 Mich. 508.

¶ 1329. In an action against a railway company for the negligent killing of a person on the track, it appeared that strangers were in the cab of the engine with the engineer. Held, that when the place has been described to the jury, and the situation of the several persons, it cannot be said that the engineer might not be permitted to testify that their presence did not interfere with the performance of his duties; the jury could not judge of this fact as well as the witness.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99.

¶ 1330. An answer of a witness is not open to the objection that it is opinion evidence where, in an action to recover damages for a collision between vehicles, he states: "There was no object that would have detained or kept the vehicles from passing. Of course, it was not a good road. If the location of the buggy was as pointed out to me, there would have been ample room, nine feet of good road."—Buxton v. Ainsworth, 153 Mich. 315.

§ 228. Care, skill or neglect.

As to safety or danger, see post § 229.

Subjects for lay and expert opinions respectively, see post § 241.

¶ 1331. A witness cannot give his opinion whether an accident happened by reason of defendant's negligence or of plaintiff's inattention; so, one who has testified that he saw plaintiff step from the steps of a car upon a box placed there for that purpose, and fall, cannot be asked on cross-examination whether it occurred to him at the time that the accident happened by reason of the darkness or of plaintiff's inattention to the step's being there.—Kelley v. Detroit, L. & N. R. Co., 80 Mich. 237.

¶ 1332. In an action by a bicycle rider against the driver of an automobile to recover damages for personal injuries sustained in a collision at a street intersection, a question put to a witness as to whether defendant appeared to have his car under control is not objectionable as calling for a conclusion.—Vezina v. Shermer, 198 Mich. 757.

¶ 1333. Contributory negligence cannot be shown by the statement of one who had no personal knowledge of it.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 1334. In an action by a tile setter against one selling and delivering plaster to a plaster contractor for damages for personal injuries sustained as the result of collapse of the porch on which plaintiff was working, due to placing heavy bags of plaster upon a bay window sill and on the floor inside the building, evidence of plaintiff that the presence of the plaster caused him no concern was a fact and not a conclusion and admissible as bearing upon his contributory negligence.—Schneider v. C. H. Little Co., 200 Mich. 361.

§ 229. Safety or danger.

Safety or viciousness of animals, see post § 230.

Questions for experts, see post § 269.

¶ 1335. A witness cannot be allowed to state whether a road is safe or not when that is an ultimate question in the case.—Harris v. Township of Clinton, 64 Mich. 447.

¶ 1336. In an action against a street railway company whose duty it was to see that a street crossing was in safe condition, it seems it is error to refuse to allow persons familiar with driving to give their opinion as eyewitnesses concerning the safety of the crossing, it being incapable of precise description.—Laughlin v. Grand Rapids St. R. Co., 62 Mich. 220.

¶ 1337. Where, in an action for injury from a defective sidewalk, there is no difficulty in laying before the jury all the facts relating to the condition of the walk, it is proper to exclude the opinion of witnesses as to whether the walk was in a condition of reasonable repair and was reasonably safe for public travel.—Girard v. City of Kalamazoo, 92 Mich. 610.

¶ 1338. Where the size and location of a log lying in the highway, and the width and character of the highway, are matters susceptible of proof, opinions of witnesses as to whether the highway at that point was dangerous, or the log a dangerous obstruction, are inadmissible.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 1339. In an action for injuries sustained upon a defective sidewalk, a witness, who had attempted to repair the walk several days before the accident, was asked the following questions: "What can you say, after you had got through your work on that walk, whether or not it was in good repair?" and "What can you say as to whether or not it was in a reasonable safe condition for public travel?" The witness had already testified fully as to the condition of the walk, and what he did in its repair. Held, that the questions calling for his conclusions were properly excluded.—Atherton v. Bancroft, 114 Mich. 241.

¶ 1340. A witness in an action against a township for damages for personal injuries sustained as the result of being kicked by one of the horses of a team upon falling from the wagon due to an unseen rut in an approach to a bridge, after describing the rut, may not give his opinion as to whether it was more than an ordinary rut which would be found on an approach to a bridge of such character, as it is a question for the jury to determine, having heard the testimony, whether the road was reasonably fit and safe for public travel.—Pool v. Township of Montague, 194 Mich. 476.

¶ 1341. Where a plaintiff is injured by choosing to walk on the narrow and dangerous side of a trestle instead of on the broad and safe side, it is error to permit witnesses to testify that in their opinion the other side was as dangerous as where plaintiff was injured.—Dolstrom v. Newport Min. Co., 165 Mich. 309.

¶ 1342. In an action for personal injury caused by an engine falling through an alleged defective bridge, witnesses may not testify that the bridge was "reasonably safe for public travel," this being a question for the jury.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 1343. A witness cannot state in an action for negligence at a crossing that in his opinion it was careless for the defendant to leave cars at the crossing projecting so as to obstruct vision.—Close v. Lake Shore & M. S. R. Co., 73 Mich. 647.

¶ 1344. The opinion of a witness as to whether or not a roadbed was reasonably safe and fit for travel is inadmissible as evidence.—People ex rel. Esper v. Detroit & Saline Plank Road Co., 125 Mich. 366.

¶ 1345. The opinion of a witness in an action against a city for personal injuries caused by a defective sidewalk, that the walk was in a dangerous condition, is incompetent.—Lindley v. City of Detroit, 131 Mich. 8.

¶ 1346. Where a witness has testified to the dangers incident to operating a machine, which are obvious and apparent, the jury is as competent as the witness to judge of the danger to which an inexperienced man would be subjected if set to perform such work, and it is not error to reject the opinion of the witness on that subject.—Melzer v. Peninsular Car Co., 76 Mich. 94.

§ 230. Animal traits and characteristics.

Questions for lay or expert witnesses, see post § 241, ¶ 1392.

Subjects for experts respecting animals, see post § 268.

¶ 1347. A witness who has driven a span of horses on a street railway both before and after an accident caused, as claimed, by the vicious character of the horses, may give his opinion as to whether they were safe for that kind of work.—Noble v. St. Joseph & B. H. St. R. Co., 98 Mich. 249.

¶ 1348. In an action for damages for personal injuries sustained by being struck by a runaway horse, held that evidence as to whether or not the horse was quiet was admissible as being a statement of fact and not a conclusion of the witness, especially as the witness stated in detail the conduct of the horse.—Dyer v. Peoples Ice Co., 188 Mich. 203.

§ 231. Mental attitude or feelings.

Motives and reasons, see post § 232.

Knowledge, understanding, intent, and assent, see post § 233.

State of one's own mind, see post § 235.

Belief that one had contract, see also ante ¶ 1257.

Subjects for experts, see post §§ 244, 259.

¶ 1349. In a suit for alienation of affections, questions asked of the husband as to his wife's feelings with reference to a divorce suit instituted by the husband are not proper where the husband and plaintiff both testify in detail as to what each of them did and did not do.—Gornetzky v. Gornetzky, 174 Mich. 492.

¶ 1350. In an action for libel the answer to a question put to a witness for plaintiff "How did these seem to make him feel," held properly excluded as calling for the opinion of the witness.—Van Lonkhuyzen v. Daily News Co., 195 Mich. 283.

¶ 1351. Conclusions of a witness that the defendant in an action for malicious prosecution appeared to be displeased when the plaintiff had been allowed to go on his own recognizance, are inadmissible as going beyond evidence giving the appearance of the defendant, which is permissible to show a mental state of pleasure, ill-will, anger, or the like.—Fleckinger v. Taffee, 149 Mich. 678.

§ 232. Motives and reasons for actions.

As to displeasure, affection or hostility, see ante § 231.

Competency of one to state what he would have done in given state of facts, see also post § 235.

Opinion as what another would have done in given case, see also ante ¶ 1243.

¶ 1352. A witness cannot be asked why another party wished a certain act done which he directed, unless some statement of his purpose or motive accompanied the direction.—Gilman v. Riopelle, 18 Mich. 145.

¶ 1353. It is incompetent for a witness to testify to the supposed motive which influenced another person's action.—McHugh v. Estate of Dowd, 86 Mich. 412.

¶ 1354. The opinion of a witness that a sidewalk in front of the premises of a railroad company was rebuilt because it needed rebuilding is inadmissible, where witnesses in the employ of the company have testified that the walk was in sound condition, and was rebuilt because of a change in grade.—Rogers v. Orion, 116 Mich. 324.

¶ 1355. Upon an issue as to whether or not a purchase of logs was made under an option held by a third person, so as to entitle him to commissions, the seller's testimony that it was so made is not a mere conclusion from the facts, although the better practice would, perhaps, require that the testimony be confined to what was said and done at the time of sale.—Burrell v. Gates, 112 Mich. 307.

¶ 1356. In an action against a buyer for commissions on a purchase alleged to have been made under an option, the buyer having been permitted to show all the sources of his information in regard to the logs, and to state that he did not purchase under the option, the court correctly refused to allow him further to state upon whose judgment and what information he in fact relied in making the purchase.—Burrell v. Gates, 112 Mich. 307.

¶ 1357. A statement by the plaintiff in an action for damages for assault and battery of the reason why she did not work for a week after the assault held to be a statement of fact and not a conclusion of the witness.—Gungrich v. Anderson, 189 Mich. 144.

¶ 1358. A tunnel contractor, having in course of work carrying the tunnel excavations beneath a large city water main, made known its reasons for objecting to payment of what it deemed an unnecessarily large number of watchmen to guard against the breaking of the main, it was not opinion evidence for the plaintiff board to show by one of its members what was the reason that so large a number was put to watch, and to state what would be the probable dire results if a break occurred.—Board of Water Com'rs of City of Detroit v. Butler Bros. Const. Co., 168 Mich. 137.

§ 233. Knowledge, understanding, intent, and assent.

Competency of one to testify of his own state of mind or intent, see post § 235.

One's own act as an acceptance, see also ante ¶ 1263.

Mental state or feelings and motives and reasons, see ante §§ 231, 232.

¶ 1359. The conclusion of a witness that the location of a dividing line between lands was acquiesced in by the parties in interest is inadmissible.—Beecher v. Galvin, 71 Mich. 391.

¶ 1359a. The court should exclude conclusions of a witness as to what the street commissioner understood from a conversation relied on to show notice to a village of defective walks, that being a question for the jury.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 1360. A statement by a witness that all the creditors at a creditors' meeting seemed to be satisfied with an arrangement for an extension of time to the debtor is properly stricken out as calling for an opinion and as not being a statement of fact in the absence of proof that words were actually spoken which would form a basis for such statement.—People v. Traves, 188 Mich. 345.

¶ 1361. In an action by a lumber company against the owner of a building to recover for materials furnished directly to defendant and for the balance due on the contract of the contractor which defendant had

agreed to pay in consideration of plaintiff not holding defendant's property, held that the answer of a witness, that what plaintiff's general manager meant by protecting himself, stated in his conversation with defendant and witness, was "by a lien," was inadmissible as being the conclusion of the witness as to the intention of a third party, which intention, even if expressed in the absence of the defendant, and without her knowledge, and not acted upon her would be incompetent, and hearsay.—Monroe Lumber Co. v. Bezeau, 192 Mich. 307.

¶ 1362. It was error for the court to permit the defendant to testify that he had stated to the prosecuting attorney all the facts about the case that he knew, without actually testifying to such facts, in an action for false imprisonment and malicious prosecution.—Lansky v. Prettyman, 140 Mich. 40.

§ 234. Imposition, fraud or undue influence.

See also ante ¶ 1253.
Surmises of fraud, see also ante ¶ 1242.
Competency of one to testify to his own fair intent, see post § 235.

¶ 1363. The opinion of the scrivener who drew a will subsequently contested as to whether or not undue influence was exercised, is incompetent.—McHugh v. Fitzgerald, 103 Mich. 21.

§ 235. One's own intent, reasons or thoughts.

See also post ¶ 1382.
As to one's own physical and perceptive faculties, see post §§ 237, 238.

¶ 1364. Where intent or motive is involved in the issue in a suit for breach of contract, the person to whom such intent or motive is imputed is a competent witness to testify thereto.—Isbell v. Anderson Carriage Co., 170 Mich. 304; Spalding v. Lowe, 56 Mich. 366; Watkins v. Wallace, 19 Mich. 57.

¶ 1365. One may testify to his own intent or motive involved in the issue unless his testimony would be excluded by statute or by some principle of evidence.—Spalding v. Lowe, 56 Mich. 366.

¶ 1366. The testimony of the assignor as to his intent in making the assignment is admissible where fraud is charged.—Watkins v. Wallace, 19 Mich. 57.

¶ 1367. A witness may state what his motive and intent were in canceling a contract, which was to be done and performed to his "satisfaction," it being contended that he was not dissatisfied but wished to make a better contract in lieu of it.—Isbell v. Anderson Carriage Co., 170 Mich. 304.

¶ 1368. In order to prove reliance upon false representations whereby a loan was procured upon land not owned by the mortgagors, it is proper to ask plaintiff's agent (who made the loan) whether he would have made it if he had known that the land was adversely occupied and that one of the mortgagors had only a tax-title.—Stubly v. Beachboard, 68 Mich. 401.

¶ 1369. Where fraud is charged the party may testify as to his intent.—Hyde v. Nelson, 11 Mich. 353; Brown v. Blanchard, 39 Mich. 790; Bedford v. Penny, 58 Mich. 424; Angell v. Pickard, 61 Mich. 561.

¶ 1370. A plaintiff who claims that his sale to defendant was because of fraudulent representations by the latter as to his financial condition may testify that he made such sale in reliance upon those statements.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 1371. In an action on an insurance policy plaintiff sought to meet the defense that the premium note had never been paid by showing that the agent of the insurance company had told him the company had given him, the agent, credit for the note. The plaintiff's further offer to show that he understood this to mean that the agent had paid the note was properly excluded as mere inference.—McIntyre v. Michigan State Ins. Co., 52 Mich. 188.

¶ 1372. It is not competent for a witness to state his understanding of a given transaction.—Fosdick v. Van Arsdale, 74 Mich. 302.

§ 236. Bodily conditions, pain, sickness and health.

Admissibility of evidence of symptoms to lay foundation, see also ante ¶ 536.
Limits and extent of lay opinions admissible, see post § 243.
Subjects for experts, see post §§ 243, 257.

¶ 1373. In an action for personal injuries a physician who has known plaintiff for some years cannot be allowed to testify that in his opinion plaintiff was "shamming before the jury"; the physician being no better qualified to give such an opinion than the jurors are.—Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77.

¶ 1374. A witness who attended the injured person may testify to a numbness of the patient's limb as a fact within his observation. It is not excluded as testimony of sensation felt by another.—Will v. Village of Mendon, 108 Mich. 251.

¶ 1375. A statement that one who had been injured in an accident had difficulty in breathing for some time after the injury does not amount to a conclusion, but simply a statement of fact.—Loose v. Township of Deerfield, 187 Mich. 206.

¶ 1376. In an action for damages for assault and battery, a lay witness who testifies

that he has known plaintiff for a period of four years, that he has seen him work, and has worked with him before and after the altercation, may properly testify that after the accident plaintiff was unable to do his work and that witness had to help him.—Foster v. Krause, 187 Mich. 630.

¶ 1377. In an action for personal injury, an answer to a question asking whether plaintiff made any exclamations of pain, or statements as to her suffering, "I think she did," was a conclusion of the witness, and improperly admitted.—Haney v. Village of Pinckney, 155 Mich. 656.

¶ 1378. A witness cannot testify that the plaintiff groaned involuntarily, as such statement is a conclusion beyond his knowledge. —Pierson v. Illinois Cent. R. Co., 159 Mich. 110.

¶ 1379. In an action for personal injury, an answer by plaintiff that "I attribute the headaches to the injury in my back. It runs right up my back and up the back of my head," is admissible since it was competent for witness to describe the pain, and the fact that she gave her conclusion as to the connection between the injury and the pain in her head cannot be said to be injurious in the light of the remainder of the answer.—Lindley v. City of Detroit, 131 Mich. 8.

¶ 1380. A question to a lay witness whether plaintiff has had other sicknesses which might have caused the injury as well as the accident sued for is one calling for the conclusions of the witness, and is properly excluded.—Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 1381. Persons other than physicians may testify that certain relatives of an insured person had died of a certain disease, the weight of such testimony being for the jury. —Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369.

§ 237. Personal ability and faculties.

Ability to work, see ante ¶ 1376.
Ability to see and hear, see post § 238.
Medical testimony as to possibilities under given state, see post § 257.
Observation as basis for opinion, see post ¶ 1425.
Admissible lay opinions, limits and extent, see post § 243.

¶ 1382. In an action for the wrongful ejection of plaintiff from defendant's train, a statement by plaintiff after having testified that as he was sitting in his seat he was seized by the conductor, who proceeded to drag him out, to the effect that "I was in no position to meet any such assault, for that reason I resisted as long as I could," is not objectionable as a conclusion.—Pierson v. Illinois Cent. R. Co., 149 Mich. 167.

§ 238. Ability to see or hear.

Physical ability and faculties, see ante § 237.
Medical testimony as to impairment from injury, see post § 257.

¶ 1383. A witness who swore to having been in the garden of her house, which was by the side of a railway track, for several minutes before a train passed, and that she did not hear any whistle blown, was asked whether the whistle could have been blown anywhere near the neighboring station without her hearing it. Held, that this question was properly ruled out; it related to a matter of opinion and common observation and experience upon which the jury could have judged as well as the witness, when she had stated the facts as to distance and the existence of any obstacle.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99.

¶ 1384. In an action against a railway company for the negligent killing of a child upon the track, it was held proper for the engineer, when asked why he did not see the child, to testify that the child could not possibly be on the track without his seeing it unless it got on from the ditch on the left-hand side of the engine. This was admissible as a matter of knowledge, as to what was within his field of vision, and not of opinion.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99.

¶ 1385. A witness who had testified that he was watching the approach of a train from a certain point, may be asked whether he could have heard a signal if it had been given; the question being merely equivalent to an inquiry whether he was within hearing distance.—Crane v. Michigan Cent. R. Co., 107 Mich. 511.

¶ 1386. In action for injuries at a crossing the plaintiff may be allowed to testify whether he could see the approaching train "coming down from where you stopped to listen" at a certain point.—Close v. Lake Shore & M. S. R. Co., 73 Mich. 647.

§ 239. Sanity and competency.

Sufficiency of witness' knowledge or observation to sustain opinion, see post § 251.
Subjects for experts, see post §§ 244, 259.

¶ 1387. In a will contest a witness may testify to the intelligence of the testator to comprehend a given instrument and to the sufficiency or lack of his mind and memory to comprehend his property and the objects of his bounty, but it is improper to allow testimony of the legal capacity or his competence to make a will.—Page v. Beach, 134 Mich. 51.

§ 240. Intoxication.

Effect to incapacitate, question for lay or expert witnesses, see post ¶ 1398.

¶ 1388. A witness may state whether or not a person had the appearance of being

intoxicated at certain times; such statement of appearance is not mere opinion.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

§ 241. Proper questions for nonexperts or experts.

Testimony regarded as conclusions and inadmissible as such, see ante §§ 211-240.
Particular questions, whether for experts of lay witnesses, see post §§ 242-247.
Inapplicability of best evidence rule to exclude lay witness' conclusions because expert might have testified, see ante § 107.
Limits and restrictions on expert testimony, see post §§ 254-269.
Questions of value for experts, see post § 263.
Subjects for and qualifications of experts to testify, see post, VI, B.

¶ 1389. The proper subjects and occasions for nonexpert opinions, discussed and considered.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 1390. Conclusions from every-day appearances that are open to the judgment of any intelligent observer, e. g., determining whether leaves that had been detached and were fastened in a small book belong to it or not, do not require expert testimony.—Passmore v. Passmore's Estate, 60 Mich. 463.

¶ 1391. Ordinary care and prudence in common emergencies is not a question for experts; and unless there is conflict it may often be taken from the jury as a matter of universal judgment.—Clinton v. Root, 58 Mich. 182.

¶ 1392. A witness cannot be asked his opinion as to the tendency of a hole in a bridge to frighten horses of ordinary gentleness; that is not a matter for expert testimony.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 1393. One who contracts to furnish machinery must, if necessary, provide suitable contrivances for making it effective. But whether a contractor should have used a certain specific device, as better known and more effective than others, is for the jury to determine from evidence as to such knowledge and usage, and does not call for an expert's opinion.—Clark v. Detroit Locomotive Works, 32 Mich. 348.

¶ 1394. The testimony of a witness who is not shown to be an expert, as to what is covered by telephone patents, is inadmissible.—American Cushman Telephone Co. v. Noble, 98 Mich. 67.

¶ 1395. An unprofessional log-scaler can testify to his own scale; the weight of his evidence, as affected by his want of experience, being for the jury.—Busch v. Kilborne, 40 Mich. 297.

§ 242. ——Operation of cause and effect.

Subjects for expert opinions, see post § 254 et seq.

¶ 1396. The opinions of police officers or detectives, as such, as to the cause of a fire, are wholly inadmissible to show probable cause of guilt, or to furnish grounds of action.—Fowler v. Gilbert, 38 Mich. 292.

¶ 1397. In an action for negligent injury caused by a fire the fire marshal's opinion as to its cause is inadmissible; it is not a question of expert testimony.—Cook v. Johnston, 58 Mich. 437.

¶ 1398. The effect of intoxication upon testamentary capacity is not a question for experts, but depends on common observation and the facts of the particular case.—Pierce v. Pierce, 38 Mich. 412.

¶ 1399. The effect of water in disintegrating the mortar of a wall is no more a matter of scientific knowledge than is the effect of a running stream in excavating its banks at its angles; and other persons who have had occasion to observe it, as well as masons, may be competent to express opinions upon it.—Underwood v. Waldron, 33 Mich. 232.

¶ 1400. On a claim that four or five dry seasons had caused the diminution of a stream, a supervisor of the township may testify what effect such seasons as the preceding four or five would have on such a stream.—Pettibone v. Smith, 37 Mich. 579.

§ 243. ——Bodily conditions, sickness and health.

Conclusions and admissible opinions, see ante § 236.
Competency of lay witnesses to exclamations of pain, see also post ¶ 2409.
Subjects for experts, see post § 257.

¶ 1401. Whether any sickness whatever exists in a particular locality is not a question requiring the testimony of experts.—Evans v. People, 12 Mich. 27.

¶ 1402. An inquiry of a lay witness without medical knowledge "whether there was any case of disease of a certain type, at a certain time, in a certain neighborhood," the question of the type of the disease being material to the issue, was held to be inadmissible.—Evans v. People, 12 Mich. 27.

¶ 1403. Unskilled witnesses may testify to facts that came within their own observation relating to ordinary injuries or sickness of those with whom they have consorted, not involving medical knowledge beyond that of ordinary unprofessional persons.—Elliott v. Van Buren, 33 Mich. 49.

¶ 1404. Declaration of a party suffering from an assault, as to existing sensations,

need not be testified to by a physician.—Elliott v. Van Buren, 33 Mich. 49.

¶ 1405. The testimony of unskilled persons as to the permanent nature of physical injuries, not recent, is not necessarily inadmissible; such facts are not exclusively for experts; the observation of others may be taken for what it is worth.—Kuney v. Dutcher, 56 Mich. 308.

¶ 1406. In an action for damages for personal injuries nonmedical witnesses who had observed the facts were properly permitted to answer whether they could form a judgment as to plaintiff's having full use of her arm, whether she was able to work during a specified time, and whether she has the full use of her left arm.—Harris v. Detroit City R. Co., 76 Mich. 227.

¶ 1407. Expert testimony is required to show the expectancy of life of a person suffering from hernia and internal injuries.—Denman v. Johnston, 85 Mich. 387.

¶ 1408. A woman's testimony in her own behalf of her diminished capacity for work after as compared with that before a personal injury, offered as bearing on extent of damages, is not objectionable as being a matter for expert testimony. It is within her own knowledge.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

§ 244. ——Mental state or capacity.

¶ 1409. There is nothing in the nature of inquiries concerning mental capacity which requires juries to be informed, of necessity, by other than ordinary witnesses.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 1410. In an inquiry concerning mental capacity to perform a certain act, witnesses who are not experts may testify to their opinions upon the question in controversy, based upon their own observations.—Beaubien v. Cicotte, 12 Mich. 459.

§ 245. ——Boundaries, landmarks and surveys.

Admissible conclusions and opinions, see ante § 223.

¶ 1411. Surveyors cannot on the basis of an ex parte survey or from parol evidence, when better is available, state where points and boundaries are located except when other ordinary witnesses might do so.—O'Brien v. Cavanaugh, 61 Mich. 368; Fisher v. Dowling, 66 Mich. 370.

¶ 1412. The question of the location of a section line or a starting point is one of fact for the jury, and should not be left to the opinions of surveyors as experts; a tangible and established boundary cannot be disturbed on such evidence as a surveyor's opinion, based, not on any data made known by testimony in the case, but on his examination of records, deeds, abstracts and other documents from which he protracted his maps and plans.—Stewart v. Carleton, 31 Mich. 270.

¶ 1413. Testimony as to boundaries need not be that of a surveyor or expert; the witness' want of accurate knowledge would only affect the weight of his testimony.—Hoffman v. Harrington, 44 Mich. 183.

§ 246. ——Travel, transportation and mechanics.

Subjects for experts, see post §§ 265, 266.

¶ 1414. Passenger traffic on river steamers is not so exclusively a maritime business that sailors alone are qualified to testify as to its methods and duties, but usage may sometimes be shown as bearing thereon.—Clinton v. Root, 58 Mich. 182.

¶ 1415. Expert testimony is inadmissible (though its reception was held harmless error) to show how a light on a drawbridge should have been placed so as to prevent injury when the draw was open.—Goodale v. Portage Lake Bridge Co., 55 Mich. 413.

¶ 1416. The question whether, from appearances, a certain engine had capacity to draw a certain train of cars, is one which no one but an expert is competent to answer.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 1417. Whether the structure of a railroad is such as to warrant fast travel is not usually a question for ordinary witnesses.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1418. A bystander may testify that there was room enough on a railroad siding to hold a train without the car's projecting into the roadway at a crossing, such not being a question for an expert.—Young v. Detroit, G. H. & M. R. Co., 56 Mich. 430.

¶ 1419. The question of the construction and condition of a country road is a subject which does not require expert testimony to enable a jury to decide as to whether it was reasonably safe for the passage of vehicles.—Loose v. Township of Deerfield, 187 Mich. 206.

§ 247. ——Speed of trains or vehicles.

Admissible opinions and conclusions, see ante § 225.

Qualifications of experts, see post § 282.

Sufficiency of witness' knowledge or observation, see post § 249.

¶ 1420. The question of the speed of a passing train is not one of science but of observation, and testimony upon it may be given by any one possessing a knowledge of time and distance.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 1421. It is not error to allow witnesses of ordinary intelligence to compare the speed of a railroad train at the time of an accident with the speed of the same train on other days before the injury occurred.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

§ 248. Knowledge or observation as basis for nonexpert opinions.

Hypothetical and speculative opinions not based on facts, see also ante § 210.
Want of personal knowledge, see also ante ¶ 1333.
As to what frightened horse on given occasion, see ante ¶ 1291.
Purpose or motive as basis for opinion as to person's reasons for action, see ante §§ 232, 235.
Relative field and limits of lay and expert testimony, see ante §§ 241-247.
As to particular matters, see post § 250-252.
Proof of knowledge, data or observation, see post § 249.
Basis for identification, see also ante ¶ 1303.
Basis or predicate for expert's opinion, see post §§ 292-297.
Restriction of expert opinions to predicated facts, see post § 293.
Experience and knowledge sufficient to qualify witness as an expert, see post §§ 270-291.
Observed mutual behavior as basis for conclusion as to existence of promise of marriage, see Breach of Promise to Marry § 5.
Want of knowledge as rendering witness incompetent, see also Witnesses, II.
Knowledge of reputation or character sufficient to qualify witness to truth and veracity of other witness, see Witnesses, VI.

¶ 1422. Only experts can be allowed to testify to their opinions, based upon the testimony they may have heard in a cause, and then only upon a matter of skill.—Daniels v. Mosher, 2 Mich. 183.

¶ 1423. A seller of merchandise cannot give his opinion that he has been the victim of short weighing over a period of years and thereupon state the estimated average weight of the articles sold and thus arrive at the supposed shortage.—Reid v. Ladue, 66 Mich. 22.

¶ 1424. In an action upon a note given for a particular machine, testimony by witnesses who have never seen the machine work, that other machines of the same kind made by the same vendors work satisfactorily, is inadmissible.—Second Nat. Bank v. Wheeler, 75 Mich. 546.

¶ 1425. In an action for negligent injury nonmedical witnesses who had worked with plaintiff in the hayfield and at other kinds of labor before and after the injury may testify as to his ability to do as good a day's work after he was hurt as before.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 1426. It is not error to exclude a question to a witness as to what was the cause of a dock's failing to stand, where he was not an expert and no knowledge of the facts on his part was shown.—Munroe v. Godkin, 111 Mich. 183.

¶ 1427. Plaintiff's opinion not based upon any knowledge of facts testified to by himself or any one else, as to the cause of a saw's failing to operate in the usual manner, whereby an injury is claimed to have been received, is not admissible as evidence of the cause sought to be proved, or as tending in any degree to establish it.—Johnson v. Hovey, 98 Mich. 343.

§ 249. ——Proof of data, knowledge or observation.

Experiments to give data for opinion, see post § 253.

¶ 1428. The answer "no" of a witness to the question whether a certain association had any financial responsibility or property, imports knowledge, and it need not appear how he acquired such knowledge.—Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712.

¶ 1429. Without some preliminary showing of his means of knowledge a witness cannot testify as to the reason that induced another person to flee the country.—Tanner v. Page, 106 Mich. 155.

¶ 1430. Ordinary railway travelers are not presumed to form, while riding, such habits of observation as will make their opinion as to the speed of trains reliable.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1431. Opinion testimony as to the speed of trains should not be merely relative without some standard of rapidity, but should, at least approximately, show the real rate and show that it was unsafe, before the question whether it was negligent can be left to the jury.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1432. The speed of trains is not a matter for scientific testimony, but it cannot be shown from the opinions of passengers observing only from the inside, unless their experience and observation is such as to make their judgment reliable.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1433. In a personal injury case caused by a collision with an automobile, a witness who was an occupant of the carriage run down by the automobile who testified that the automobile was but 20 feet from the horse's head when first discovered, and that the auto made no noise heard by him when

approaching, and that when running at a high rate of speed it makes but little noise, and when running at low speed it makes much more noise, is not competent to testify as to the rate of speed of the auto on the occasion in question, having no reasonable opportunity to judge it.—Wright v. Crane, 142 Mich. 508.

¶ 1434. The testimony of a witness that two men voted who were not registered voters, that he saw their ballots as they were handed by the voters to the inspector, and that he is confident they were straight democratic tickets, is not objectionable as testifying from the appearance of a folded ticket, when it does not appear that was his sole source of information.—Harbaugh v. People ex rel. Cicott, 33 Mich. 241.

¶ 1435. An estimate of the number of printed labels requisite to supply various match factories, based on hearsay, and without furnishing any data on which it is founded, is not proper testimony of the amount required for that purpose, and its admission, to prove the improbability that a contract would be made for printing so large a number as that claimed to have been agreed on for defendant's factory, was erroneous.—Owen v. Union Match Co., 48 Mich. 348.

§ 250. ——As to values, cost or damages.

¶ 1436. A witness having knowledge of the value of replevied goods may testify as to their value.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 1437. Where the value of a set of furniture of unique pattern designed by plaintiff and having no ascertained market value is in question, a witness who has worked thereon for some months and who has testified that he knows how much time plaintiff spent upon it may state how much it would cost to replace it or to make another just like it.—Ruppel v. Adrian Furniture Mfg. Co., 96 Mich. 455.

¶ 1438. In a suit to recover the amount of a claim against an estate for services rendered deceased, witnesses who have some knowledge of the services rendered and the value thereof, may testify to an opinion as to such value.—In re McNamara's Estate, 155 Mich. 585; McNamara v. Michigan Trust Co., Id.

¶ 1439. One Bolin was active as a promoter in selling stock in a corporation and knew all about its details. In an action of deceit by plaintiff, who was induced by defendant through Bolin to purchase stock, held, Bolin was competent to testify as to the value of the stock.—Diel v. Kellogg, 163 Mich. 162.

¶ 1440. Testimony by an administrator as to the value of legal services performed by the intestate is competent where a history of the services is given.—Walbridge v. Tuller, 125 Mich. 218.

¶ 1441. In an action for breach of warranty in the sale of fruit trees testimony of the value of fruit land is admissible although the witness testifies he knew of no sale of fruit land.—Long v. Pruyn, 128 Mich. 57.

¶ 1442. In a suit by a father as administrator to recover for loss of services for the death of his child, it is error to permit a witness to estimate the value of the child's services, where his opinion is based on no knowledge.—Feldman v. Detroit United Ry., 162 Mich. 486.

§ 251. ——As to sanity or mental state.

Admissibility of opinions, see ante § 239.
Matters for lay witnesses and experts respectively, see ante § 244.
Subjects for experts, see post § 259.
Basis for conclusion that persons assented to given proposal, see ante ¶ 1360.

¶ 1443. A nonprofessional witness, in giving his opinion as to a person's sanity, can speak only from personal observation, and his opinion is not admissible in evidence if he does not, as far as possible, explain to the jury the grounds for it.—Rice v. Rice, 50 Mich. 448.

¶ 1444. An intimate acquaintance of five years with a testatrix, terminating six years before she made her will, and frequent conversations with her during that period about her children, her life, and the hardships she had gone through, do not render the witness testifying to such facts competent to express an opinion as to the competency of the testatrix to make the will.—Buys v. Buys, 99 Mich. 354.

¶ 1445. Where a witness in a will contest showed by his testimony that he had met decedent on the average of twice a week during a period of ten years preceding testator's death and had observed him in various business transactions in the bank with which witness was connected and deceased did business, it was not error to allow witness to testify that decedent was the equal of the average business man and could not be influenced in business transactions against his will.—In re Sparks' Estate, 198 Mich. 421; Hodgman v. Sears, Id.

¶ 1446. Witnesses in a will contest should not be permitted to state opinions as to the mental incompetency of the deceased until they have given evidence of having made sufficient observations upon which to base such opinion.—In re McMaster's Estate, 163 Mich. 210; Cooper v. Harlow, Id.

¶ 1447. A witness who appears to have been well acquainted with an injured child since the time of the injury is competent

to give an opinion whether he is an ordinary bright child.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390.

¶ 1448. The opinion of a witness upon the question of testator's competency is admissible only when it appears that the witness was sufficiently acquainted with him to be able to form an opinion; and the trial judge may properly require the witness to state all of the circumstances upon which his opinion is based before permitting him to state his opinion, and perhaps it would not be a great stretch of discretion if he permitted cross-examination before allowing the opinion to be given.—O'Connor v. Madison, 98 Mich. 183.

¶ 1449. Nonexpert and nonprofessional witnesses, before being permitted to give an opinion as to the mental competency of a testator, must state facts and circumstances as a basis for their opinion.—In re Hogmire's Appeal, 108 Mich. 410.

¶ 1450. Before a witness may express an opinion as to the mental competency of the testatrix in a will contest, he must state the facts and circumstances upon which he bases such opinion.—In re Hoyles' Estate, 162 Mich. 275.

¶ 1451. A witness' opinion that her aged father was incompetent to execute a deed is not sufficiently supported by her testimony that he sometimes addressed her by the name of one of his other children, that he lost his way several times in the city, that he sometimes cried, seemed low-spirited, and sat all day without talking except when some one spoke to him, in which case he answered intelligently.—Lynch v. Doran, 95 Mich. 395.

¶ 1452. A witness who has described looks and actions and language of a testator, inconsistent with a normal state of mind is properly permitted to express an opinion that he was mentally unsound.—Rivard v. Rivard, 109 Mich. 98.

¶ 1453. The opinion of witnesses as to mental incompetency is of no weight unless they state facts tending to show it.—Ramsdell v. Ramsdell, 128 Mich. 110.

¶ 1454. It is improper in a will contest to take the testimony of a witness of two or three erratic detached acts of the testatrix of doubtful significance and then permit the witness to give an opinion that the person was insane or incompetent.—Page v. Beach, 134 Mich. 51.

¶ 1455. In a will contest, testimony that the witness visited the testatrix soon after the death of her husband, that when asked how old she was she cried, that she was sitting up in apparent good physical health but fleshy and old and most of the time half crying, that the witness was there half an hour and never saw her before or after, is insufficient to justify taking the witness' testimony as to the mental capacity of the testatrix.—Page v. Beach, 134 Mich. 51.

¶ 1456. Testimony of witnesses tending to show eccentricities on the part of the testator beginning years before and continuing to and increasing until his death, formed sufficient basis for opinions as to such testator's mental incapacity, even though such witnesses had only slight acquaintance with the testator.—Roberts v. Bidwell, 136 Mich. 191.

¶ 1457. A witness cannot be permitted to express an opinion upon a decedent's mental incapacity where his testimony only goes to show acts and appearances on the part of decedent that are entirely consistent with sanity.—Prentis v. Bates, 93 Mich. 234, on rehearing of 88 Mich. 567.

¶ 1458. The opinion of a witness that a testator was sane is competent, where it appears that he was well acquainted with the testator, and had never seen anything unusual in his speech or actions; but before a witness can express an opinion that the testator was insane, he must testify to something that the latter said or did fairly tending to show insanity.—Lamb v. Lippincott, 115 Mich. 611.

¶ 1459. An opinion that a testator was incompetent can only be given when the witness has testified to circumstances upon which it is predicated, and which to some extent justify it.—O'Connor v. Madison, 98 Mich. 183.

¶ 1460. The extent of nonexpert testimony must depend upon the familiarity of the witness with the testator, the character of the disqualification, the nature and number of extraordinary circumstances detailed, and proximity to the act involved in point of time; and, taken as a whole, they should move the judicial discretion of the trial judge by apprising him that the witness may fairly doubt the competency of the person upon reasonable grounds; and this discretion must be carefully exercised.—O'Connor v. Madison, 98 Mich. 183.

¶ 1461. A nonexpert's opinion on the sanity of a testator is inadmissible where he has testified to no observed facts inconsistent with a well and sound condition of mind.—Hibbard v. Baker, 141 Mich. 124.

¶ 1462. Nonexpert witnesses may not express opinions as to the mental incompetency of a testatrix where they have testified to no facts inconsistent with sanity.—Graves v. Northrop, 190 Mich. 377; In re Curtis' Estate, Id.

¶ 1463. On a petition by a woman to be relieved of guardianship on the ground of incompetency, an answer to a question pro-

pounded to a witness as to whether he deemed petitioner mentally competent to have charge of her affairs, held properly excluded on the ground that no foundation had been laid where the witness detailed nothing on which to base an opinion that she was not mentally competent to have charge of her affairs.—In re Stroebel, 194 Mich. 634; Appeal of Runge, Id.

§ 252. ——As to handwriting or signatures.

Subjects for experts, see post § 260.
Qualifications of experts, see post §§ 276, 277.
Knowledge as qualifying expert, see post § 277.

¶ 1464. In proving handwriting in general no particular amount of skill is required in the witness.—Vinton v. Peck, 14 Mich. 287.

¶ 1465. Any experience in using pen and ink will qualify a person of ordinary capacity to form and express an opinion whether one writing was with the same ink as another, though it might be of small weight in doubtful cases.—Vinton v. Peck, 14 Mich. 287.

¶ 1466. A mortgagee's wife, who has never seen the mortgagor and never saw him write is incompetent to testify as to his handwriting in letters received from him acknowledging the debt.—Carr v. Carr, 138 Mich. 396.

§ 253. Comparisons as basis for opinions.

Comparisons by experts, see post §§ 296, 297.

¶ 1467. An experiment by a witness at a railroad crossing placing himself at or near the spot described where plaintiff first saw an approaching train, and then when a train approached testing the time required to cross at the supposed speed made by plaintiff, is inadmissible as invading the province of the jury and, where the speed and traverse of the train are not established, as lacking in necessary data for comparison.—Klanowski v. Grand Trunk R. Co., 64 Mich. 279, per Campbell, C. J., and Champlin, J.

¶ 1468. It is not error to allow witnesses of ordinary intelligence to compare the speed of a railroad train at the time of an accident with the speed of the same train on other days before the injury occurred.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 1469. In an action against a village and a telephone company for personal injuries resulting from an electric shock, evidence on the part of a common laborer concerning a shock which he had received under different conditions and its effects upon him, raises a collateral issue and is not admissible to prove the injurious effects of plaintiff's shock.—Sykes v. Village of Portland, 193 Mich. 86.

B. EXPERT OPINIONS.

1. Subjects for and qualifications of witness.

§ 254. In general; proper subjects and scope.

Matters for lay and expert opinions respectively, see ante §§ 241-247.
Qualifications of experts, see post §§ 270-291.
Formation of hypothetical question to exclude opinion on ultimate issues, see post § 299.
Hypothetical questions propounding direct issues, see post § 305.
Necessity that opinion be responsive to question and within the assumed hypothesis, see post § 305.
Weight and effect of expert testimony, see post § 600.
Direct evidence overcoming opinions, see post § 600.
Conclusion by party stated out of court as hearsay, see post ¶ 1748.
Competency of physicians to testify of exclamations of pain or complaints of sickness offered as res gestæ, see post §§ 453-456.
Motion to strike improper opinion or extraneous matter therein, see Trial, V, C.
Relevancy and sufficiency of opinions to prove values, see Values.
Expert evidence in trials for crime, see Indictment, VIII, B.

¶ 1470. The opinions of physicians are admissible when confined to medical inferences from hypothetical facts based on the testimony.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667.

¶ 1471. An expert witness cannot be asked whether, in his opinion, the jury would be justified in basing a verdict upon his testimony.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 1472. Expert testimony to show the character and quality of goods sold and delivered is admissible, in an action for the price thereof, where the buyer alleges in defense, fraud and misrepresentations on the part of the seller in the inception of the contract of sale.—Lyon v. Linblad, 145 Mich. 588.

§ 255. Rebuttal opinions.

Evidence to impeach or refute opinions by showing false premises or bad reasoning, see Witnesses, VI, D.

¶ 1473. In an action for personal injuries alleged to have resulted from an electric shock, held not erroneous to permit plaintiff's physician to rebut the diagnosis of defendant's physicians.—Sykes v. Village of Portland, 193 Mich. 86.

§ 256. Professional and trade skill and practices.

¶ 1474. In an action against a physician and a nonprofessional friend whom he took

with him to attend a case of confinement, a competent witness may testify as to the custom among physicians in regard to calling assistance in such cases.—De May v. Roberts, 46 Mich. 160.

¶ 1475. In an action for malpractice physicians and surgeons may testify whether the treatment as detailed by other witnesses was proper or improper.—Spaulding v. Bliss, 83 Mich. 311.

§ 257. Bodily conditions, causes and effects, and prognosis.

Conclusions and admissible opinions, see ante § 236.
Limits and extent of admissible lay opinions or observations, see ante § 243.
Lay opinions as to intoxication, see ante § 240.
As to expectancy of life, see post § 258.
Mental conditions, see post § 259.
Animal injuries and pathology, see post § 268.
Admissibility of rebutting opinions, see ante § 255.
Qualifications of expert, see post § 273.
Basis or predicate for opinion, see post §§ 292-297.
Opinion of physician as to condition of woman explaining nature of assault, see also Assault ¶ 103.
Medical opinions as to probable consequences as evidence of damages from personal injury, see Damages § 322.

¶ 1476. A physician may testify whether a cause which it is alleged existed would, in his opinion as a medical man, suffice to produce a condition claimed to have resulted from such cause.—Lacas v. Detroit City R. Co., 92 Mich. 412.

¶ 1477. In an action for an assault with intent to ravish, plaintiff's physician was properly allowed to testify that after the assault he found her in a condition for which he could not account until he heard of the attempted outrage, and that he was satisfied that if the fact was true it would account for her state.—Fay v. Swan, 44 Mich. 544.

¶ 1478. It is proper to permit a medical witness, who examined the injury and treated it, to state that the injury suffered "could be produced" from the cause sued on.—Boehm v. City of Detroit, 141 Mich. 277; Bush v. St. Joseph & B. H. St. Ry. Co., 113 Mich. 513.

¶ 1479. That injuries such as the plaintiff sustained, would cause the conditions found upon examination to exist, may be shown by medical testimony.—Darling v. Grand Rapids, G. H. & M. Ry. Co., 184 Mich. 607.

¶ 1480. Where there is evidence in the case from which the jury may find that a healthy, robust child with perfectly sound legs was injured by stepping into a hole in a walk and that directly after the injury an abscess formed, a medical witness may properly state that the abscess might have been caused by straining the leg; and the presence of proof that there was any straining of the leg is not a necessary predicate for his opinion.—Boehm v. City of Detroit, 141 Mich. 277.

¶ 1481. In an action for an injury to the plaintiff's arm a medical expert may be asked to give his opinion whether the condition alleged could coexist with the fact of the plaintiff's ability to use her arm in the manner witnessed by the jury.—Graves v. City of Battle Creek, 95 Mich. 266.

¶ 1482. The physician who treated plaintiff for personal injuries may testify whether or not, in his judgment, plaintiff will continue to suffer pain, and whether she will be able to perform her household duties.—Holman v. Union St. R. Co., 114 Mich. 208.

¶ 1483. Inasmuch as it is competent for a surgeon to testify that a physical injury would render useless for work the injured member, a physician familiar with the injury may testify to the degree of impairment; and a question as to how much in the physician's opinion the injuries reduced the plaintiff's physical ability to perform manual labor was admissible as against the objection it was pure "speculation."—McDonald v. City Elec. Ry. Co., 144 Mich. 379.

¶ 1484. Plaintiff was injured by the breaking of a seat board in defendant's grand stand, whereby she fell to the ground. Held, that it was proper to permit plaintiff's physician to testify that her present injuries were due to the fall.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

¶ 1485. In an action for damages for personal injuries, it is proper for a physician who has made a physical examination of plaintiff to state in his testimony before the jury that in his opinion the plaintiff could not control the manifestations made upon the application of certain physical tests, and as to others, that he might control them in part.—Marshall v. Wabash R. Co., 171 Mich. 180.

¶ 1486. In an action for personal injuries alleged to have resulted from an electric shock, where the testimony as to the actuality of physical injury was conflicting, and there were no external marks or indications of the shock received by the plaintiff, held that defendant's medical expert should have been permitted to testify as to whether there is a characteristic element of deception and dissimulation in the ailments of hysterical persons.—Sykes v. Village of Portland, 193 Mich. 86.

¶ 1487. A physician who has examined a patient may, in an action for damages for

assault and battery, state whether or not the hearing in patient's ear has been destroyed.—Matthews v. Lamberton, 198 Mich. 746.

¶ 1488. In an action for ejecting a passenger by a technical assault and battery, the gravamen being the words used and the ejection, a physician's testimony as to the possible effect on the plaintiff's health of provoking language or vexatious circumstances is inadmissible.—Hufford v. Grand Rapids & I. Ry. Co., 53 Mich. 118.

¶ 1489. In an action for personal injury it is proper to strike out as mere conclusions answers of plaintiff's medical witness, such as, "He is a physical wreck as well as a mental wreck. He is in that condition of health in which there is absolutely no enjoyment of life to him and can be none. There is evidence of constant pain—plenty of it."—Sterling v. City of Detroit, 134 Mich. 22.

¶ 1490. In an action for personal injuries, it is not error as calling for a conclusion to admit testimony of a doctor as to the seriousness of mental and physical shock.—Haines v. Lake Shore & M. S. R. Co., 129 Mich. 475.

¶ 1491. It is error to allow physicians and an attending nurse to give an opinion as to the reality of a plaintiff's illness and to state whether in their judgment the patient was simulating and malingering; and where the condition of the patient had been fully described to the jury it is for them to draw the conclusion.—McCormick v. Detroit, G. H. & M. Ry. Co., 141 Mich. 17.

§ 258. Expectancy of life.

Qualifications of experts, see post § 291.
Relevancy and sufficiency of evidence of expectancy on damage questions, see Damages §§ 329, 330; Death by Wrongful Act §§ 26, 28.
Admissibility of mortality tables on question of expectancy, see also Damages § 329.
Admissibility of expert opinions to increase or reduce individual expectancy as shown by mortality tables, see Damages § 329.
Relevancy of opinion on expectancy of life to rebut or corroborate mortality tables, see also Death by Wrongful Act ¶ 97.

¶ 1492. In a suit for injuries to a child resulting in his death under the Survival Act (Comp. Laws 1897, § 10117), it is proper to admit the testimony of an insurance expert as to the child's expectancy of life.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

§ 259. Mental capacity or conditions.

Conclusions and admissible opinions, see ante § 231.
Relative field for lay and expert opinions, see ante § 244.
Observation by attending physician as basis for opinion, see post § 295.
Relevancy and sufficiency of evidence on insanity or incompetency, see Insane Persons, I; Incompetents; Wills, III, V.

¶ 1493. The opinion of a physician as to the capacity of a testator to plan and execute a paper propounded as a will was held admissible as evidence.—McGinnis v. Kempsey, 27 Mich. 363.

§ 260. Signatures, writings, alterations, and genuineness.

Decipheration of obscure or illegible writings, see post § 261.
Qualifications of experts, who is expert, see post §§ 276, 277.
Comparisons of genuine and questioned writing as basis for opinion, see post § 297.

¶ 1494. Where the official minute books of a corporation are claimed to be the best evidence, expert testimony is admissible to show that a page, which is alleged to have been fraudulently inserted, was, judging from an examination of the book, written by a different operator on a different typewriter than another page, as indicated by the alleged differences in type, margining, punctuation, capitalizing and water marks on the paper.—Bartholomew v. Walsh, 191 Mich. 252.

§ 261. Meanings and translations.

As to custom of trade to explain trade terms, see post ¶ 1498.

¶ 1495. Expert witnesses are properly allowed to give their opinion as to the numeral character indicated by an ill-written figure in an entry made in a bank pass book, the true significance being a question of fact for the jury.—Kux v. Central Michigan Sav. Bank, 93 Mich. 511.

¶ 1496. A cipher telegraph message is a proper subject for translation, and it is not improper to permit a witness to testify as to the meaning of a message sent, "Buy three May."—Carland v. Western Union Tel. Co., 118 Mich. 369.

¶ 1497. The meaning of written bulletins and rules governing the movement of railroad trains is a question for the court, and opinion evidence as to what they mean is not admissible.—Jones v. Pere Marquette R. Co., 168 Mich. 1.

§ 262. Customs, usages and matters of trade.

Admissibility of custom to explain or interpret, see ante § 166.
Relevancy and sufficiency of evidence of custom and usage, see Customs and Usages.
Qualifications of experts on customs of trade, see post § 278.

¶ 1498. A bill for belting was made out at a certain price, but the words were added,

"Less expense account, $47.46," and this was claimed to be a discount from the regular price list. Held, that the custom as to selling belting at a discount might be shown by the testimony of an experienced buyer in connection with proof of the value of the belting furnished.—Sager v. Tupper, 38 Mich. 258.

§ 263. Values and damages or loss.

Conclusions and admissible opinions, see ante § 224.
Qualifications of experts, see post §§ 286-290.
Relevancy and sufficiency of opinion proof of value, see Values.

¶ 1499. The value of services in keeping house on a farm and taking care of men there is not so far a subject upon which a jury can form an opinion as to render inadmissible expert testimony in relation thereto.—Fowler v. Fowler, 111 Mich. 676.

¶ 1500. Where the sire and dam of a colt killed by a train had been shown, it is proper in estimating the value of such colt to take the testimony of horsemen as to the value of get from such stock.—Parker v. Lake Shore & M. S. R. Co., 93 Mich. 607.

¶ 1501. The relative value of foreign and American currency is a question of commercial usage, and may be proved by any one acquainted with the usage.—Kermott v. Ayer, 11 Mich. 181.

¶ 1502. In an action on a fire insurance policy where there was dispute as to the cause of the loss of the merchandise in question, and there was an assumption that such loss was occasioned by an explosion followed by fire, an expert was permitted to give an estimate of the proportion of the loss caused by fire and the proportion caused by the uninsured fall of the building.—N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212.

¶ 1503. Where, in a suit for destruction of an elevator from fire set by a locomotive, said building has no market value, an expert witness may properly be asked his opinion of the value of said elevator and its equipage for the purpose for which it was used.—Close v. Ann Arbor R. Co., 169 Mich. 392.

§ 264. Surveys, boundaries and landmarks.

What are admissible opinions or conclusions, see ante § 223.
Lay and expert questions, scope of each respectively, see ante § 245.
Qualifications of experts, see post § 279.
Field notes and other data as basis for opinion, see post ¶ 1651.

¶ 1504. A surveyor may testify as an expert that he found the corners of the land in dispute to be in accordance with the original government survey.—Hockmoth v. Des Grands Champs, 71 Mich. 520.

§ 265. Mechanics and construction.

Conclusions and admissible opinions, see ante § 226.
Questions for lay or expert witnesses, see ante §§ 242, 246.
Railroad, transportation, logging, and lumbering questions, see post §§ 266, 267.
Qualifications of experts, see post § 280.
Qualifications on engineering questions, see post § 279.
Qualifications of experts on mechanical and construction questions, see post § 280.

¶ 1505. On the question of negligence in keeping a bridge safe, which had fallen by the collapse of a member of the structure by internal dry rot, it is proper to receive testimony of the professional builder of the bridge as to how long such a stringer usually lasts, as bearing on the degree of care required in examination.—Blank v. Township of Livonia, 79 Mich. 1.

¶ 1506. A bridge builder may testify as to the effect of the loosening of timbers forming a brace in a bridge. It is not a matter of common knowledge for the jury.—Bettys v. Township of Denver, 115 Mich. 228.

¶ 1506a. In a suit against a township for injuries arising from the sliding off of plaintiff's sled from an embankment constructed on a public road across a culvert, it is not reversible error to refuse to permit plaintiff's driver to state his opinion as to whether a railing on either side of the embankment would have been of any benefit to him.—Stanton v. Tp. of Webster, 170 Mich. 428.

¶ 1507. It is proper for one having long experience with timber, to give an opinion that the timbers of a sidewalk were so rotted for a year or so past that they would not hold a nail.—Williams v. City of Lansing, 152 Mich. 169.

¶ 1508. The inefficiency of ice tongs is not a matter of expert evidence.—Wheaton v. Wagner Lake Ice & Coal Co., 151 Mich. 100.

¶ 1509. The incompetency of an engineer to run an engine may be shown by the opinions of others competent to testify in an action involving the liability of the master for damages for injuries to a fellow workman alleged to be due to such incompetency.—Salo v. Martin, 187 Mich. 617.

¶ 1510. A witness, shown to be experienced and expert, may give his opinion that a certain kind of insulator is ineffective to prevent the escape of current to trolley span wires, and may state that insulators of a given kind such as those in question are falling into disuse in places where they have been used.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 1511. Expert engineers may express an opinion as to whether the running of a trac-

tion engine past buildings where there was inflammable material, with the damper open, and no spark arrester, was a proper operation of the engine, since it is not a matter necessarily within common knowledge as to how much the issue of sparks would be increased by an open damper.—Underwood v. A. W. Stevens Co., 149 Mich. 39.

¶ 1512. In an action for damages to a building alleged to have been caused by the negligent excavation of caisson pits on adjoining land, it would seem that a question to one skilled in such business is proper as to the effect a building of the character of the one in question usually has on neighboring buildings.—Bissell v. Ford, 176 Mich. 64.

¶ 1513. In an action for damages to plaintiff's building alleged to have been caused by the negligent excavation of caisson pits on defendant's land, when there is testimony that there was a bulging in the lagging in one of the pits on the side towards plaintiff's building, expert testimony is admissible to the effect that it is impracticable to put down such pits without leaving some space between the lagging and the earth.—Bissell v. Ford, 176 Mich. 64.

§ 266. Railroads, transportation and shipping.

Speed or motion as matter of conclusion, see ante § 225.

Field and limits for nonexpert testimony, see ante § 246.

Qualifications of experts, see post §§ 281, 282.

¶ 1514. In an action by a brakeman against his employer for injuries received while engaged in more dangerous work, which he had been required to do, it is proper to allow a competent witness to show what the actual duties of a brakeman were in practice, in order to find how the additional duties differed therefrom. But where the witness himself was hired as train baggageman, and, like plaintiff, had been ordered to take part in the extra work, a question as to whether, in his opinion, the order called him out of the line of his duty, was immaterial.—Jones v. Lake Shore & M. S. Ry. Co., 49 Mich. 573.

¶ 1515. In an action against a railroad company for killing cattle, the testimony of a roadmaster as to the condition of the cattle guard in question as far as being in condition suitable to turn cattle away and prevent cattle from passing over it, should have been admitted as expert testimony, and was not a conclusion on the ultimate issues.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 1516. In an action based upon a refusal to pay for defective machinery placed in a steamer, expert evidence was held admissible to show the condition of the boat as fitted to receive the machinery, as, e. g., whether the stern, in which it was placed, settled more than it ought to.—Clark v. Detroit Locomotive Works, 32 Mich. 348.

§ 267. Logging and lumbering.

Safety or danger from fires, see post ¶ 1523.

¶ 1517. Witnesses shown to be accustomed to run logs on a certain stream, and to have a knowledge of the business and the stream not possessed by ordinary persons, may state their opinions or conclusions—after giving the facts upon which they are based—as to whether any force of men could have got defendant's logs out of the stream, and whether a force should not have been put on for such purpose.—Butterfield v. Gilchrist, 63 Mich. 155.

§ 268. Agriculture and domestic animals.

Traits and dispositions of animals as conclusion or admissible opinion, see ante § 230.

As to value of pedigreed or blooded animals, see ante § 263.

Qualification of experts on animal questions, see post § 275.

Qualifications of experts on values, see post § 286.

¶ 1518. Expert woolgrowers may give their opinion, based on an examination of land where sheep have been kept, as to its being a proper place to keep sheep in the wintertime; but they cannot testify that the condition in which they found the sheds wherein the sheep were kept was not suitable for the purpose, it not being shown that their condition was the same as when the sheep were there some years before.—Wolscheid v. Thome, 76 Mich. 265.

¶ 1519. A mortgagee of a crop of celery when sued by the mortgagor for damage done to such crop by opening the trenches should be allowed to show by expert testimony of skilled celery growers what proper care of the crop is.—Van Werden v. Winslow, 117 Mich. 564.

¶ 1520. Plaintiff sued defendant telephone company for negligently placing one of its wires near another live wire so as to conduct a charge of electricity into the ground, killing plaintiff's horses. Defendant sought to show that the death of the horses was caused by a stroke of lightning. Held, it was proper to permit a physician and surgeon to testify in plaintiff's behalf as to whether it takes less voltage to kill a horse than a man, where said physician's learning and experience with reference to experiments with electricity were established by evidence.—Anthony v. Cass County Home Tel. Co., 165 Mich. 388.

§ 269. Danger or safety.

Conclusions and admissible opinions, see ante § 229.

Questions of construction, mechanics, railroading, and logging, see ante §§ 265-267.

¶ 1521. Evidence from competent persons as to the dangerous character of machinery, and the consequences of coming in contact with it, is admissible in an action for injuries caused thereby.—Huizega v. Cutler & Savidge Lumber Co., 51 Mich. 272.

¶ 1522. In an action for injuries caused by plaintiff's falling into a hole on defendant's ground, a civil engineer may testify that the hole was a dangerous place and needed protection.—Cross v. Lake Shore & M. S. Ry. Co., 69 Mich. 363.

¶ 1523. It does not require any special knowledge, beyond that presumably open to a jury in a lumbering country, to determine what means would be safe or ordinarily prudent to be used to put out fires in an engine and boiler room or sawmill, and expert testimony is not admissible in that direction.—McNally v. Colwell, 91 Mich. 527.

¶ 1524. In an action against a village and a telephone company for personal injuries resulting from a shock received by a woman when she attempted to rescue her child from contact with a charged electric light wire belonging to the defendant village, and which had burned off and fallen as a result of coming in contact with wires of the telephone company because of an insecurely fastened telephone pole which swayed in the breeze and permitted the telephone wires to sag down upon the electric light wire in question, held that an expert witness for the plaintiff did not usurp the jury's functions in testifying concerning his conclusions that proximity of less than 40 inches between the wires of the two defendants was unsafe, and that the court did not err in admitting such evidence. —Sykes v. Village of Portland, 193 Mich. 86.

¶ 1525. In an action by a tile setter against one selling and delivering plaster to a plaster contractor for damages for personal injuries sustained as the result of collapse of the porch on which plaintiff was working, due to placing heavy bags of plaster upon a bay window sill and on the floor inside the building, it was error to permit the architect to answer the question "That would be a dangerous situation which any ordinarily prudent man would undoubtedly see?" since such question called for a conclusion.—Schneider v. C. H. Little Co., 200 Mich. 361.

§ 270. Qualifications of experts.

Proof of qualifications, see post § 271.
Qualification as court or jury question, see post § 272.
Qualifications for particular subjects, see post §§ 273-291.
Basis or predicate for testimony, see post §§ 292-297.
Sources of experience of knowledge of the witness, see post §§ 294-297.
Sufficiency of book learning to qualify expert, see post § 294.

¶ 1526. Expert evidence can be rejected where the witness has no personal knowledge of the matter in controversy, and for many years has had no experience of his subject, which has changed meanwhile.—McEwen v. Bigelow, 40 Mich. 215.

§ 271. ——Evidence as to qualifications and experience.

Necessity of proof of data or facts on which opinion is predicated, see post § 293.
Impeachment or refutation of opinions, see Witnesses, VI.
Cross-examination of experts, see Examination of Witnesses, II.
Showing of experience in affidavit for capias to qualify affiant, see Civil Arrest § 10.

¶ 1527. When persons offer themselves as experts to testify respecting business in which their experience has not been very great, it is competent to call persons of greater experience, and inquire of them how much time and experience are necessary to make one an expert in respect to that business.—Mason v. Phelps, 48 Mich. 126.

¶ 1528. One expert testifying to his opinion derived from knowledge as to the qualifications of another expert should not base his opinion on general reputation.—People v. Holmes, 111 Mich. 364.

¶ 1529. Witnesses may not express an opinion as to the competency of the maker of certain deeds, in the absence of evidence to qualify them to express such opinion.—In re Dowell's Estate, 152 Mich. 194.

¶ 1530. In an action for negligent injury to a hearse, against a street railway company, whose car collided with the vehicle, having run down a steep grade, witnesses who have driven other street cars cannot testify to the feasibility of stopping if the brake had been in good order, where there is no evidence that they knew what brake was used on the car, or that they had ever driven the car down the incline.—Geist v. Detroit City Ry., 91 Mich. 446.

¶ 1531. In an action by a contractor against the owner of a building to recover under a contract for the installation of tile floors in defendant's building, where defendant sought to recoup on the ground that the tile was not laid in a workmanlike manner and that the floors were uneven, necessitating the doing over of the work, held that the evidence of a witness for defendant who was asked to state what it would cost to put the job in dispute which he had examined in a good and workmanlike condition and also to state why, in his opinion, the floor was not level, was properly excluded on the ground that a proper foundation had not been laid for the admission of such testimony where it also appeared that he stated that he had never laid the kind of floor that was in dispute, and that

his sole experience in laying tile floors was in laying tile around fireplaces, which, he admitted, was a different kind of tile.—Forrester v. Lawson, 194 Mich. 92.

§ 272. ——As a question of law.

¶ 1532. Whether a witness has been shown to be an expert is for the trial judge to determine.—Ives v. Leonard, 50 Mich. 296.

§ 273. ——On medical, pathological and physiological questions.

On expectancy of life, see post § 291.

¶ 1533. One who, though not a physician or medical school graduate, has had actual experience for fifteen years with one hundred employees in the manufacture of Paris green, is competent to testify whether such patent results as paralysis, and cutaneous diseases, affecting exposed parts of the body, follow from employment in such manufacture.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 1534. In an action against a village and a telephone company for personal injuries resulting from an electric shock where there were no indications upon the person of the plaintiff or visible marks of a shock, held that evidence of electrical experts based on experience as to the possibility that an electric shock might be received enough to knock one down without leaving exterior marks upon the person was admissible.—Sykes v. Village of Portland, 193 Mich. 86.

§ 274. ——On skill or competency of persons.

¶ 1535. Where, in an action for a personal injury, one of the questions involved is the competency of an employee of defendant, who was acting as head sawyer in defendant's sawmill at the time of the accident, to fill that position, it is competent for defendant's foreman and regular head sawyer, with whom said employee had worked, to testify whether or not he was a competent head sawyer.—Lewis v. Emery, 108 Mich. 641.

§ 275. ——On questions relating to animals.

As to values of animals, see post § 286.

¶ 1536. An expert's qualifications depend on his experience and not upon his profession; a man may know something of horses without being a horse doctor.—Peer v. Ryan, 54 Mich. 224.

¶ 1537. The fact that one has been employed in a stable for two years and a half, where he has had charge of forty horses, and that he has, as he testifies, "watched the symptoms" of horses, does not, in the absence of any showing that he has had skill or experience in the diseases of animals, render him competent as an expert as to the cause of death of a horse.—Lewis v. Bell, 109 Mich. 189.

¶ 1538. A witness who testifies that he noticed a puff on the hind leg of a horse, which looked like a bog spavin, that he was raised on a farm with horses, has been a blacksmith for fifteen years, and has read something about spavins, is competent to testify that he does not think such a spavin would appear within a week after it was contracted, although he also testifies that he never watched one until it was fully developed, and has no practical knowledge of them.—Rogers v. Ferris, 107 Mich. 126.

§ 276. ——On signatures and handwriting and forgeries.

Knowledge required of lay witness, see ante § 252.

¶ 1539. A conveyancer of twenty-five years' practice is entitled to express an opinion whether a signature is genuine.—Vinton v. Peck, 14 Mich. 287.

¶ 1540. Evidence that a witness can read and write, and would know his own signature, is not a sufficient foundation to permit him to testify as an expert on his own handwriting.—Pillard v. Dunn, 108 Mich. 301.

¶ 1541. Bankers may testify as to the genuineness of a treasury note.—Atwood v. Cornwall, 28 Mich. 336.

§ 277. ——Knowledge of handwriting.

¶ 1542. The testimony of one who swears that he knows another's handwriting, either from having seen him make his signature or from business correspondence apparently signed by him, is competent in proving the latter's indorsement.—Empire Mfg. Co. v. Stuart, 46 Mich. 482.

¶ 1543. Any one who has had the proper facilities and can swear to a knowledge of the handwriting of a person is a competent witness to prove such handwriting.—Stretch v. Stretch, 191 Mich. 416.

¶ 1544. One who swears definitely that he has read a number of letters written by his brother and that he is able to identify his handwriting is a competent witness to prove the signature of the brother to a promissory note.—Stretch v. Stretch, 191 Mich. 416.

¶ 1545. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of letters, in a responsible way, of their genuineness, before he can swear to their writer, or use them as comparisons of handwriting.—Pinkham v. Cockell, 77 Mich. 265.

¶ 1546. Where one or more letters, purporting to come from a certain person, are recognized by him in subsequent transactions, that may, in some cases, be admissible on questions of handwriting. But the mere receipt of letters purporting to be from a

person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge. So held where a witness called to prove an indorsement on a note testified that he never saw the purported indorser write, but had one or two letters from him, and saw two or three that a bank had, and thought the signature was his.—Pinkham v. Cockell, 77 Mich. 265.

§ 278. ——On trade terms, usages and customs.

¶ 1547. Where a contract for the delivery of lumber provided that it was to be measured "straight measure," testimony of witnesses familiar with the lumber trade is admissible to explain what is meant among dealers in lumber by the term "straight measure," and whether it includes or excludes mill culls.—Crane Lumber Co. v. Otter Creek Lumber Co., 79 Mich. 307.

¶ 1548. It was competent for a witness who was a builder to state what is meant among mechanics when the term "smokestack" is used.—Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87.

§ 279. ——On engineering and surveying.

Questions for experts, see ante §§ 245, 264.
On mechanics, construction, railroads, speed or distance, and mining questions, see post §§ 280-283.

¶ 1549. A competent surveyor is qualified as a witness to test and apply the data on the map of the proposed line of a railroad as sufficient guidance for locating the road.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

§ 280. ——On mechanics and construction.

See also ante § 265 and ante ¶¶ 1531, 1548.
Qualification of witness as to competency of workmen, see ante § 274.
On sawmill operations, see post § 284.

¶ 1550. One does not become qualified as an expert to testify as to the cost of an alteration in an engine by talking with machinists and mechanics about it.—Wickes Bros. v. Swift Electric Light Co., 70 Mich. 322.

¶ 1551. In an action for injuries from the nonrepair of a bridge, a witness whose testimony showed that he was possessed of more than ordinary skill in such matters, and who testified that he had examined the premises thoroughly a few minutes after the accident (the falling of an engine through a bridge) occurred, and that he saw the lugs and joists, the appearance of which he described, may be asked by what reason the engine went down.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 1552. A witness who is shown to have some knowledge of and to have had some experience with elevators and safety devices may testify as an expert in an action for injuries caused by the fall of an elevator, although he has never had any experience with an elevator with a safety device similar to that used in the elevator in question.—Hall v. Murdock, 114 Mich. 233.

¶ 1553. A witness who had been a locomotive engineer for five or six years, who had known stay bolts to break, and seen them taken off, and who had been in railroad shops a great deal during the time mentioned, was competent to testify whether the bolts examined by him had been recently broken.—Woods v. Chicago & G. T. R. Co., 108 Mich. 396.

¶ 1554. In an action for personal injuries, testimony of an expert boiler maker, as to the safety and value of a home-made mechanical device used on the safety valve of a boiler which exploded is properly admitted.—Beunk v. Valley City Desk Co., 128 Mich. 562.

¶ 1555. In an action by an employee for injuries received by the breaking of a saw, it is competent for witnesses who are shown to be familiar with such saws, and who have had large experience in their use, and know their strength, and the force to which they are subjected, to testify that in their judgment the saw in question was suitable and safe for use.—Lau v. Fletcher, 104 Mich. 295.

¶ 1556. A witness who has been in the soda fountain business for 20 years, is qualified to give his opinion as to why a particular soda fountain failed to work.—Tufts v. Verkuyl, 124 Mich. 242.

¶ 1557. One who had worked five years about trolley span wires insulated as defendant's were, and who during that time found many hot wires, may testify as an expert that the insulation was unfit to prevent their becoming hot from the current passing into them.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 1558. An expert who has observed the operation of an electric motor three dozen times, is qualified to give an opinion as to whether it was operated carefully or otherwise.—H. J. Reedy Co. v. Cameron, 163 Mich. 638.

¶ 1559. A person who is employed by defendant for the purpose of looking after and repairing its machines, may testify as an expert, with regard thereto.—Clemens v. Gem Fibre Package Co., 153 Mich. 495.

¶ 1560. A university instructor in metallurgical and qualitative analysis who does practically all the metallurgical analysis and microscopic work along metallurgical lines in the university, is competent to testify as

an expert concerning the condition as to softness or temper of a steel hammer.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

¶ 1561. Admission of opinion evidence tending to show that the stakes of a show tent should not have been driven vertically, at right angles with the earth, and should have been driven at another angle, given by witnesses not shown to have had any experience in securing such tents to the earth, held to be erroneous.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

§ 281. ——On railroad and transportation questions.

On navigation and shipping, see post § 285.
Competency of brakeman to testify how lumber is customarily piled alongside tracks, see also Customs § 7.

¶ 1562. An experienced conductor is presumed to know whether ties are fit for use.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1563. A person not connected with the management of a train of cars, but who had been for a long time in positions enabling him to observe the effect of checking a train, is a competent witness to testify how fast a train should have been moving at a certain point to be stopped at the usual place.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 1564. The testimony of one who had had seventeen years' experience as motorman and conductor, who was familiar with the place where the accident occurred and with the car in question, was properly admitted as to the distance within which a car could be stopped, running at various rates of speed, at the place where the car struck plaintiff.—Bladecka v. Bay City Traction & Electric Co., 155 Mich. 253.

¶ 1565. Where it is shown that a former motorman operated all of a street car company's freight cars before another street car company took control of them and renumbered them, and that a certain renumbered car was one of such cars, he may properly answer a hypothetical question as to the distance within which he could stop such car when traveling at a specified speed with a specified amount of freight therein.—Walter v. Detroit, J. & C. Ry. Co., 191 Mich. 667.

¶ 1566. Evidence that plaintiff had been a passenger on freight trains many times, and had frequently seen them "come together," established his competency to testify that the shock produced upon the occasion in question was the hardest he had ever experienced from coupling cars, although it did not specifically appear that he had been on such trains when couplings were being made.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 1567. A locomotive engineer is competent to state whether a cracked push bar on the engine would have stood the shock of coupling if sound.—McDonald v. Michigan Cent. R. Co., 108 Mich. 7.

¶ 1568. Witnesses who have worked as motormen for a street railway, and have run over a certain line a part of the time, are competent to testify as to whether the use of sand and sand boxes on the cars is necessary to make the track safe.—Mayer v. Detroit, Y., A. A. & J. Ry., 152 Mich. 276.

¶ 1569. On an issue as to whether a locomotive from which sparks escaped and set fire to a building, was in good order and properly managed, within the meaning of Comp. Laws 1897, § 6295, locomotive engineers of several years' experience were competent to testify from their observation and experience as to the distance burning sparks would be carried if the engine was in proper order, although on cross-examination they stated that they had made no scientific tests, were not familiar with the law of independence of motion, and were not competent physicists.—Potter v. Grand Trunk Western Ry. Co., 157 Mich. 216.

¶ 1570. In an action for the destruction of an ice house by fire set by defendant's locomotive, an engineer of 22 years' experience was qualified to testify as an expert as to whether or not an engine in good condition for arresting sparks could set a fire 40 or 50 feet from the track.—Union Ice Co. v. Detroit & Mackinac Ry. Co., 178 Mich. 346.

¶ 1571. In an action for injuries caused by plaintiff's falling into a hole on defendant railroad's ground, a civil engineer may testify that the hole was a dangerous place and needed protection.—Cross v. Lake Shore & M. S. R. Co., 69 Mich. 363.

§ 282. ——As to speed, times and distances.

Judicial notice of locomotive engineer's business to estimate speeds, see ante ¶ 115.
Competency of laymen to give opinions, see also ante §§ 225, 247.
Speed compatible with control of cars, see also ante ¶¶ 1563-1565.

¶ 1572. A person who has timed trains many times is competent to testify as to the speed.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 1573. A witness, who had lived within eight or nine rods of the railroad track for eight years and had frequently observed trains running by, is competent to testify as to the speed of a train, even though he further stated that he was "acquainted with the running of trains only just by them saying how fast they would run, and such like."—

Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 1574. A witness who testifies that he has seen bodies move and in motion a good many times and has seen horses trot and run, is not qualified to give an opinion as to the rate of speed of a hand car.—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 1575. A witness who shows sufficient experience in observing the speed of street cars is qualified to testify as to the speed of the particular car in question.—Mertz v. Detroit Electric Ry., 125 Mich. 11.

¶ 1576. A witness in a personal injury case who had lived by the side of a railroad track for four years, had observed the speed of trains, had ridden upon the cars, had timed trains between stations and had just returned from a railroad journey to another state is competent to express an opinion as to the speed of a train.—Line v. Grand Rapids & I. R. Co., 143 Mich. 163.

¶ 1577. Witnesses who had lived two or three years in houses fronting a railroad track not more than three or four rods from it and who have observed the rates of speed of trains are competent to express an opinion as to the rate of speed of a particular train, particularly as to whether it was going at a high or a low rate of speed.—Garran v. Michigan Cent. R. Co., 144 Mich. 26.

¶ 1578. A person who has been employed as a brakeman on a steam railroad, and who has also frequently ridden with street car motormen, is competent to express an opinion as to the speed of a street car at the time of an accident.—Millette v. Detroit United Ry., 186 Mich. 634.

¶ 1579. One who has driven a vehicle in a city for years and ridden upon and observed the speed of street cars, is competent to express an opinion as to the speed of a car at the time of an accident.—Millette v. Detroit United Ry., 186 Mich. 634.

¶ 1580. A plaintiff who is accustomed to watch automobiles, who has ridden in them himself, and who saw the auto in question approaching for some distance, is competent to testify in a personal injury suit that its speed exceeded ten miles an hour.—Matia v. Rapid Motor Vehicle Co., 160 Mich. 639.

¶ 1581. A railroad locomotive engineer of long experience is a competent judge of the speed of an automobile which passes his engine, although he sees it only while passing over a space of twenty feet.—Harnau v. Haight, 189 Mich. 600, 13 N. C. C. A. 566.

§ 283. ——On mining questions.

¶ 1582. The cost per ton of mining ore may be testified to by a witness who has shown himself competent to express an opinion upon the subject.—Hartford Iron Min. Co. v. Cambria Min. Co., 93 Mich. 90.

¶ 1583. Miners with practical experience in such work are qualified to give opinion evidence as to the proper method of building a raise or chute in a mine.—Ranta v. Newport Min. Co., 180 Mich. 459.

§ 284. ——On logging and lumbering and scaling.

As to values, see post §§ 286, 289, 290.

¶ 1584. In an action against a boom company for obstructing a river and thereby preventing plaintiff from putting his logs therein, a witness who testifies that he has put logs into the river for twenty-seven years, driving logs part of the time, may give an opinion whether defendant handled the logs as well as they could have been handled to prevent the jam.—Coburn v. Muskegon Booming Co., 72 Mich. 134.

¶ 1585. A witness is competent to testify as to the competency of plaintiff as a sawyer where, although he is not a sawyer himself, he has had a long experience in sawmills, has observed plaintiff's work, was able to compare it with that of others, and where he testified to other matters, such as the causes for "pulling off a saw," which rendered him competent to give an opinion.—Alexander v. Mud Lake Lumber Co., 153 Mich. 70.

¶ 1586. In an action for damages to land and timber due to overflow, held that a witness who had had some experience as an estimator of timber was properly qualified to testify as an expert regarding the amount of timber destroyed.—Colwell v. Alpena Power Co., 190 Mich. 255.

¶ 1587. In an action for the price of railroad ties a witness who states that he has shipped railroad ties to a certain market and seen the reports of the inspection sent back from there may state what an inspection according to the rules of that market would show with regard to a certain lot of ties with which he is familiar, although he may not have been present when the count was made in the place of inspection, and he could not impeach that count.—Lehigh v. Standard Tie Co., 149 Mich. 102.

§ 285. ——On navigation and shipping.

On logging and lumbering, see ante § 284.

¶ 1588. A general custom of navigation, like that for vessels to pass each other to the left, may be proved by the testimony of persons skilled in navigation.—Drew v. The Chesapeake, 2 D. 33.

§ 286. ——As to values and prices or damages.

As to mining costs, see ante ¶ 1582.
On timber quantities and estimates, see ante § 284.

As to land values, see post § 287.
As to value of services or labor, see post § 288.
As to value of one's own services or property, see post § 289.
As to depreciation or loss, see post § 290.
As to damage or loss by fire, see post § 290.
Competency of one to testify of the value of his own goods or property, see post § 289.
Proof of character or description of articles to afford basis for valuation, see post § 293.
Personal examination of object as basis for opinion, see post § 295.

¶ 1589. A farmer who testifies that he is acquainted with the market value of horses may testify to what the value of a particular horse would be on the hypothesis that it is not a blooded animal.—Browne v. Moore, 32 Mich. 254.

¶ 1590. A witness who has shown himself to be possessed of a sufficient knowledge of the market value of horses to entitle him to speak upon the subject is competent to testify, in an action for breach of warranty of a horse, as to the value of the horse in question.—Connell v. McNett, 109 Mich. 329.

¶ 1591. Proof of a witness' competency to testify as to the value of horses and carriages, is not sufficient proof of his competency to testify as to the value of any other articles belonging to a livery outfit.—Mulholland v. Kelsey, 166 Mich. 269.

¶ 1592. A workman in a sawmill, if familiar with the prices of lumber at the mill, is a competent witness as to the value of particular lumber cut in the neighborhood and taken there for manufacture.—Skeels v. Starrett, 57 Mich. 350.

¶ 1593. A married woman sued for the seizure of some goods in which she owned an undivided half interest. Held, that as she had shown a knowledge on the estimate, her subject of the aggregate value of the goods taken was admissible; and as the amount of sales was an element in arriving at the true condition of the stock, it was also proper to allow her to state the value of the goods sold out of the store during her own attendance on the store.—Keables v. Christie, 47 Mich. 594.

¶ 1594. Testimony as to the "general value" of a stock of second-hand drugs by a witness who, though he has been in the drug business for twenty-four years, knows nothing of the stock in question, is properly excluded.—Showman v. Lee, 86 Mich. 556.

¶ 1595. A witness who testifies that he has been in the drug business for a number of years, and is very familiar with a stock of drugs, which he assisted in inventorying at time of their purchase, and is acquainted with the value of such goods, is competent to testify as to their market value.—Showman v. Lee, 86 Mich. 556.

¶ 1596. A witness who testifies to having handled engines for ten years, as engineer, but who is not shown to have any knowledge as to the value of threshing machines, is not competent to testify as to such value.—Woods v. Gaar, Scott & Co., 99 Mich. 301.

¶ 1597. A witness who testifies that he knows very nearly what soda water fountains are worth is competent to testify as to the value of a fountain with which he is acquainted.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 1598. In an action upon the breach of a contract for the sale of an insurance business, which contained a guaranty that the value of commissions upon the business then in force and for one renewal, amounted to a stated sum, witnesses who were familiar with the insurance business and had knowledge of what makes such a business valuable, were competent to testify to the effect that the value of an insurance business depended largely upon the value of the business which was likely to be renewed; although they had no particular knowledge of the business in question.—Graves v. Kennedy, 119 Mich. 621.

¶ 1599. A party who has been in the business of selling the particular patterns, the value of which is in question, for one year and a half, is competent to testify as to their wholesale market value.—Hines v. Pictorial Review Co., 192 Mich. 256.

¶ 1600. In an action for conversion of an automobile a witness who has handled automobiles a number of years and had driven the particular car was qualified to testify as to the value of the car.—Ward v. Carey, 200 Mich. 217.

¶ 1601. In a suit against a railway to recover for a building destroyed by sparks from a locomotive, an experienced contractor and builder who has made most of the improvements upon said building and has taken contracts for the erection of buildings in which the cost of painting was included in the bid made, is a competent witness to give an opinion of the cost of painting the building in question.—Close v. Ann Arbor R. Co., 169 Mich. 392.

§ 287. ——As to land values and damages.
See also post ¶ 1667.
As to damage or depreciation, see post § 290.

¶ 1602. One need not be a real-estate dealer to testify as to the value of real estate.—Huff v. Hall, 56 Mich. 456.

¶ 1603. A farmer who has resided for several years in the vicinity of the premises

in question and is well acquainted with them—who owns land near by and knows of the purchase and sale of lands in the neighborhood—is competent to testify as to the value of the premises.—Wallace v. Finch, 24 Mich. 255.

¶ 1604. Opinions as to the value of land may be given by farmers, though not residents of the immediate vicinity, if they have examined it and made the usual inquiries to inform themselves.—Stone v. Covell, 29 Mich. 359.

¶ 1605. Witnesses who have knowledge of grape culture and of the value of grape vines may testify to the value of vines upon land sought to be condemned for a street, even though it is insisted that such vines are of peculiar value.—City of Detroit v. Robinson, 93 Mich. 426.

¶ 1606. In an action by the owner of property sold by a broker under an agreement not to sell for less than $35,000, wherein he sought to recover part of the commission based on a sale made on a basis of $35,000, and wherein other real estate had been taken as part payment, evidence of expert real estate men as to the actual value of the property taken in exchange was admissible, the real issue involved being the actual amount of the consideration of the sale.—Yore v. Meshew, 146 Mich. 80.

¶ 1607. The testimony of a witness, who is a farmer and has resided in the vicinity where a particular tract of land is located, and is familiar with it, and knows the value of other lands in the vicinity, as based upon the sale price, as to the value of the tract in question, is admissible in an action by the purchaser of such tract for damages because of alleged fraudulent statements as to value made by vendor.—McCormick v. Bradbury, 187 Mich. 512.

¶ 1608. The testimony of a witness who states that he does not know the market value of land in the vicinity of a particular tract, the purchaser of which is suing for damages for alleged false representations as to value made by vendor, is inadmissible upon the question of value.—McCormick v. Bradbury, 187 Mich. 512.

¶ 1609. The opinions and estimates of eye-witnesses acquainted with the premises and the surroundings are admissible to show the extent of damage done by overflowing land. —Enright v. Hartsig, 46 Mich. 469.

¶ 1610. Witnesses who are familiar with a particular residence property and have an adequate knowledge of real estate and rental values in the city in which such residence is located are competent witnesses to testify as to the depreciation in the rental value of such residence property due to the construction of a railroad in the street in front of it.—Plantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661.

§ 288. ——As to value of services or labor.

Competency of one to testify of value of his own services or labor, see post § 289.

As to probable earnings, see post § 291.

Comparisons as basis for opinion, see post § 296.

Testimony of associate of attorney as to value of services, see also Attorneys ¶ 155.

¶ 1611. Neighbors who have employed servants to do like work are competent to testify to the value of the services of a girl employed to do housework.—Carter v. Carter, 36 Mich. 207.

¶ 1612. A woman who frequently visited the home of a decedent, and is familiar with the services rendered the latter in the household by another, is competent to testify as to the value thereof.—Bolthouse v. De-Spelder, 181 Mich. 153.

¶ 1613. In an action against an estate to recover the value of services rendered to deceased, held that the opinion of neighbors as to the value of the services of plaintiff was admissible.—Maynard v. Schrumpf's Estate, 192 Mich. 494.

¶ 1614. The admission of the opinion of a witness living in one place as to the value of services performed at another is not error where there is nothing to show that he did not know the value of labor at the latter place or the comparative value of wages at both.—Kent Furniture Mfg. Co. v. Ransom, 46 Mich. 416.

¶ 1615. Witnesses who employed a farm laborer at or about the time he was working for another person, or who knew the character of his work for those who did so, are competent to give an opinion as to the value of his work.—Ritter v. Daniels, 47 Mich. 617.

¶ 1616. In an action against an estate for services rendered to decedent by way of attendance and companionship, a witness who, together with claimant, resided in decedent's house, and who showed herself possessed of a general knowledge of the physical condition of decedent, and of the necessity for care, and of the kind of care furnished by claimant, was properly permitted to give an estimate, based on the conditions described, as to the value of the services rendered.—Lathrop v. Sinclair, 110 Mich. 329.

¶ 1617. A witness who had been a carriage manufacturer for many years, and had hired trimmers by the piece, although not by the day, is competent to testify as to the value of trimmers' services by the day, in the absence of a showing of incompetency on cross-examination.—Hialey v. Hialey's Estate, 157 Mich. 45.

¶ 1618. An attorney's services in managing, probating and settling a decedent's estate are professional, meriting compensation as such, and an expert may testify as to their value.—Turnbull v. Richardson, 69 Mich. 400; Kelley v. Richardson, 69 Mich. 430.

¶ 1619. The probating and establishing of a will, the making and filing of an inventory of testator's property, advising in the closing out of testator's varied interests, the preparation for a contest and compromising a dispute with certain heirs, are professional, and an expert in law practice may testify as to their value.—Kelley v. Richardson, 69 Mich. 430.

¶ 1620. A lawyer of experience with lumbermen as clients, may give his opinion as to the value of the services of a lawyer employed as such in managing, administering and settling an estate mainly consisting of large lumber interests; and this although purely business matters are somewhat involved in such services.—Kelley v. Richardson, 69 Mich. 430.

¶ 1621. A witness who is not an attorney is incompetent to testify to the value of professional services rendered by an attorney.—Howell v. Smith, 108 Mich. 350.

¶ 1622. The defendant in a suit brought by attorneys to recover for professional services testified that he had had some experience in employing counsel, and had employed as good attorneys as plaintiffs, and those who were in as good standing in the profession, and had had occasion to settle with them. Held, that this testimony did not render the defendant competent to state what plaintiffs' services were worth.—Howell v. Smith, 108 Mich. 350.

§ 289. ——As to value of one's own services or property.

Competency of attorney to testify to value of his own services, see also Attorneys ¶ 152.

¶ 1623. A party to an action on a contract of employment is as competent as any other witness, if he knows the facts, to swear to the value of services according to current rates.—Richardson v. McGoldrick, 43 Mich. 476.

¶ 1624. In an action of assumpsit, when plaintiff testifies that he has performed work and labor for defendant, it is proper to ask him how much his services were worth.—McDonald v. McDonald, 67 Mich. 122.

¶ 1625. Where plaintiff suing for such services had testified generally that he is acquainted with the value of services rendered by him in the apprehension of a felon, it is competent for him to express his opinion as to their value.—Foley v. Platt, 105 Mich. 635.

¶ 1626. A woman employed to do the general housework about a farmhouse is competent to testify, in an action to recover therefor, as to the nature and value of the services rendered.—Fowler v. Fowler, 111 Mich. 676.

¶ 1627. An attorney suing for compensation may testify as to the nature and character of the services rendered, and their reasonable worth.—Babbitt v. Bumpus, 73 Mich. 331; Chamberlain v. Rodgers, 79 Mich. 219.

¶ 1628. Where plaintiff's household goods have been seized on attachment, she and her husband may testify as to the value of such articles; they being presumed as householders to have sufficient knowledge upon the subject.—Erickson v. Drazkowski, 94 Mich. 551.

¶ 1629. The purchaser of a horse, who is engaged in a business in which he makes use of such horses, is competent to give an opinion as to the value of the animal.—Mason v. Patrick, 100 Mich. 577.

¶ 1630. An assignee for the benefit of creditors, who has been in possession for the purposes of making sales, and is shown to be acquainted with the goods and with the prices they brought, can give his opinion as to the value of a portion of the stock taken from him under process in bankruptcy, and for which an action of trover has been brought against the officer taking them.—Mathews v. Stewart, 44 Mich. 209.

§ 290. ——As to depreciation or loss.

As to damages to land, see also ante § 287.

¶ 1631. To show the value of the growth and increase in weight which cattle might reasonably have been expected to attain but for overfeeding of plaintiff's pasture caused by defendant's tortiously turning into it his own cattle also, the testimony of farmers, graziers and drovers having experience of cattle and that mode of feeding is competent.—Gilbert v. Kennedy, 22 Mich. 117.

¶ 1632. It is not error to exclude the opinion of a witness as to the depreciation caused to property by a trespass if it does not appear that he professed to know or had means of judging of the effect on the value of the estate.—Clark v. Field, 42 Mich. 342.

¶ 1633. A witness who has been engaged for five years in selling threshing machines and engines, and who shows that he is possessed of a degree of knowledge upon the question of their values, is competent to testify as to what their depreciation in value would be by reason of use for one season.—Woods v. Gaar, Scott & Co., 99 Mich. 301.

¶ 1634. In an action on a fire insurance policy for the loss of a vessel which sank

while burning, a witness who admits that he cannot estimate the cost of repair may nevertheless testify, if otherwise competent, that in his opinion, apart from that question, the boat is a total loss.—Jackson v. British America Assur. Co., 106 Mich. 47.

¶ 1635. The opinion of a witness as to the value of an insured house is properly rejected where it is not shown that he had any competent knowledge on the subject.—Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98.

¶ 1636. In an action on an insurance policy a daughter of the plaintiff who had bought many of the articles insured, and was present when others were bought, is a competent witness as to the value of goods burned.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 1637. One who was buyer and owner of a museum and who has taken part in exhibitions of several museums, and has bought curios and animals for exhibition, is competent to express an opinion as to the value of articles in a museum destroyed by fire.—Richter v. Harper, 95 Mich. 221.

¶ 1638. An expert wool buyer, though he has never inspected wool damaged by fire, is nevertheless a competent witness, after inspecting wool so damaged, to give an opinion concerning the amount of the damage to the fibre and the market value of the fleeces burned, wet, torn, and made unclean.—Close v. Ann Arbor R. Co., 169 Mich. 392.

§ 291. ——On expectancies and probable value of earnings.

¶ 1639. In an action to recover damages for the negligent killing of a five-year-old child, testimony of witnesses who by their knowledge and experience are qualified to express an opinion upon the pecuniary value of such a life is admissible to aid the jury in assessing damages.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 20.

2. *Basis of opinion and form of question or hypothesis.*

§ 292. Basis or predicate for opinion.

Basis for lay opinions, observed facts narrated to jury, see ante §§ 248-252.

Sufficiency of knowledge to support lay opinion, see ante §§ 248-252.

Necessity of evidence in case to support opinion, see post § 293.

Source of expert's knowledge or opinion, see post §§ 294-297.

Necessity of basing hypothetical question on testimony as adduced, see post § 299.

Incorporation in question of testimony heard by expert, see post § 302.

In criminal cases, see also Indictment, VIII, R.

¶ 1640. A physician cannot testify to his opinion as to what ails a patient, where it is not the result of his own examination, nor based on facts in proof, nor given in answer to hypothetical questions based on facts.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1641. A physician cannot be asked his opinion as to the cause of an injury, judging merely from the condition in which he found the patient, and without any knowledge as to how it took place.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 1642. In an action for false imprisonment a physician was asked his opinion of the effect of the arrest upon the plaintiff's health. It did not appear that he had any information as to what the circumstances were that attended the arrest. Held, that the objection to the question, if there was any, was avoided by an answer limited to the plaintiff's condition as he had observed it before and after the time when the arrest took place. He expressed no opinion upon a hypothetical case, but only on facts falling under his own observation.—Somerville v. Richards, 37 Mich. 299.

¶ 1643. It is not error to allow a physician testifying for plaintiff in an action for damages for assault and battery to answer in the affirmative a question as to whether, if plaintiff's ear was filled with dirt, gravel and blood, as the witness found upon his examination, that would be the natural and most probable way of having germs introduced into the ear, where the answer of the witness was based entirely upon his personal observation and not upon hypothesis.—Matthews v. Lamberton, 198 Mich. 746.

¶ 1644. A physician testifying in a case of personal injury was asked what he should say the cause of the trouble was, judging from the examination he had made at the time and supposing it to be true that the injured person was suffering in certain specified ways. The question was objected to on the ground that the answer could not be based partly on a hypothesis and partly on examination. Held, that the question was allowable.—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322.

§ 293. Necessity and sufficiency of proof of data or predicate.

Establishment of genuineness of writing as basis for comparison by expert, see post § 297.

Sufficiency and conformity of the hypothesis to the evidence in the case, see post § 299.

Conformity of opinion to issues and restriction thereto, see post §§ 305, 306.

¶ 1645. Scientific opinions can only be founded on established facts.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 1646. An expert cannot give an opinion based on his personal examination unless the facts on which the opinion is founded are all stated; and it must be limited to those facts and exclude all others, even though there are others within his knowledge.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 1647. An expert cannot be asked for a conclusion upon facts not stated; as where a physician is asked his opinion as to what produced the condition of a patient as he observed it.—Van Deusen v. Newcomer, 40 Mich. 90.

¶ 1648. Neither medical experts nor other witnesses can be allowed in any case to give an opinion upon mental capacity or condition, without first showing the circumstances and facts upon which the opinion is based.—White v. Bailey, 10 Mich. 155.

¶ 1649. Upon questions relating to the mental capacity of a person to make a will, the opinions of men skilled in medical science, though not founded on their own personal observation of the facts of the particular case, are admissible in evidence. The facts, however, on which the opinion is founded must be stated, and the jury left to determine, not only the truth of the facts, but of the opinion founded upon them.—Kempsey v. McGinniss, 21 Mich. 123.

¶ 1650. It is not competent for a professional witness to give his opinion of a case, assuming the testimony of certain specified witnesses to be true, when it appears that he did not hear the whole of their testimony and it does not appear what facts stated by them he did and what he did not hear.—Kempsey v. McGinnis, 21 Mich. 123.

¶ 1651. A surveyor's testimony as a man of science is never receivable except in connection with the data from which he surveys, and if he runs lines they are of no value until the data are established from which they are run.—Jones v. Lee, 77 Mich. 35.

¶ 1652. In an action for personal injuries, testimony of an expert boiler maker as to the cause of an explosion of a boiler is competent when accompanied by explanations and reasons for his opinion.—Beuhk v. Valley City Desk Co., 128 Mich. 562.

¶ 1653. In an action for personal injuries, testimony of a physician that he could determine whether or not plaintiff was tender at a certain point, was admissible as against the objection that the physician had not testified how he was able to make such determination, since the sources of his knowledge could have been ascertained by cross-examination.—Marshall v. Saginaw Valley Traction Co., 157 Mich. 541.

¶ 1654. An expert may not testify as to injury to the spine of a person where he bases his opinion on an X-ray picture, if the picture is not produced in court.—Jolman v. Alberts, 192 Mich. 25.

¶ 1655. A shepherd dog chiefly valuable for his ability to herd cattle and horses need not be shown to have a market value in order to render competent the opinions of witnesses as to his value.—Bowers v. Horen, 93 Mich. 420.

¶ 1656. Statements made by an accountant from account books, in evidence without objection, showing, as claimed, the condition of the owner's business at a given date, are admissible in evidence in connection with said books.—Mooney v. Davis, 75 Mich. 188.

¶ 1657. Unless the description is stated to the jury it is not competent for a witness to testify to the value of articles from a description given him by a party.—Richter v. Harper, 95 Mich. 221.

¶ 1658. A dry goods and clothing merchant testified, in a suit to recover for damage to insured property, that he had been in the store of the plaintiff a number of times, but could not say that he was there within a month before the fire, but had been within a year; that he thought he had noticed a stock which would amount to anywhere from $9,000 to $12,000; that in such estimate he did not confine himself to the year before the fire, and that all he knew was that he had a recollection of being in the store several times, when he saw a good-sized stock of goods there. Held, that the witness did not show himself competent to testify as to the value of the insured property.—Metzger v. Manchester Fire Assur. Co., 102 Mich. 334.

¶ 1659. A witness shown to be familiar with the value of goods is not qualified to testify as to the value of a stock where he testifies that he was not asked to examine the stock, that he saw no inventory and that he could not tell within 1,000 pieces as to how much the stock contained.—Grabowsky v. Baumgart, 128 Mich. 267.

§ 294. Sources of knowledge or experience.

Witness' personal experience or knowledge as basis for opinion, see post § 295.

Use of market reports or comparative prices as basis for opinion, see post § 296.

Comparison of questioned with genuine writings as basis for opinion, see post § 297.

Conformity of question to personal knowledge or hypothesis based on evidence adduced, see post § 298 et seq.

Incompetency of physician to testify of privileged communications, see Witnesses, V, B.

Knowledge of signature gained from privileged statements in writing (tax returns), see Witnesses, V, E.

In criminal cases, see also Indictment, VIII, B.

¶ 1660. It is competent for a medical expert to testify, from knowledge derived by him from books of recognized authority, as to the effect of a specified poison when taken into the system.—Brown v. Marshall, 47 Mich. 576.

¶ 1661. Where, in an action against a railroad company for damages caused by fire set by its engine, a witness who was the fireman on the engine at the time of the fire and was subsequently promoted to be engineer, has testified on his cross-examination that he had read no books on engineering or on the construction of locomotives, it is proper to exclude as immaterial the question "What education have you received, then, with reference to your present position as engineer aside from the fact that you stoked on an engine?"—Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163.

¶ 1662. One who has merely been in a store without inspecting the goods there is not competent to express an opinion as to their value on mere inspection of the inventory and invoices.—Dyer v. Rosenthal, 45 Mich. 588.

¶ 1663. The testimony of a boot and shoe dealer who was present when a stock of boots and shoes was inventoried by attaching creditors, and set down the amount of the appraisement as given to him by the appraisers, but who did not look over the goods to any extent, though he noticed that they were in fair condition and comparatively new, and who did not make sufficient examination to give an opinion as to the exact value of the goods, is admissible, and the weight to be given to it is for the jury.—Hutchinson v. Poyer, 78 Mich. 337.

¶ 1664. An experienced millman and lumberman may testify to his opinion as to the value of saw logs which he has never seen, upon reports made to him by his partner and an employee, who are both practical and expert woodsmen, and upon the strength of which reports the witness made an offer for the purchase of the logs.—Meigs v. Weller, 90 Mich. 629.

¶ 1665. Where the only knowledge on the part of a physician superintending an asylum in regard to a former inmate is based on a record of her case kept in the asylum before his superintendency, and where he is not shown to have any knowledge of the method of keeping such record at the time, he is not competent to give an opinion as to such inmate's mental condition.—Prentis v. Bates, 88 Mich. 567, 93 Mich. 234.

¶ 1666. A physician in charge of a poorhouse testified that he based his diagnosis of the case of an inmate who was suffering from partial paralysis on "that paper," being apparently an indorsement by the city physician upon the inmate's ticket of admission. Held, that the testimony of the diagnosis should have been stricken out as based on hearsay.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 1667. A real estate agent held competent to testify as to the value of a contemplated building as shown by specifications and blue prints.—Newton v. Consolidated Construction Co., 184 Mich. 63.

§ 295. ——Personal experience, observation and attendance.

See also ante ¶ 1643.

Brief observation of speed, see ante ¶ 1581.

Res gestæ of treatment or attendance, matters to which physician may testify, see post §§ 453-456; Witnesses, V, B.

Testimony of attending physician as to actions and utterances of patient, see also post § 454.

Examination of plaintiff's person before trial by experts chosen by defendant to qualify them to give evidence based thereon, see Discovery § 9.

¶ 1668. A physician who was injured by the derailment of a train on which he was a passenger, may testify that his injuries resulted from a concussion of the spine, although by reason of temporary unconsciousness, he was unable to state what he was thrown against.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 1669. Experts who have examined damaged wearing apparel and baggage may give an opinion in money as to the amount of damages to each article.—Withey v. Pere Marquette R. Co., 141 Mich. 412.

¶ 1670. On an issue as to the correctness of a logger's scale, the testimony of the plaintiff as to a scale made by him was admissible where it was shown that lumbering had been his paramount business and that he had been engaged therein for more than twenty years and what he had learned about scaling was by observation, and that he was capable of making a fairly accurate scale of sound logs, although he had never acted as scaler for anybody before he went into the business, and that the logs in question were sound logs.—Peterson v. Reichel, 143 Mich. 212.

¶ 1671. The testimony of a physician as to the cause of the death is admissible even though he was not present at the time thereof, where it appears that he was the attending physician, and had called upon the patient once a day for several days preceding the death.—Chadwick v. Phoenix Accident & Sick Benefit Ass'n, 143 Mich. 481.

¶ 1672. In the contest of a will the physician who attended the testator a few hours after he is alleged to have signed the will may give his opinion as to the testator's mental capacity where his testimony shows

a full knowledge of the case.—Lange v. Wiegand, 125 Mich. 647.

¶ 1673. In a will contest on the ground of mental incompetency, a physician was called to testify for the contestant, who was a close friend of the deceased, but did not attend her professionally; who saw her often in the weeks preceding her death; knew the disease she was afflicted with; observed the progress of the disease from her general appearance; and testified that said disease in its late stage produces blindness and dullness of mind. Held, he was competent to express an opinion as to the mental competency of the deceased.—In re Hoyles' Estate, 162 Mich. 275.

§ 296. ——Market reports and comparative values.

¶ 1674. In an action by the purchaser for a breach of contract to deliver lumber at Detroit, a witness in behalf of plaintiff testified as to the value of such lumber at Wayne, a point eighteen miles distant, and stated that he did not know the market value at Detroit, though it would be higher there. Held, that the evidence was admissible.—Savercool v. Farwell, 17 Mich. 308.

¶ 1675. The value of logs at a particular place cannot be proved by the opinion of a witness having no knowledge of values there, and showing no facts from which it could be got at as compared with values elsewhere. Knowledge of one market justifies no presumption of knowledge of others.—Greeley v. Stilson, 27 Mich. 153.

¶ 1676. A witness may testify to his knowledge of the market value of cattle derived from the reports of newspapers.—Cleveland & T. R. Co. v. Perkins, 17 Mich. 296.

¶ 1677. Testimony as to the value of attached goods from a clerk who had been employed for some time in selling them, and might therefore be presumed to have some knowledge of current rates in the business, was held admissible, although it appeared that he had based his estimates on "price-lists," i. e., such market lists as guide dealers.—Sirrine v. Briggs, 31 Mich. 443.

¶ 1678. A witness who is not shown to have any knowledge of the value of the services for which a suit is brought, beyond that possessed by the jury, cannot give his judgment of such value, based upon what he considers the services of plaintiff worth to him in a line of business not disclosed.—Williams v. Williams, 82 Mich. 449.

¶ 1679. In a suit by an attorney to recover the value of his services, he may show by his own testimony his experience and knowledge, and give his judgment as to such value, and to that end may testify as to his knowledge of the charges of other attorneys for like services in similar cases.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 1680. In the absence of some customary standard of charges, or proof of such standard, it was not competent to base judgment as to the value of one's own services in arresting thieves upon the fact that specific rewards may have been from time to time offered in cases corresponding to a greater or less extent with the case under consideration. If that was the only basis, some different standard should be adopted, as, for instance, a reasonable per diem.—Foley v. Platt, 105 Mich. 635.

§ 297. ——Comparison of questioned writings.

Foundation proof of genuineness of writing used for comparison, see post § 516.

¶ 1681. Where a signature is in question, witnesses may be allowed to compare it with a genuine signature to any paper already in the case—e. g., an appeal bond on file therein,—and to express an opinion whether they are the same in writing.—Vinton v. Peck, 14 Mich. 287; In re Foster's Will, 34 Mich. 21; First Nat. Bank of Houghton v. Robert, 41 Mich. 709.

¶ 1682. An alleged signature may be tested by comparing it with an unquestioned signature to some writing already in evidence in the cause; but such comparison cannot be made with a signature not established or admitted, and where the result might be to raise a collateral issue as to the genuineness of such other signature.—Vinton v. Peck, 14 Mich. 287; In re Foster's Will, 34 Mich. 21.

¶ 1683. A witness' knowledge of handwriting cannot be tested by comparing papers in the case with others not in it, as, e. g., fictitious specimens.—Howard v. Patrick, 43 Mich. 121.

¶ 1684. In an action on a note the question arose whether defendant had written certain letters. The execution of the note was not in issue, but defendant denied having signed it, and there was testimony tending to show he did not write the letters. Held proper to admit, for purposes of comparison, the testimony of a witness showing that he had a note which he had seen defendant sign, and to allow him to compare the note in suit with it, and express his opinion as to whether he had signed the note and written the letters.—Worth v. McConnell, 42 Mich. 473.

¶ 1685. It is immaterial with which of two papers in evidence an expert witness compared a disputed signature before testifying as to its genuineness; and his statement that he based his testimony upon the handwriting, both papers being shown him, does not necessarily exclude either paper.—Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

§ 298. Form and scope of question.

Form of hypothetical question, see post § 299.
Form of question based on testimony heard, see post § 302.
Long and confusing questions, see post § 300.
Ambiguous and uncertain questions, see post § 301.
Incorporating allusions to books, see post § 303.
Relation of the question to the issues, see post § 304.
Responsiveness and form of the opinion, see post § 305.
Question based on observation and hypothesis, see also ante ¶ 1644.
Propriety of question as matter for the court, see Trial, VI.
In criminal cases, see also Indictment, VIII, B.

¶ 1686. A question to an expert witness calling for an expression of opinion upon a state of facts not known to him or stated to him hypothetically in the question, is properly excluded.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 1687. It was error to ask an insurance expert's own opinion as to whether undisclosed or misrepresented facts were material to the risk; the proper inquiry being whether he was able to say from his knowledge or the practice and usage among life insurance companies generally, that information of such fact would have enhanced the premium or would have led to a rejection of the risk.—New Era Ass'n v. Mactavish, 133 Mich. 68.

¶ 1688. In an action for diminishing the flow of a stream by diverting its course, the defendant claimed that the diminution was due to a succession of dry seasons. One of his witnesses testified to having known the stream for many years, and lived near it before its course was changed. and to having examined it the preceding fall. Held, that he could ask this witness how the flow at that time compared with what it was when he lived there.—Pettibone v. Smith, 37 Mich. 579.

¶ 1689. A long question to an expert witness in a malpractice case concluded thus: "I ask you, as a surgeon, what you have to say of that kind of treatment?" Held, that this was intended to call for the opinion of the witness upon the kind of treatment indicated in the question, and was unobjectionable.—Mayo v. Wright, 63 Mich. 32.

¶ 1690. In an action for personal injuries, physicians, called as experts, were asked if certain conditions described by them might be caused by the injury shown. It was objected that the form of the question should be whether they would "probably" be caused thereby. Held, that the degree of probability was a proper subject for cross-examination, and did not need to be indicated by the question.—Bush v. St. Joseph & B. H. St. R. Co., 113 Mich. 513.

¶ 1691. A lawyer testifying as an expert in an action to recover compensation as an attorney may properly be asked the value of plaintiff's services as "associate counsel in the administration, management and securing to defendant the estate left her by her husband"; such question cannot be considered to include services of a business and not of a legal character.—Turnbull v. Richardson, 69 Mich. 400.

§ 299. ——Of hypothetical questions.

Long and confusing questions, see post § 300.
Ambiguous and uncertain questions, see post § 301.
Reduction of question to writing, when proper or advisable, see post § 304.

¶ 1692. A hypothetical question must not wrongly state a matter that is in evidence.—Prentis v. Bates, 88 Mich. 567.

¶ 1693. Hypothetical questions to experts must be based upon facts and conditions that are supported by the testimony.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 1694. Hypothetical questions to experts are not necessarily objectionable because based upon facts not at the time in evidence. If after the testimony is all in any questions are found unsupported by facts, the court should be asked to exclude the answers and the ruling thereon would be reviewable.—Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405.

¶ 1695. Hypothetical questions are not erroneous if they contain no assumption not justified by the evidence.—Daniells v. Aldrich, 42 Mich. 58.

¶ 1696. Hypothetical questions directed to the effect of certain conditions of electric light wires as to the transfer of electricity are proper, although some of the conditions inquired into are not shown to exist in the particular case, but are shown to be caused by the same general principles that are supposed to govern electricity, and are therefore analogous to the case in hand.—Kraatz v. Brush Electric Light Co., 82 Mich. 457.

¶ 1697. Hypothetical questions asked of an expert are not necessarily improper because embracing facts assumed or not proved which are not, standing alone, the subject of expert testimony. And if the facts stated are in the case, or are afterwards proved, and are such as to form the basis of an opinion by an expert, the question is proper although it does not contain a statement of all the facts.—Turnbull v. Richardson, 69 Mich. 400.

¶ 1698. All facts which the jury can interpret as well as the witness should be excluded from hypothetical questions put to a witness testifying as an expert.—Prentis v. Bates, 88 Mich. 567.

¶ 1699. The statements embraced in a hypothetical question to a medical expert, calling for his opinion as to the mental competency of a testator, should be limited to facts which, if true, are indicative of mental unsoundness.—Rivard v. Rivard, 109 Mich. 98.

¶ 1700. Questions as to propriety of medical treatment, based on hypotheses stated in such sequence as to convey the idea that the conditions described followed one upon the other, and failing to state the time elapsing between the various acts and events included in the hypotheses, are improper.—Farrell v. Haze, 157 Mich. 374.

¶ 1701. An objection to permitting a physician to state whether a certain effect, alleged to exist, would naturally arise from a certain cause, on the ground that the question is deficient in not stating the circumstances under which the cause arose, is without merit, for such a question does not call for an opinion on the whole case.—Smith v. Detroit United Ry., 155 Mich. 466.

¶ 1702. Admission of a hypothetical question to medical experts who had without objection been permitted to testify as to an examination of plaintiff made by them and what it disclosed, on the ground that under it the witness was at liberty to consider subjective symptoms in his answer, was not error where the question did not call upon the witness to consider such symptoms and there was no such specific objection.—Potter v. Detroit, G. H. & M. R. Co., 122 Mich. 179.

¶ 1703. An objection to a hypothetical question as deviating from the testimony in the case is untenable where the answer is based on an examination of the injured person made professionally.—Boehm v. City of Detroit, 141 Mich. 277.

¶ 1704. In an action to recover compensation for services as an attorney in settling an estate, a hypothetical question to an expert witness stated that "an actual contest was made in the probate court which resulted favorably to the proponents of the will." The bill of exceptions in the case stated that the only proceedings had in the probate court were the filing of papers, etc., and it also showed that certain heirs were represented in the probate court, who cross-examined the proponents' witnesses. Held, that the words "actual contest" meant that the probate proceedings were not entirely ex parte; and that it could not be claimed that the statement in the question was not borne out by the evidence.—Turnbull v. Richardson, 69 Mich. 400.

¶ 1705. Including in a hypothetical question to medical witnesses the distance that plaintiff fell when she was injured does not make the question improper, where it is undisputed that she did fall that far.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 1706. A hypothetical question is not objectionable where there is testimony which warrants it, especially where the objection is general and does not point out the facts claimed to be assumed by it.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 1707. In a personal injury case a hypothetical question based upon the claim that the plaintiff was a well woman at the time of injury is proper and may be admitted as against the objection that she was a sick woman when in fact there was some evidence to support the assumption she was well, although it was in dispute.—Herbeck v. Germain, 144 Mich. 157.

¶ 1708. A hypothetical question assuming that plaintiff in an action for personal injuries was suffering from no displacement of the womb before the injury is not objectionable, on the ground that it is not based on the evidence, where plaintiff has testified that her general health was good before the accident, that she had no soreness or lameness, or injury to the internal organs, and that before that time she did all her household work, and a physician has testified that the patient is usually the first to discover any displacement.—Holman v. Union St. R. Co., 114 Mich. 208.

¶ 1709. A witness for plaintiff was examined about a point in the walk thirty-five or thirty-six feet from a bridge, and testified concerning a hole in the walk at that point that he thought was five inches deep. Plaintiff identified the place of the accident as being near a telephone pole, which she located at a distance of from thirty-four to thirty-five feet from the bridge. The witness said nothing about a telephone pole in describing the place he saw. Expert witnesses were asked hypothetical questions, in which the hole was described as of the depth testified to by the witness. Held, that the court properly allowed the question to be answered, as it was for the jury to say whether or not plaintiff was hurt in the place testified to by the witness.—Edwards v. Common Council of Village of Three Rivers, 102 Mich. 153.

¶ 1710. A physician should not be permitted to answer a hypothetical question as to what effect the administration of quantities of opiates to an injured person would have upon his capacity to knowingly execute a release, where there is nothing in the evidence to show the time of the administration of the opiates, or the quantity thereof.—Brown v. Ann Arbor R. Co., 183 Mich. 574. (McAlvay, C. J., Brooke and Kuhn, JJ., concurring in result only.)

¶ 1711. In an action on a fire insurance policy, in which the cause of the fall of the building in question then being remodeled, was in dispute, the opinion of experts, contractors and builders that a fire which burned off the ceiling joists or floor joists

would occasion the fall of such building in the manner in which it fell, was not objectionable on the ground that the matter was not the subject of expert testimony, and as assuming facts not shown by the evidence; where there was testimony that almost immediately before the building fell a flame or blaze shot up from the building and that the method of remodeling the building was safe.—N. & M. Friedman Co. v. Atlas Assur. Co., 133 Mich. 212.

§ 300. ——Long or confusing questions.

Ambiguous and uncertain questions, see post § 301.

Length as reason for reducing to writing, see post § 304.

¶ 1712. A question to an expert witness cannot be objected to on account of its length if it is confined to the facts upon which the expert's opinion is desired, and does not contain statements irrelevant for that purpose, and not proper to be submitted as a basis of expert testimony.—Mayo v. Wright, 63 Mich. 32.

¶ 1713. In examining a nonprofessional witness as to a person's capacity to execute a will, it seems to be improper to put a hypothetical question containing a confusing number of elements as to the various items of his property and the members of his family, and then require the witness to arrive at a result by comparing the testator's appearance and conversation as he had described it to the jury with what the witness had known of him formerly.—Rice v. Rice, 50 Mich. 448.

§ 301. ——Ambiguity or uncertainty in question.

Long and confusing questions, see ante § 300.

¶ 1714. In a will case in which the testator's sanity is in issue, an omnibus question to an expert, presenting a hypothesis covering many things of which there was neither proof nor offer of proof, including conditions which necessarily indicated insanity as well as facts which might coexist with a state of mental soundness, and going not only into the history, eccentricities and physical condition of the testator, but into the personal traits of his relations, is properly excluded as tending to make the jury suppose that each of the enumerated circumstances indicated insanity, and to leave them at discretion to decide whether the will was suitable and proper and satisfied their judgment.—Fraser v. Jennison, 42 Mich. 206.

¶ 1715. A hypothetical question to a medical expert, calling for his opinion, upon the facts assumed, as to the mental capacity of a testator, is not objectionable because it includes the question of his power to comprehend "his moral obligations to others, and the proper objects of his bounty," where, from the context, it would be readily understood that the obligations referred to were not general but those which a parent owes to his children.—Rivard v. Rivard, 109 Mich. 98.

¶ 1716. One of defendant's medical witnesses was asked whether, in cases where there is simply a physical shock, as a fall upon the side, and there is no warning or apprehension preceding the shock, he would expect a case of railroad spine or concussion of the spine to follow. Held, that the question was properly excluded; that, aside from the fact that it did not fairly represent the case as made by the proofs, it contained an assumption that railroad spine and concussion of the spine meant the same thing; that, as the question was put, it would be impossible for any expert to give an intelligent answer as to whether a fall upon the side would occasion concussion of the spine, and that something of the nature of the fall should have been included in the question.—Turner v. Township of Ridgeway, 105 Mich. 409.

§ 302. ——Questions based on hearing of testimony by expert.

Testimony not all heard by witness, see ante ¶ 1650.

¶ 1717. A witness who did not see a collision between a street car and a loaded wagon cannot give his opinion of the speed the car was going at the time of the accident when the question does not assume he heard all the testimony, and it does not appear what part of the testimony he did hear, nor that he had knowledge of the weight of the car, its momentum, or the weight of the load which was struck.—La Londe v. Trans St. Mary's Traction Co., 145 Mich. 77.

¶ 1717a. Hypothetical questions so framed as to call for answers based "particularly upon the testimony" of designated witnesses, or based upon "the testimony in the case," which the witness says he has heard "to some extent," are properly excluded.—Connell v. McNett, 109 Mich. 329.

§ 303. ——Allusions to quotations from books.

Admissibility of scientific books as documentary evidence, see post § 511.

¶ 1718. In examining an expert witness counsel are not allowed so to evade the rule against reading scientific works to the jury as to have the witness read a selected paragraph in private and thereafter to ask him if there is a record of such and such a case, reading from the paragraph.—Marshall v. Brown, 50 Mich. 148.

§ 304. Reduction of question to writing.

¶ 1719. A question to be put to an expert witness should, if of considerable length, embracing a long history of a case, be reduced to writing in order to enable the witness to

answer intelligently and the opposite counsel to cross-examine or offer testimony in rebuttal.—Mayo v. Wright, 63 Mich. 32.

¶ 1720. A hypothetical question put to a physician testifying as an expert cannot be objected to on account of its length, but it should be in writing, and should embrace the whole question in a connected manner.—Jones v. Village of Portland, 88 Mich. 598.

¶ 1721. It is the better practice to reduce a hypothetical question to writing where the facts are confusing or complicated.—Matthews v. Lamberton, 198 Mich. 746.

§ 305. Relation of question to the issues, specificness and details.

Form of the question to confine answer to proper issues, see also ante § 298.
Conformity of the opinion to the predicated facts, see ante § 293.

¶ 1722. It is proper to put the question to the witness in such a way as to call for his opinion upon mental capacity with reference, as near as may be, to the very act in dispute.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 1723. A witness in a will contest may be asked as to the capacity of the testator to make a will without confining the question to the particular will in controversy.—Page v. Beach, 134 Mich. 51.

¶ 1724. Hypothetical questions based on evidence of the defendant's treatment of the plaintiff may be submitted to expert witnesses in an action against a physician for malpractice.—Duffy v. Charters, 180 Mich. 572.

¶ 1725. In an action for injuries from the nonrepair and collapse of a bridge under a traction engine, a witness whose testimony showed that he was possessed of more than ordinary skill in such matters, and who testified that he had examined the premises thoroughly a few minutes after the accident occurred, and that he saw the lugs and joists, the appearance of which he described, may be asked by what reason the engine went down.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 1726. A hypothetical question asked an expert as to the value of a lawyer's services in managing, probating and settling a large estate, where he was consulted daily and held himself prepared for threatened litigation, need not set out each special item of consultation or business included in such services.—Kelley v. Richardson, 69 Mich. 430.

¶ 1727. In an action for negligence in withdrawing or disturbing lateral support an expert on engineering questions cannot be asked as to the effect of a specific building or pressure.—Bissell v. Ford, 176 Mich. 64.

§ 306. Form, construction and responsiveness of the opinion.

General rule as to responsiveness of answers, see Examination of Witnesses, I; and see Trial, V.

¶ 1728. An opinion elicited by a hypothetical question must be based thereon and not on the witness' extraneous personal knowledge.—Fuller v. City of Jackson, 92 Mich. 197.

¶ 1729. Plaintiff was injured by defendant's train, amputation of his leg being necessitated. The condition of the leg had been stated in detail in the evidence, and, in response to a question as to what could be done to improve the condition of the limb, and make it practicable for the use of an artificial leg, a physician, qualified as an expert, replied that he feared there would not be bone enough left to swing the artificial limb. Held, that this was an expression of expert opinion, and a motion to strike out what the doctor "feared" was properly denied.—Beauerle v. Michigan Cent. R. Co., 152 Mich. 345.

¶ 1730. A medical witness' testimony that a certain physical condition of an injured member "evidently" exists "yet" is not objectionable as not founded on any examination recently made, where he afterwards states that within two weeks before the trial an examination was made.—Boehm v. City of Detroit, 141 Mich. 277.

VII. HEARSAY, CHARACTER, DECLARATIONS, AND RES GESTÆ.

A. HEARSAY AND DECLARATIONS OUT OF COURT IN GENERAL.

Contemporaneous or prior conversations and statements to explain or vary writings, see ante, V.
Statements and declarations or appearances held out as evidences or grounds of estoppels in pais, see Estoppel, III.
Instructions on admissions and declarations as evidence, see Instructions, V, VI.
Motion to strike evidence subsequently appearing to have been hearsay, see Trial, V, C.
Striking out hearsay from depositions, see Depositions § 34.
Rules of criminal evidence as to declarations made out of court, see Indictment, VIII, B.

§ 307. Hearsay in general, what constitutes.

[Note. The rule excluding hearsay and declarations made out of court has relatively few decisions. Most of the cases turn on some one of the exceptions to the rule. They have been arranged according to the controlling principle of decision in the sections which follow in this division. The cross-references which immediately follow will explain the analysis and arrangement.]

Various kinds and circumstances of statements out of court, constituting hearsay, see post §§ 308-320.
Matters provable by hearsay as exceptions to rule, see post §§ 321-325.
Admissibility of evidence that statement was made for purpose of proving other than facts stated, see post §§ 326-328.
Admissibility of evidence of statement as evincive of mental state, attitude or consciousness of declarant, see post §§ 329-335.
Admissibility of statement by person since deceased, see post § 336.
Admissibility of former testimony of persons as witnesses, see post §§ 337-344.
Admissibility of declarations and acts amounting to admissions against interest of declarant, see post, VII, C.
Admissibility of statements because part of the res gestæ, see post, VII, D.
Exclusion of self-serving declarations, see post, VII, E.
Mode and sufficiency of proof of declarations, see post §§ 345-347.
Testimony that statement was made as distinguished from statement as evidence of facts stated, see post § 327.
Effect of death of declarant to make declarations admissible, see post § 336.
Testimony as to incorporation based on information and personal dealings, see Corporations ¶ 74.

¶ 1731. Testimony that an insurance agent stated that the premium note was paid to defendant insurer is hearsay.—McIntyre v. Michigan State Ins. Co., 52 Mich. 188.

¶ 1732. In an action for the price of an engine warranted to effect a saving in fuel "equal to that claimed for the Corliss," the reports of an expert upon tests made of the Corliss and similar engines at an exposition are irrelevant where it is not shown that such reports were in the contemplation of the parties at the time of the sale or that the contract was made in reference to such tests.—Wickes Bros. v. Swift Electric Light Co., 70 Mich. 322.

¶ 1733. Evidence in a libel case that a person said that her mother had read the libelous article and shed tears over it and felt badly about it is hearsay and incompetent.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

¶ 1734. In a libel suit what certain signers of a petition for the appointment of plaintiff to office said to defendant about plaintiff's character and reputation is hearsay.—Sanford v. Rowley, 93 Mich. 119.

¶ 1735. Testimony, upon the probate of a will, as to the statement of a person who not long before testator's death was sent for to draft a will for him and who declined to go, that his reason for declining was that he did not consider testator capable of making a will, is inadmissible, being hearsay.—In re Lefevre's Estate, 102 Mich. 568.

¶ 1736. Testimony of a witness for the contestant of a will as to what her husband told her with reference to proponent's intention to keep them away from testator, is inadmissible as hearsay.—Hurton v. Hurton, 113 Mich. 634.

¶ 1737. In replevin for goods fraudulently purchased from plaintiffs, it is error to permit plaintiffs' attorney to testify to a statement, made by the representative of other vendors in the absence of the vendees, of a conversation he had with a stranger in a street car that he had sold the vendees a large bill of goods, and that the representative further said that he had ascertained that the vendees had purchased several thousand dollars' worth more than they got from him.—Munzer v. Stern, 105 Mich. 523.

¶ 1738. In an action to recover for the illegal sale of liquor to plaintiff's son, who was injured by reason of his intoxication, testimony of statements made by the son to the effect that he did not procure liquor from defendant, is hearsay and inadmissible, except to impeach the son as a witness.—Van Alstine v. Kaniecki, 109 Mich. 318.

¶ 1739. Evidence as to what was said by the son of an alleged fraudulent vendor with reference to where he obtained property subsequently sold by him is inadmissible in a suit between the vendee and an execution creditor of the vendor, being mere hearsay.—Vyn v. Keppel, 108 Mich. 244.

¶ 1740. Testimony by a bank cashier, sued upon his written agreement to repay to the bank certain money, that his son, an employee of the bank, told him he had stolen the money from the bank, is hearsay and incompetent to invalidate the writing for want of consideration and thus to relieve defendant from liability where the theft has never been brought home to the son.—Lansing Nat. Bank v. Coleman, 117 Mich. 177.

¶ 1741. In an action involving the payment of a check paid by the banker's son in the absence of the father, testimony of the father as to what was said between the father and son upon the father's return, is inadmissible for the drawer against the payees.—Baumgardner v. Henry, 131 Mich. 240.

¶ 1742. As against a father-in-law, defendant in an alienation suit by the wife, it is hearsay for her to testify that her husband ascribed the blame for a temporary separation to the father, and that on a certain occasion his father was mad about taking a horse.—Derham v. Derham, 125 Mich. 109.

¶ 1743. Testimony by witnesses as to statements made to them by the wife of

plaintiff, in an action for alienation of affections and criminal conversation, detailing acts of extremely cruel conduct on the part of her husband, is inadmissible, being purely hearsay.—Brown v. Evans, 149 Mich. 429.

¶ 1744. In an action for trespass vi et armis, where damages were claimed to a mowing machine which had been damaged by spikes that were concealed in the grass the tenant was cutting, evidence by plaintiff as to what some one told him it would cost to have the machine repaired is hearsay and incompetent, when in fact the machine had not yet been repaired.—Byers v. Anderson, 143 Mich. 178.

¶ 1745. Testimony of a witness to the effect that three members of the board of public works, together with the city engineer, examined the street, and agreed that the plan proposed for the improvement was the best one, is hearsay evidence, and therefore incompetent.—City of Grand Rapids v. Coit, 149 Mich. 668.

¶ 1746. Where, in an action on an insurance policy the defense was suicide, and as a motive for suicide it was attempted to show that insured had appropriated money received by him on certain collections, such appropriation cannot be shown by evidence of an agent of insured's employer as to what third persons said to him concerning moneys paid to insured.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240.

¶ 1747. Evidence that a teamster hauling goods from a railroad to the warehouse of the consignee, told witness that he hauled a certain number of cases of goods, is inadmissible as hearsay in an action by an assignee of the consignee against the railroad to recover for loss of goods before delivery.—Oceana Canning Co. v. King, 200 Mich. 268.

§ 308. Party's acts and declarations as hearsay.

Admissions and declarations against interest by party in person, see post VII, C, 1, 2.
Admissibility of declarations by agents and privies against interest of party, see post, VII, C, 3.
Others' statements as to what a party said or did, see post § 312.
Res gestæ declarations, see post, VII, D.
Self-serving declarations of party, see post VII, E.

¶ 1748. Where a surgeon is sued for malpractice in healing a fractured limb it is not proper to give in evidence plaintiff's statement, while under treatment, that he thought the bandages were too tight. Plaintiff was not an expert, and if he had been the testimony was hearsay.—Mayo v. Wright, 63 Mich. 32.

¶ 1749. Testimony by the father of a person who claims bona fide and actual possession of a parcel of wild land that he once heard his son say he calculated to buy an adjoining parcel of land and make a home of the two parcels, is inadmissible, being hearsay.—McKinnon v. Meston, 104 Mich. 642.

¶ 1750. The testimony of a widow, on a bill to determine the title to a policy of insurance taken out by her deceased husband, in which he named his mother as the beneficiary, that he said he had made a demand of the policy of his mother and she had refused to give it up, is hearsay evidence—no witness being called who heard such a demand made.—Coston v. Coston, 145 Mich. 390.

§ 309. Conversations between parties.

Conversations offered as admissions or declarations against interest, see post, VII, C.
Conversations offered as res gestæ, see post, VII, D.
Self-serving conversations, see post, VII, E.
Conversations evincive of mental state, attitude or thoughts, see post §§ 329-335.
Conversations admissible in proof of other than stated facts, see post §§ 326-328.
Admissibility of complementary portions to make conversation complete, see ante § 91.

¶ 1751. In an attorney's action for services rendered in the trial of a case, a conversation between him and his client in the nature of advice shortly after such trial concerning the result thereof was admissible although it contained a reference to the opinion of a third person on the same subject.—Crowell v. Truax, 94 Mich. 585.

¶ 1752. In a suit on an indemnity bond to secure repayment to a surety upon a former bond of what he paid thereon, evidence may be given of interviews between the parties thereto concerning their respective interests, whether before or after date of the bond sued on.—Lee v. Wisner, 38 Mich. 82.

§ 310. Common remark or bystanders' comment.

See also post ¶ 2473.
Acts of persons in like situation as res gestæ of accident, see post § 466.
Character evidence and evidence of common reputation, see post, VII, B.

¶ 1753. It is incompetent to testify to mere statements made by people living in the vicinity of alleged oil lands as to the character and market value of the lands; such evidence is hearsay.—Kost v. Bender, 25 Mich. 515.

¶ 1754. That bystanders at the time of an assault asked a policeman to arrest defendant

cannot be shown in an action for assault, nor are the opinions or comments of such bystanders admissible.—Kuhn v. Freund, 87 Mich. 545.

¶ 1755. In a suit for assault and battery, evidence as to the opinions and conclusions expressed by bystanders on various aspects of the controversy are inadmissible, as being hearsay.—Pratt v. Hamilton, 161 Mich. 258.

¶ 1755a. In an action on a mutual benefit insurance certificate, in which it is claimed that defendant was estopped to set up the defense of fraudulent statements in the application of insured as to his use of intoxicating liquor and drugs by knowledge of the habits of the insured before the certificate was signed, the evidence of a local officer that she told a representative of the supreme camp before the certificate was signed that it was rumored that insured was a user of liquor and a drug fiend is incompetent as hearsay.—Cameron v. Royal Neighbors of America, 197 Mich. 173.

¶ 1756. Where, in an action for conversion of goods, their value is in question, evidence as to what was said concerning their quality by prospective bidders at an execution sale is inadmissible.—Wessels v. Beeman, 87 Mich. 481.

§ 311. Testimony by witness based on others' statements or knowledge.

Testimony as to one's own age, see post § 323.

Testimony as to another's health, pain or bodily condition, see ante § 236.

Opinion of expert based on another's medical report as hearsay, see ante ¶ 1666.

Testimony to description of lands identified by others, see post ¶ 1815.

Hearsay as to another man's reputation, see post § 358.

Based on writings made by others, see post § 317.

Writings embodying information gained from others, see post § 315.

Hearsay testimony of telephone conversation, see post ¶ 1799.

Admissibility of testimony by party that other parties to contract sued on told him they were a partnership, see also Corporations ¶ 396.

¶ 1757. In an action for injury from a surgeon's negligence it is proper for the defense to show that it resulted from plaintiff's imprudence in throwing off his splints and going on crutches; but that fact cannot be shown by the statements of one who had no personal knowledge of it.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 1758. In an action for personal injury from mill machinery, the question whether a witness had ever heard of such injuries to other persons is improper as calling for hearsay.—Huizega v. Cutler & Savidge Lumber Co., 51 Mich. 272.

¶ 1759. In an action for labor and materials furnished a plaintiff was asked, "How about the time?" and was allowed to answer, "It was correct as given by my foreman." Another plaintiff who testified on the subject stated that he knew nothing about it except what the workmen had told him. It did not appear who the foreman was, and no excuse was given for not producing his testimony or that of the workmen. Held, that the evidence was hearsay and inadmissible.—Richmond v. Atkinson, 58 Mich. 413.

¶ 1760. A physician who says that he knew nothing as to the health of deceased, cannot testify as to a conversation concerning it between himself and the mother of deceased, as evidence of such health.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 1761. Where a sheriff sued in trover for selling mortgaged property defends on the ground that the mortgage was fraudulent, the testimony of the mortgagor's wife as to negotiations between her husband and the mortgagee, of which she knows nothing except as the husband informs her, is incompetent.—Eddy v. McCall, 71 Mich. 497.

¶ 1762. Defendant in slander was charged with having said that plaintiff "is a damned, low-lived, thieving son of a bitch, and I have had a man watching him, and seen him steal: and I believe you know he is a thief." One of the persons to whom these words were spoken testified that defendant did not state at the time what he had plaintiff watched for. Held, that testimony from such witness that he had since learned why defendant had plaintiff watched was properly excluded as hearsay.—Ellis v. Whitehead, 95 Mich. 105.

¶ 1763. On the issue whether a tax purchaser ever went into possession of land in question, it is hearsay prove by a child of the original owner what he understood to be the facts learned in conversations with a third person.—Watkins v. Green, 101 Mich. 493.

¶ 1764. In an action involving payment of a check, paid by the banker's son in his absence from the bank, the banker cannot testify as to what the son said to him relative to the transaction or as to who presented the check, such testimony being clearly hearsay.—Baumgardner v. Henry, 131 Mich. 240.

¶ 1765. In an action to recover for hauling goods where the defendant had denied he had requested plaintiff to haul them, the plaintiff cannot prove defendant's order by testifying as to what another had reported to him defendant had said over the telephone.—Duvall v. Ferwerda, 146 Mich. 13.

¶ 1766. In an action for the price of goods sold and delivered, being furnished under an oral contract to erect a building, where the contention was over articles furnished and claimed to be extras, testimony by the plaintiff's superintendent as to what items figured in the work is properly excluded where it appears that witness had no conversation with the defendant, and only knew what the plaintiff had told him about the contract.—Rikerd Lumber Co. v. Hoertz, 146 Mich. 386.

¶ 1767. In an action by a tenant against a landlord for unlawful ejectment, there was no written lease between the parties but there was evidence that one Starks, the preceding tenant, had a written lease, that defendant orally told plaintiff he should have the same rights as Starks and that during the making of the oral arrangement plaintiff did not see Starks' lease or know its contents. Held, the testimony of plaintiff as to Starks' lease was not admissible.—Carman v. Scott, 172 Mich. 44.

§ 312. Testimony by others as to what a party said or did.

¶ 1768. The kind of knife with which an attack was made upon defendant cannot be testified to by one who did not see the knife at the time of the fight, but to whom defendant subsequently showed a knife which he claimed to have been the one used.—Culley v. Walkeen, 80 Mich. 443.

¶ 1769. Where in a suit for assault and battery, the question is disputed as to whether defendant hit the plaintiff with his fist or a hammer, it is error to permit a physician to testify that the plaintiff said he was hit by a hammer.—Pratt v. Hamilton, 161 Mich. 258.

¶ 1770. In an action for breach of promise of marriage, testimony that third persons had told plaintiff that defendant said she had certain physical disabilities is inadmissible, being hearsay.—Goddard v. Westcott, 82 Mich. 180.

¶ 1771. Testimony of a witness in a will probate contest as to statements made by another to the effect that one of the parties to the suit had made certain admissions, is hearsay and therefore inadmissible.—Henrich v. Saier, 124 Mich. 86.

¶ 1772. In an action for seduction testimony by the plaintiff that she had been told by third parties that defendant said she was a mother but he could prove he was not the cause is clearly hearsay and inadmissible.—Greenman v. O'Riley, 144 Mich. 534.

¶ 1773. In an action for assault and battery, defendant sought to show in support of his plea of self-defense that plaintiff had gone about saying defendant was cheating one Mills. Held, it was prejudicial error to permit defendant to quote Mills as saying plaintiff had made such statements.—Mills v. Warner, 167 Mich. 619.

¶ 1774. Testimony by plaintiff in an action for libel that a third person stated that defendant sent him to plaintiff to make a settlement between the parties is hearsay and refusal to strike it is error.—Kovacs v. Mayoras, 175 Mich. 582.

§ 313. Testimony as to source of information or authority.

Proof of making of statement as distinguished from truth of statements, see post § 327.

Competency of agent's direct testimony that he is agent, see Agency §§ 9, 40.

¶ 1775. A husband's testimony that he had a building made by his wife's directions and with her money is not hearsay evidence of her title.—Gutsch v. McIlhargy, 69 Mich. 377.

¶ 1776. In an action upon a note defendant sought to show that the indorsement by the payee (since deceased) to plaintiff was a forgery. Plaintiff's testimony showed the indorsement was made after the actual transfer. Held, that a question asked plaintiff by his counsel as to the person who told him that such indorsement was necessary was properly excluded as immaterial and hearsay.—Hillman v. Schwenk, 68 Mich. 293.

§ 314. Testimony partly hearsay.

Admissibility of entire conversation or communication, see ante § 91.

Testimony as to things said admitted for proof of other things, see post § 326 et seq.

Declarations admissible to show mental state and inadmissible for other purpose, see also ante ¶ 494.

¶ 1777. Where individual witnesses, in testifying to the reasons of several joint parties for delaying in the presentation of stale claims, speak in the plural number, their testimony, so far as it involves merely the knowledge or opinions of others than themselves, is hearsay.—Patrick v. Howard, 47 Mich. 40.

¶ 1778. In an action by an attorney for services rendered in the trial of a case, it is error to permit the plaintiff, when testifying as a witness, to state that part of a conversation had with defendant upon his employment in a previous case in which he told defendant what lawyers about town said in regard to defendant's having trouble in settling with all the lawyers he ever had.—Crowell v. Truax, 94 Mich. 585.

¶ 1779. Where the testimony of a witness in reference to a particular subject is part of a continuous conversation relating to that matter and to the subject of the litigation,

it is not error to admit it if the conversation is relevant.—Dibble v. Nash, 47 Mich. 589.

§ 315. Private writings and entries as hearsay.

Diary entries based on others' statements, see post ¶ 2601.

Writings emanating from third persons, see post § 316.

Public writings as hearsay, see post § 320.

¶ 1780. Mere memoranda appearing upon the pages of a ledger and journal fix no right or credits, and are inadmissible in evidence, if they cannot be identified with any transaction or their purpose ascertained. And they cannot be treated as if they were different in any respect from what they really are for the purpose of giving them significance.—Seligman v. Ten Eyck's Estate, 53 Mich. 285.

¶ 1781. A plaintiff cannot be permitted to testify that his bill of particulars is a correct statement after he has testified that it does not refresh his memory as to items to which he cannot testify without it, and of which he has no personal knowledge.—Richmond v. Atkinson, 58 Mich. 413.

¶ 1782. A memorandum written by witness on the envelope in which the note was inclosed is not admissible as original evidence to corroborate his testimony as to the date of receipt; since it is like any other declaration by him out of court.—Weaver v. Bromley, 65 Mich. 212.

¶ 1783. A private memorandum made by one party of the differences arising on an attempted settlement is not admissible in evidence in a suit involving the subject-matter of such attempted settlement.—Tompkins v. Gardner & Spry Co., 69 Mich. 58.

¶ 1784. Ex parte statements in preliminary proof of death of an insured person are not evidence.—Cook v. Standard Life & Accident Ins. Co., 84 Mich. 12.

¶ 1785. An inventory based in part upon information derived from others by the person who made it is not admissible in evidence.—Black v. Simon, 116 Mich. 382.

¶ 1786. Memoranda purporting to show items of shortage in goods purchased are inadmissible in evidence in the absence of testimony to prove their correctness.—Pabst Brewing Co. v. Lueders, 107 Mich. 41.

¶ 1787. In an ejectment suit brought by plaintiff claiming title by adverse possession, defendants sought to show that the possession had been interrupted by contractual sales and surrender of the premises to third parties. Held, it was improper to allow defendants to introduce in evidence the memoranda and indorsements of payments made upon the contract, such evidence being hearsay.—Merritt v. Westerman, 165 Mich. 535.

§ 316. Writings emanating from third persons.

Statements based on others' writings, see post § 317.

Official and public writings, see post § 320.

Recital in deed as to facts of ownership as prima facie evidence thereof, see also post ¶ 2904.

¶ 1788. Time checks issued by a subcontractor to laborers are in the nature of hearsay and inadmissible in an action for a labor debt.—Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538.

¶ 1789. An instrument purporting to be an assignment of a certificate of purchase therein recited, although duly proved, does not establish the existence of the certificate of purchase as against persons not parties to it.—Lee v. Payne, 4 Mich. 106.

¶ 1790. In a proceeding against an estate to recover the face of the note given by decedent it was shown that the maker had directed the cashier of a bank to pay the claimant a certain sum, and had himself given the cashier a check to serve as a voucher. Held, that after the payment of the amount had been shown the cancelled check was properly excluded as evidence, at least as against the claimant, since it was only a voucher by the bank to the drawer.—Smith's Appeal, 52 Mich. 415.

¶ 1791. Where there is nothing to show that plaintiff is bound by its contents, a letter to defendant from a third person is inadmissible to show that plaintiff has parted with his interest in the cause of action.—Ziegler v. Henry, 77 Mich. 480.

¶ 1792. Letters from the board of a church of which a clergyman was about to take charge, to such clergyman, and letters from his former parishioners to such board, in answer thereto, were hearsay evidence as to defendants, and inadmissible, in an action for a libel consisting of a letter derogatory to the character of such clergyman written to such board.—Konkle v. Haven, 140 Mich. 472.

¶ 1793. It is not competent to offer petitions for appointment to office as evidence in a libel suit to show that the plaintiff's character and reputation for truth and veracity is good.—Sanford v. Rowley, 93 Mich. 119.

¶ 1794. In garnishment proceedings to reach property conveyed by a husband to his wife, a letter written by a son to a friend is inadmissible, because, not being introduced by way of impeachment, and not being so connected with the transaction as to be part of the res gestæ, it is mere hearsay.—Webber v. Hayes, 117 Mich. 256.

§ 317. Statements based on writings made by others.

¶ 1795. In an action on a contract to furnish logs through a boom company, the number of logs delivered by the company cannot be shown by asking a witness who has no personal knowledge to state the number as given him by the company's tally.—Hopkins v. Sanford, 41 Mich. 243.

¶ 1796. Allowing a surveyor, who is called as a witness in a case involving the location of a boundary line, to state his knowledge of its true location as derived from his early survey of the same, which he found to correspond with certain specified old maps and plats not offered in evidence, was held not to have been error.—Wineman v. Grummond, 90 Mich. 280.

¶ 1797. Where, in an action for the price of goods sold, plaintiff's shipping clerk is handed statements which he testifies he saw copied from plaintiff's order-books, containing lists of goods shipped to a third person on defendant's account, such clerk may testify that he gave the lists to the packer, and shipped the cases packed by him to such third person; and this though the packer is not produced as a witness.—Robinson v. Mulder, 81 Mich. 75.

§ 318. Market quotations.

Admissibility of market reports and quotations on questions of damages or values, see Damages, XI, B; Values.

¶ 1798. Market quotations contained in a trade paper as to the value of hides in Chicago were admissible in evidence, in an action for breach of contract of sale of hides in Detroit, Michigan; where supported by evidence that more hides of the class named in the agreement of sale are taken off in Chicago than in any other city of the United States.—Kibler v. Caplis, 140 Mich. 28.

§ 319. Conversations over telephone.

Presumption as to identity of person called and responding, see ante ¶ 237.

Testimony that another reported having had certain telephone conversation, see ante ¶ 1765.

¶ 1799. Testimony of the plaintiff as to what someone had told him the defendant had said over the telephone is inadmissible as hearsay and should have been stricken out on proper motion.—Duvall v. Ferwerda, 146 Mich. 13.

¶ 1800. Conversation over the telephone is admissible as evidence against a railroad company for wrongful interference with plaintiff's contract rights, where there was no doubt concerning the identity of the persons talking over the telephone and the official character of those who were assuming to speak for such company.—Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712.

¶ 1801. A telephone conversation is admissible where the identity of the persons communicated with by telephone is established.—Thelsen v. Detroit Taxicab & Transfer Co., 200 Mich. 136.

§ 320. Official or public statements and declarations.

Official tests and reports, see also ante ¶ 1732.

Reports as documents, see post § 534.

Reading law books as evidence of particular custom, see Customs ¶ 50.

¶ 1802. An unofficial oral statement of an ex-deputy land commissioner to the commissioner of the land office was held to be mere hearsay, and too uncertain to have any bearing on a question of land titles.—People ex rel. County of Houghton v. State Land Office Com'r, 23 Mich. 270.

¶ 1803. In an action to recover for the breach of a contract to construct a building, a notice from the building department of a city is not admissible for the purpose of showing the condition of the structure at a certain time, since it is hearsay.—Newton v. Consolidated Construction Co., 184 Mich. 63.

¶ 1804. A policeman's report as to the time of an accident is inadmissible in a personal injury action where not based on his own personal knowledge.—Sterling v. City of Detroit, 134 Mich. 22.

¶ 1805. In an action for personal injuries a report by a patrolman sent to the scene of the accident after it had happened is properly excluded.—Goosen v. Packard Motor Car Co., 174 Mich. 654.

§ 321. Exceptions to hearsay rule, matters provable.

Exception in favor of ancient documents, see post § 322.

To prove identity, possession, existence, or title, see post §§ 324, 325.

Proof of statements to fix time or other extraneous fact, see post §§ 326-328.

Exception as to res gestæ, see post, VII, D.

Inadmissibility where fact is unnecessary to be proved, see ante ¶ 389.

Admissibility for limited purpose of impeachment, see Witnesses, VI, D.

Ruling limiting purpose and instructions thereon, see Trial, V, C; Instructions, VI.

¶ 1806. In those cases where hearsay is admissible because the matter is of public interest, what a witness has heard post litem motam—by which is meant since the dispute has arisen, and not merely the commencement of suit—is not evidence.—Stockton v. Williams, W. 120.

§ 322. Recitals in ancient documents.

¶ 1807. Documents, viz., a power of attorney, a deed, and a court order, executed in 1846 are ancient documents, and their recitals are proof of the facts therein recited, even as against strangers.—Norris v. Hall, 124 Mich. 170.

§ 323. Pedigree, age and relationship.

One's testimony to his own age as best evidence, see ante § 113.

Proof of breed or pedigree of horses by registration in stud books, see Jud. Act, chap. XVII, § 45; Comp. L. 1915, § 12533.

¶ 1808. Interrogatories relating to family relationship, dates of decease and marriages, may well be answered on the basis of family tradition instead of direct personal knowledge.—Van Sickle v. Gibson, 40 Mich. 170.

¶ 1809. While the declarations of a deceased person shown to have been legitimately related by blood to the person to whom they relate, or by the husband or wife of such a person, are admissible as primary proof of pedigree, such relationship, if questioned, must be shown by other evidence than such declarations.—Lamoreaux v. Attorney-General, 89 Mich. 146.

¶ 1810. A leaf taken from deceased soldier's private record book, required to be kept by soldiers in the British service, containing the names of the father and his wife, and the names, ages and birth-places of all his children, is admissible in proof of the age of a child of such soldier.—Hunt v. Supreme Council of Chosen Friends, 64 Mich. 671.

¶ 1811. One may testify to his own age.—Cheever v. Congdon, 34 Mich. 296; Morrison v. Emsley, 53 Mich. 564.

§ 324. Identity, existence or residence of persons.

¶ 1812. General hearsay and public reputation subsequent in time to the treaty are inadmissible to prove which of two persons claiming, by the same name, a particular reservation made by the treaty of Saginaw of September 24, 1819, was the person intended.—Campau v. Dewey, 9 Mich. 381; Stockton v. Williams, 1 D. 546 which affirmed, but criticised as too broad the rule laid down in Stockton v. Williams, W. 120.

¶ 1813. Testimony that a witness knows by repute that her father and his brother came to the state together, and that they were the only two brothers of the family that did come to the state, is not objectionable as hearsay.—Fraser v. Jennison, 42 Mich. 206.

¶ 1814. Hearsay evidence is not admissible to prove the existence of living persons; especially when it furnishes no means of finding or identifying them.—Crane v. Reeder, 21 Mich. 24.

§ 325. Possession, title, identity or ownership of property.

Statements showing title, see also post § 326.

As to identity, see also post ¶ 1819.

Res gestæ declarations, see post §§ 447, 448.

Agents' declarations relative to possession as res gestæ, see post § 481.

Self-serving claims of title or right, see post § 486.

¶ 1815. Where the controversy was whether lumbering on certain lands ceased in 1873, a witness testified that subsequently he worked upon lands the government description of which he could not give, but which he had pointed out to another witness. Held, that the latter witness, after testifying that the lands were so pointed out to him, and that he knew the descriptions, could give the same.—Wright v. Dickinson, 67 Mich. 590.

§ 326. Admissibility on issues other than facts stated.

To show rationality or irrationality of declarant, see post § 335.

Declarations as verbal acts forming part of res gestæ, see post, VII, D.

Admissibility of declarations in contradiction or corroboration of impeached witness, see Witnesses, VI, D.

Admissibility of newspaper advertisement, offering property for sale, in action for broker's commission, see Brokers ¶ 165.

Admissibility of evidence of threats to prosecute as bearing on issue of compounding crime, see Contracts § 314.

Admissibility of prosecuting attorney's statement to complaining witness as bearing on who was responsible for prosecution, see Malicious Prosecution, VI.

¶ 1816. The fact of a conversation with a third person in the absence of the opposite parties to a case may be admissible to show the date of a negotiation with them when it would not be to show the terms of the negotiation itself.—Shaver v. Ingham, 58 Mich. 649.

¶ 1817. Parol negotiations with a third person by which a chattel was sold to him on condition and that the condition was not performed by reason whereof title remained in the party testifying to such conversation are admissible against the person claiming under the conditional buyer even though they were not had in his presence.—Fifield v. Elmer, 25 Mich. 48.

¶ 1818. A letter from the superintendent of a boom company to its president, stating the terms upon which he had hired an employee (i. e., what he "told" the plaintiff when hiring him), is admissible in evidence for the latter in a suit by him against the

company for his wages, where it was obtained by the defendant for its own information as to terms of the employment.—Hardy v. Tittabawassee Boom Co., 52 Mich. 45.

¶ 1819. In a suit by the taker of a counterfeit note to recover its value, the statements of persons not witnesses, through whose hands the note has passed, are not admissible either to identify or prove the note counterfeit.—Atwood v. Cornwall, 28 Mich. 336.

¶ 1820. A woman whose husband's employer had discharged him sued the employer for an indecent assault upon her. Defendant claimed the suit was one by collusion to extort money. Held proper to strike out as hearsay a witness' testimony for plaintiff that she had heard of the case from the plaintiff's husband before his discharge.—Mawich v. Elsey, 47 Mich. 10.

¶ 1821. A telegram from the owners of logs to a broker, to whom they had given an option on the logs, which he had sold to a lumber manufacturer for an agreed commission, stating that the option was extended, is competent evidence, in a suit by the broker against the buyer to recover the commission, of the extension of the option.—McKinnon v. Gates, 102 Mich. 618.

¶ 1822. Plaintiff, employed by defendant's general agent to get out timber, and claiming also that there was a separate agreement to hire help in getting out a particular lot pursuant to which plaintiff advanced money to the person so hired, may testify as to conversations had with persons about getting out that timber after the general agent sanctioned the employment, such conversations having been reported by plaintiff to the general agent.—Inglish v. Ayer, 79 Mich. 516.

¶ 1823. In an action by the owner of goods against commission merchants to whom goods are intrusted for sale on the common counts in assumpsit and for goods sold and delivered, correspondence between the commission merchants and their agent offered for the purpose of showing what became of the goods and the things done in discharge of their duties is properly excluded as hearsay.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 1824. In an action on an insurance policy where the question is whether formal proofs were waived by the conduct of an insurance adjuster, the company's agent, as showing the circumstances under which the adjuster came, may testify that he introduced him to the son of the assured, and heard some of their conversation.—Gristock v. Royal Ins. Co., 84 Mich. 161 adhered to on rehearing 87 Mich. 428.

¶ 1825. In an action for fraud in the sale of a partner's interest in a business, based on misrepresentations of the value of the interest and of the accounts outstanding, it was proper for the plaintiff as a witness to testify what was said as to the extent of the continuing partner's interest, and to show that it was really nominal.—Totten v. Burhans, 103 Mich. 6.

¶ 1826. Where one party to an action claims that he stopped cutting timber on certain lands because served with an injunction, which claim and the fact of service the other party denies, the testimony of witnesses that they had heard of such service, offered to fix the date when the cutting was suspended, but which is unnecessary for that purpose, is inadmissible.—Wright v. Dickinson, 67 Mich. 590.

§ 327. ——To prove the making of the statement.

Proof that another gave or reposed authority, see ante § 313.

Admissibility of hearer's testimony of what words were spoken, see ante ¶ 415.

¶ 1827. Where the correctness of a scale was disputed in an action on a contract for sawing logs testimony that a witness had heard something going to affect the correctness of plaintiff's scale from certain specified persons is not hearsay; though to state what he heard would be improper.—Grosvenor v. Ellis, 44 Mich. 452.

¶ 1828. A husband's testimony that he caused a building to be made by his wife's directions and with her money is not hearsay evidence of her title.—Gutsch v. McIlhargey, 69 Mich. 377.

¶ 1829. In an action to recover damages for defective springs sold by defendant to plaintiff, plaintiff's witness testified that he examined the springs and knew the items of loss suffered from the complaints of plaintiff's customers. Held, such evidence was not open to the objection of being hearsay.—H. Scherer & Co. v. Independent Steel & Wire Co., 162 Mich. 173.

¶ 1830. Where testimony was offered to prove by a clerk that certain letters were dictated to her by a member of the firm, were written out by her and signed by her with the firm name, put in an envelope properly addressed and mailed to the plaintiff, an objection that the evidence was hearsay and the proper person by whom to prove the facts was the member who dictated the letter was improperly sustained.—Wyandotte Portland Cement Co. v. Bruner, 147 Mich. 400.

¶ 1831. One at whose direction a letter was written by another, and who read it after it was written, is competent to testify as to its contents.—Burt v. Long, 106 Mich. 210.

§ 328. ——To bring notice or knowledge to others.

¶ 1832. Replevin for certain barrels of apples. Defendant claimed a part of them. It became a question whether these could be distinguished from the rest; and the question of title was also material. On the trial, the defendant being a witness, it was held competent for him to testify that when the apples were replevied his agent pointed out certain barrels and stated that they were the ones purchased by defendant. The evidence was competent, not to establish title, but as tending to show whether there was such a confusion of goods that the officer was justifiable in taking possession of more apples than belonged to the plaintiffs.—Sleight v. Henning, 12 Mich. 371.

¶ 1833. In an action to charge two defendants as partners with the payment of plaintiff's services in running a shingle-mill previously owned by both as a firm, but then belonging to one only, reports of a scaler employed by plaintiff, wherein the mill is described by the name of the defendant alone, and which were made for the purpose of enabling the plaintiff to settle with the boom company for boom charges, are admissible in evidence as tending somewhat to show notice to plaintiff that the mill business was being carried on on such defendant's individual account, and not, as formerly, by the firm.—Robinson v. Worden, 33 Mich. 316.

¶ 1834. A plaintiff in trespass can show that he received information from a third person that the trespassers were on his land, but the testimony is admissible to show how he learned of the trespass, and not as tending to show that it was committed.—Gordon v. Cook, 47 Mich. 248.

¶ 1835. In an action by a married woman for the seizure of property mortgaged by her husband and son, but in which she had an undivided interest, evidence of defendant's conversations with the mortgagers on their own private business, and in plaintiff's absence, is inadmissible. But evidence bearing on a conversation between defendant and plaintiff concerning the purchase of property for herself and her husband is competent to show his knowledge of her interest.—Keables v. Christie, 47 Mich. 594.

¶ 1836. In an action for the value of timber taken from land by one who has purchased from the holder of a void tax-title, the good faith of the purchaser could not be shown by merely hearsay evidence that before his purchase the title was investigated by counsel and pronounced good.—Tuttle v. White, 49 Mich. 407.

¶ 1837. A client buying land on which execution has been levied cannot, against objection, show that his attorney advised him that the execution was returned satisfied and the levy was no longer a lien, for this would be hearsay. And if the advice were sound it would be unnecessary for protection, while if it were not it could not affect rights depending on the levy.—Vroman v. Thompson, 51 Mich. 452.

¶ 1838. In replevin for shingles which both parties claim to have purchased from the same vendor, evidence of conversations between vendor and defendant's agent, when the latter visited the mill to count the shingles, is admissible for defendant.—Marthinson v. Wagner, 63 Mich. 543.

¶ 1839. On an issue of plaintiff's good faith in cutting timber on another's land evidence as to what C., a foreman of the landowner, but having no authority to bind him, said after the trespass, about the boundary between plaintiff's land and the other's, is inadmissible, especially where it does not appear that plaintiff was informed of what C. said.—Gates v. Rifle Boom Co., 70 Mich. 309.

¶ 1840. Where the good faith of a chattel mortgage is in issue, evidence of advice given to the mortgager, in the mortgagee's absence, by one who had done the business for both parties, "as to what disposition he could make of his property so as to cover it up," cannot be received to affect the mortgagee's rights.—Ganong v. Green, 71 Mich. 1.

¶ 1841. In an action in assumpsit for breach of warranty, hearsay evidence is admissible for the purpose of showing when the plaintiff learned and became satisfied that he had been defrauded.—McNitt v. Henderson, 155 Mich. 214.

¶ 1842. On the question whether a creditor, holding an unrecorded chattel mortgage, made false representations of his debt and of the debtor's residence to induce another to give the debtor credit, such other person may state, as bearing upon the place where he would be likely to search for chattel mortgages, where he understood the debtor's residence to be, from a letter written to him by the creditor in answer to a letter of inquiry.—Curtis v. Wilcox, 91 Mich. 229.

¶ 1843. Where, in a suit to recover the price of certain mirrors, defendant claimed that they were defective, and were never accepted, it is competent to show that defendant requested a third person to notify plaintiffs of her dissatisfaction, if it is shown that such message was communicated to plaintiffs; otherwise such testimony is incompetent and immaterial.—Hudson v. Roos, 76 Mich. 173.

§ 329. Declarations evincive of claim or dominion.

Declarations evincive of other thoughts and intents or of mental condition of declarant, see post §§ 330-335.

To show adverse claim, see post § 330.

¶ 1844. Testimony in a replevin suit that plaintiff's son had offered to sell the property would not tend to show the son's actual ownership, but would tend to show his assertion of ownership, which would be some evidence that he did not recognize his father's title, and might bear upon the father's acquiescence; it would be of the same quality as testimony of the father's conduct showing the nature of his possession.—Woolston v. Smead, 42 Mich. 54.

¶ 1845. In an action for trespass evidence of a previous conversation between the plaintiff and a third person about splitting rails to fence the land was held admissible as tending to show acts of ownership.—Gordon v. Cook, 47 Mich. 248.

¶ 1846. In an action for withholding possession of furniture in a hotel and leased by plaintiff's vendor to K., who was also sublessee of the hotel, for as long as K. continued to lease the hotel, it was admissible as against defendant claiming under later levy against plaintiff's vendor to show that when demand by plaintiff was made of K. for surrender of the furniture he stated that the lease was terminated and that he could not surrender because he was holding under the levy; also that the lessor of the hotel had agreed to cancel; it shows that plaintiff was then entitled to possession because of the termination of the lease.—Munroe v. Moloney, 67 Mich. 83.

¶ 1847. Where plaintiff seeks to recover for goods furnished to M. on the credit of defendant, who, as plaintiff alleges, knew the fact and understood he was to pay, evidence that defendant's agent took possession of a part of the goods for the reason, as stated, that his principal would have to pay for them, is admissible as tending to support plaintiff's claim.—Hagadorn v. Stronach Lumber Co., 81 Mich. 56.

¶ 1848. In a suit against the owner of a building for personal injuries arising from the lack of automatic gates to the elevator, a letter from defendant to the tenant in possession, confirming oral arrangements for the leases and stating that the defendant would provide automatic gates to the elevator, is admissible, not as an admission of a statutory duty to provide such gates, but to show defendant's assertion of dominion over the building.—Barfoot v. White Star Line, 170 Mich. 349.

§ 330. ——Evincive of adverse claim or possession.

Res gestæ of possession, see post § 447.
Self-serving declarations, see post § 486.

¶ 1849. The lessee of one tenant in common told the son of the other, while the father was living, that he (the lessee) had more right on the premises than he (the son) had. Held, that this had no tendency to prove that the tenant in common under whom he occupied the premises held adversely to the other.—Campau v. Campau, 45 Mich. 367.

¶ 1850. Assertions of title by one tenant in common to a stranger not communicated to or known by a cotenant are not receivable in evidence to show acts of open hostility to the title of said cotenant.—Loranger v. Carpenter, 148 Mich. 549.

§ 331. ——Evincive of responsibility or authorship.

¶ 1851. A hotel dining room manager brought suit against the proprietor for preventing the performance of the contract of management by interference. Held, that a letter from the proprietor to a newspaper, avowing his responsibility for the discharge of the table-waiters, was relevant evidence.—Beecher v. Pettee, 40 Mich. 181.

§ 332. ——Evincive of feelings or mental attitude.

Exclamations of pain as acts rather than declarations, see post ¶ 2401.
Evincive of intent or thoughts, see post §§ 333, 334.
Res gestæ showing feelings or state of mind, see post § 450.
Admissibility of threats known to defendant as bearing on self-defense, see Assault § 27.

¶ 1852. What one sued for assault and battery said after the assault is inadmissible to show malice at the time of the assault.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 1853. Statements made by a wife, not in the presence of defendant, and letters written by her, may be admitted, in an action by her husband for alienating her affections, for the purpose of showing her state of mind towards him; though on his objection she is excluded from testifying to her version of it in behalf of defendants.—McKenzie v. Lautenschlager, 113 Mich. 171.

¶ 1854. Evidence of statements made to plaintiff by his wife and tending to show the state of her feeling towards him, are admissible in an action for the alienation of her affections, although not made in the presence of the defendant.—Sweikhart v. Hanrahan, 184 Mich. 201.

¶ 1855. In an action by an administrator to recover for the conversion of certificates of deposit claimed by defendant as a gift causa mortis from decedent, declarations tending to show the relations of decedent and defendant are admissible as tending to show a state of mind inconsistent with the claim of the gift.—Pease v. Jennings, 180 Mich. 682.

§ 333. ——Evincive of good or bad faith, knowledge or intent of declarant.

See also ante ¶ 1749.

Admissibility of statements made as showing notice to hearer, see ante § 328.
Evincive of recognition, understanding, demand, claim, or protest, see post § 334.
Res gestæ evincive of malice, intent, knowledge, etc., see post § 451.
Books of account as evidence of knowledge by corporate officer who testified from them, see also post ¶ 2691.
Declarations and acts evincive of fraud or honesty, see Fraud, III; Fraudulent Conveyances, I, V.
Admissions tending to prove fraud on third persons in chattel mortgage, see Chattel Mortgages § 59.
Admissibility of letter to prove good faith in execution of chattel mortgage, see also Chattel Mortgages ¶ 246.

¶ 1856. Declarations and admissions made by an assignor for creditors, subsequent to the assignment and not in the assignee's presence, are nevertheless admissible to show the assignor's bad faith.—Koch v. Lyon, 82 Mich. 513.

¶ 1857. In order to show a co-defendant's knowledge of and connection with a fraud in procuring a loan partly of money and partly of other smaller mortgages on other land, the security being worthless land not owned by the mortgagers, plaintiff's agent testified that after obtaining certain of the smaller mortgages he met this co-defendant, who asked him "Have you got them all?" The agent answered "Yes." Defendant said "Don't you want to sell it. . . . It is a good thing." The agent further testified that he had never had any previous talk with this defendant about these mortgages. Held, that the evidence was admissible.—Stubly v. Beachboard, 68 Mich. 401.

¶ 1858. Admissions of a subsequent purchaser that he had knowledge of an attachment are admissible in evidence where it is further shown that he admitted also that he had purchased both after and subject to the attachment.—Hunt v. Strew, 33 Mich. 85.

¶ 1859. In a suit in replevin brought to recover on hay grown on defendant's land and harvested by plaintiff under an agreement for the division thereof made with defendant's father, testimony of defendant's conversations and acts after suit commenced is admissible to show acquiescence by him in the acts of his father as his agent.—Cronk v. Mulvaney, 168 Mich. 346.

¶ 1860. In an action for damages for assault and battery and ravishment, it is not reversible error to admit evidence that the defendant without giving any reason requested a friend to go on his bond, if necessary, before any action was taken and before he had knowledge that the plaintiff had informed her husband of the alleged acts.—Totten v. Totten, 172 Mich. 565.

¶ 1861. An admission by the defendant after the destruction while in his possession of a lighter belonging to the plaintiff, that he guessed that he would have a lighter to pay for, is admissible in an action against him for the value thereof, as tending to show that he understood that he had neglected some duty to protect the lighter.—Lund v. Lough, 186 Mich. 640.

¶ 1862. Conversations between the seller of a moving picture business and certain of his employees in which the former told the latter that he was losing money in the business, are properly admitted in evidence in an action by the purchaser of the business for damages for fraud as admissions against interest.—Johnson v. Campbell, 199 Mich. 186.

§ 334. ——Evincive of understanding, recognition, demand, claim, or protest.

See also ante ¶¶ 1750, 1832.
Evincive of fraud or bad faith, see ante § 333.
Res gestæ declarations, see post § 449.
Res gestæ of performance, acceptance or rejection, see post § 459.
Book entry as evidence which of two persons was one charged, see post ¶¶ 2676, 2685.
Admissibility of plaintiff's letters written during engagement to prove promise, see Breach of Promise to Marry § 5.

¶ 1863. The question of a loan by plaintiff to defendant being in issue, two witnesses testified to conversations with defendant, in which he authorized and requested one of them to procure the loan. Held competent to prove by a third witness that he had a conversation with defendant about the same time, about the feasibility of procuring such loan from the plaintiff.—Clark v. McGraw, 14 Mich. 139.

¶ 1864. Where a receiptor, on demand for the goods, replied orally that he would pay up the execution thereon, his answer was admissible to show which clause of the receipt he chose to comply with.—Bowen v. Culp, 36 Mich. 224.

¶ 1865. Where there was an issue as to whether abandonment of a contract by a third person was caused by defendant, and some evidence in the affirmative, it was proper to admit a letter from defendant to such third person telling him not to do certain work until certain conditions prevailed, and, if they did not occur, to omit doing it.—Hood v. Olin, 68 Mich. 165.

¶ 1866. On an issue as to there having been a settlement of accounts leaving a third person free from debt to one of the parties, a letter to another third person, stating that there had been such a settlement and that little was owing, and warning against selling anything more on defendant's account, is admissible.—Hood v. Olin, 68 Mich. 165.

¶ 1867. A surety on a note, after maturity, endorsed thereon his consent to "any extension of time" which might be given the principal. In an action against the surety, the defense being the statute of limitations, held that testimony that the surety upon being asked to give further extension refused to sign again and stated that the note was just as good as if he had signed it, is admissible as tending to show the light in which the parties regarded the agreement whether as a technical extension or as forbearance and successive indulgences.—Borden v. Fletcher's Estate, 131 Mich. 220.

¶ 1868. In a suit by a plaintiff to collect a loan, it is proper to admit letters written to defendant demanding payment, where the court instructs that the only purpose of such evidence is to prove a demand.—Leonard v. Piggott, 152 Mich. 436.

¶ 1869. In an action under the Interstate Commerce Act where the shipper sues the initial carrier for a diversion of the shipment, a letter sent by plaintiff to the connecting carrier protesting against stoppage of the car short of its destination is admissible to show that plaintiff objected to a violation of the contract of shipment but not as to declarations in his own favor.—Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

¶ 1870. In an action by a father against the estate of his son-in-law to recover on a claim for money loaned to be used by deceased and his wife in the purchase of property, letters written by deceased to claimant referring to a transaction relating to some stock which another witness stated that deceased said to him was turned over to claimant to pay interest, were admissible for the purpose of showing that the loan was made and that it was kept alive by payments and by acknowledgments in writing.—In re Davis' Estate, 200 Mich. 500.

¶ 1871. Statements and conduct of a grantee named in a deed delivered to a third person for delivery to the former at the grantor's death, may be considered in an action to set aside such conveyance for the benefit of the grantor's creditors, as bearing on the grantee's credibility as a witness, and his understanding as to the delivery and acceptance of the deed prior to the grantor's death.—Brown v. Keiser, 182 Mich. 432.

§ 335. ——To show sanity, mentality or rationality of declarant.

Admissibility against heirs, legatees or estate, see post § 412.

Book entries by decedents, see also post, VIII, B.

Relevancy and sufficiency of evidence of sanity or insanity, see Insane Persons, I; Wills, II, V.

¶ 1872. Where, in a suit to set aside a deed for a nominal consideration made to defendant by an aged and infirm person, mental incapacity and undue influence are charged, declarations made by the grantor to the effect that the defendant had agreed to give him a contract providing for his support are properly admitted as tending to show the mental state of the grantor at the time of the execution of the deed.—Noban v. Shoup, 171 Mich. 191.

§ 336. Declarations by persons since deceased.

Former testimony of persons since deceased, see post §§ 337-344.

As admissions against interest binding on successors, see post § 409 et seq.

Self-serving declarations by person since deceased, see post § 488.

¶ 1873. Testimony as to statements or understandings of executors respecting land sold by them, which would be inadmissible as hearsay, if they were living, is not made admissible because they are dead.—Egan v. Grece, 79 Mich. 629.

¶ 1874. Under Comp. L. 1897, § 2635, providing that the certificate of a notary public "shall not be evidence of notice of non-payment or non-acceptance in any case" in which a defendant shall annex to his plea an affidavit denying the fact of having received such notice; such a certificate is not admissible as secondary evidence when the notary is dead, under the rule admitting memoranda made in the usual course of business, etc.—Sexton v. Perrigo, 126 Mich. 542.

§ 337. Former testimony of witness present or available.

Former testimony of party where other party has since died, see also post ¶ 1889.

Former testimony as admission against interest, see post § 376.

Failure to deny other's testimony heard in court as an admission, see post ¶ 2068.

Failure to deny testimony in deposition as admission, see post ¶ 2070.

Propriety for impeachment, see Witnesses, VI, D.

Testimony on preliminary examination as evidence in trial for crime, see Indictment, VIII, B.

¶ 1875. Evidence of what a witness testified to on a former trial is properly excluded as hearsay, until he has been called as a witness on the second trial, and the proper foundation laid for such evidence.—Michigan Sav. Bank v. Butler's Estate, 98 Mich. 381.

¶ 1876. A witness may be questioned as to his testimony on a former trial for the purpose of refreshing his memory or to impeach him.—Battishill v. Humphreys, 64 Mich. 514.

¶ 1877. On a former trial plaintiff testified as to the location of a particular article and gave exactly the same evidence on the

second trial. Held, that there was no error committed in allowing the testimony of another witness, given on the former trial, that he heard the testimony of plaintiff on the point, and what such testimony was.—Johnson v. Spear, 82 Mich. 453.

¶ 1878. Where the court permitted the reading of the testimony of one witness on a former trial, that he heard the testimony of another witness on that trial to a certain effect, held, that such reading could not be injurious where the latter witness himself testified that he had given such evidence at a former trial, although his recollection at the second trial was indefinite as to the particular point involved.—Johnson v. Spear, 82 Mich. 453.

¶ 1879. Where a witness has stated that on the trial in justice's court defendant's son-in-law testified that he was present and heard the contract made between plaintiffs and defendant, his testimony that certain persons testified on such trial that such son-in-law was not present is hearsay and inadmissible.—Curren v. Ampersee, 96 Mich. 553.

¶ 1880. Upon a new trial, the attorney for plaintiff had caused a copy of the stenographic notes of the former trial to be made, and at the request of defendant's attorney produced them, and defendant's attorney read portions therefrom in evidence to the jury. Later, plaintiff desired to read from them to show what defendant testified on the former trial. Defendant's attorney objected on the ground that the defendant was in court and ready to testify. No proof of the authenticity of the notes was made, but defendant made no objection on this point. Held, no error was committed by allowing plaintiff to read into the evidence extracts from the notes of defendant's testimony on the former trial.—Opsomere v. Opsomere, 167 Mich. 636.

§ 338. Testimony on former trial by person since dead, absent or incompetent.

Of absent witness where deposition might be taken, see post § 339.
Character of former examination and testimony requisite to admission, see post § 340.
Requisite identities of present and former cases, see post § 341.
For and against whom admissible, see post § 342.
Foundation proofs or stipulations for admission, see post §§ 343, 344.
Means and sufficiency of proofs of former testimony, see post §§ 346, 347.
Sufficiency of proof of absence and of search, see post § 343.
Evidence to rebut inference arising from failure to testify on former occasion, see ante § 86.

¶ 1881. Where a witness has died, or is sick, insane or beyond the jurisdiction of the court, his testimony given on a former trial of the same issue between the same parties may be introduced.—Howard v. Patrick, 38 Mich. 795; Dunbar v. McGill, 69 Mich. 297.

¶ 1882. Where it has been shown that a witness at a former trial is beyond the jurisdiction of the court at the second trial his testimony given at the former trial may be read to the jury.—Dolph v. Lake Shore & M. S. Ry. Co., 149 Mich. 278; Croze v. St. Mary's Canal Mineral Land Co., 153 Mich. 363.

¶ 1883. Where a witness is only temporarily absent from the state, and it does not appear that he has been subpœnaed or that any effort has been made to procure his testimony or personal attendance, his testimony given on a trial in another court between other parties cannot be introduced.—Kellogg v. Secord, 42 Mich. 318.

¶ 1884. Temporary illness of a witness is not sufficient ground to justify the reading of evidence of the testimony of such witness taken upon a former trial.—Siefert v. Siefert, 123 Mich. 664.

¶ 1885. One cannot introduce the stenographic notes of testimony given on a former trial without having exhausted the best sources of information reasonably accessible to learn whether the witness himself cannot be found: this was so held where the witness' wife was not questioned as to his whereabouts.—Mawich v. Elsey, 47 Mich. 10.

¶ 1886. Testimony given in a justice's court by a party who has since died may be shown on appeal in the circuit court.—Lewis v. Roulo, 93 Mich. 475.

¶ 1887. Where a witness in justice's court dies pending an appeal, evidence of what he testified to before the justice is admissible upon the trial at the circuit.—Detroit Baseball Club v. Preston Nat. Bank, 113 Mich. 470.

¶ 1888. The right to use on a second trial, because of his absence from the state, the testimony of a witness given on the first trial of the case, is not affected by the fact that on the first trial he testified as a witness for the opposite party.—Hudson v. Roos, 76 Mich. 173.

¶ 1889. Where, after the first trial of a cause, defendant dies, plaintiff's testimony taken on such trial cannot be read upon a second trial if it relates to matters equally within defendant's knowledge; nor can the stenographer testify as to what plaintiff said on such trial, even though plaintiff offers to admit defendant's testimony as given thereon (How. St., § 7545).—Barker v. Hebbard, 81 Mich. 267.

§ 339. ——Testimony available by deposition.

See also ante ¶¶ 1883, 1884.

¶ 1890. Stenographer's minutes of testimony given on a former trial may be admitted even though the deposition of the witness himself has since been taken.—Labar v. Crane, 56 Mich. 585.

¶ 1891. In replevin against an officer for goods attached by him, an appraiser identified his signature to the appraisal, testifying that there was no material difference in the stock between his appraisal and an appraisal upon attachment. Held, that on a new trial, if he was absent from the state, his testimony could be read in evidence without showing that his deposition could not have been taken.—Rosenfield v. Case, 87 Mich. 295.

§ 340. ——Completeness and character of former examination.

¶ 1892. Testimony is not admissible if the party against whom it is to be used, or those in privity with him, has no opportunity to cross-examine the witness.—Sperry v. Moore's Estate, 42 Mich. 353.

¶ 1893. Where the assignor of a claim against an estate was called to prove the claim, and his cross-examination was delayed by the claimant to accommodate another witness, and he died before it could be taken, it was held proper to exclude his testimony.—Sperry v. Moore's Estate, 42 Mich. 353.

¶ 1894. Testimony given on a former trial by a party whose examination was left incomplete cannot be introduced in evidence, as a whole, by an adverse party, even though the witness has an opportunity to add to it.—Misner v. Darling, 44 Mich. 438.

§ 341. ——Identity of theories, issues, and parties.

Admissibility against different parties, see also post ¶¶ 1901, 1902.

Admissibility in other action of deposition taken, see Depositions § 37.

¶ 1895. Testimony given on a trial in ejectment cannot be introduced after the death of the witness, in an action between other parties in interest upon a covenant of warranty.—Mason v. Kellogg, 38 Mich. 132.

¶ 1896. One Jones sued and recovered a verdict for real estate commissions. The case was reversed and remanded in the upper court on the ground that the declaration did not count on a certain modification of the contract proved at the trial. Meanwhile Jones died and in the new trial plaintiff was substituted as his administrator. Held, the new trial under the amended declaration did not state a new cause of action, and it was error to exclude the evidence of the plaintiff given at the first trial.—Jones v. Pendleton, 160 Mich. 338. (Hooker, J., dissenting.)

¶ 1897. In an action against a railroad company for negligent killing the declaration was amended so as to charge gross negligence. A witness on both trials testified that the company through him had notified persons not to use the crossing. On a third trial, under the amended declaration, the witness not being present, it was held that his original testimony, which had not been produced on a second trial, was incompetent because given under a different issue.—Schindler v. Milwaukee, L. S. & W. R. Co., 87 Mich. 400.

¶ 1898. In a suit for obstructing a river so as to damage complainant in the use of its water power, the testimony of a deceased witness taken at another trial at which the complainant was not a party and in which the issues were not the same, is not admissible for the purpose of showing the history of the river prior to the building of defendant's dam.—Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78.

¶ 1899. Testimony of the husband, given in another case, is inadmissible against the wife, in an action against the wife and husband to reach property alleged to have been conveyed to the wife in fraud of the husband's creditors.—Riggs v. Whitaker, 130 Mich. 327.

¶ 1900. Testimony taken in another case to which one of the present parties was not a party is inadmissible; and the fact that the present party is suing by a next friend, who was a party in the other suit, does not alter the rule; since a next friend is a nominal party and did not then represent them.—Walterhouse v. Walterhouse, 130 Mich. 89.

§ 342. ——For or against whom admissible.

Necessity that theory, issues and parties be the same in both cases, see ante § 341.

¶ 1901. Stenographer's minutes of the testimony given upon a former trial by a party who has since left the jurisdiction are admissible; and if the effect of such evidence is so confined as to affect only the liability of the party who gave it, a joint party cannot complain of its admission.—Stewart v. First Nat. Bank, 43 Mich. 257.

¶ 1902. In an action by a wife against a saloon-keeper for wrongful sale of liquor to her husband, the stenographer's notes of the testimony given by such saloon-keeper in a prosecution against the husband for drunkenness resulting proximately from the sale complained of, are admissible.—Lucker v. Liske, 111 Mich. 683.

§ 343. ——Sufficiency of foundation proof.

See also ante ¶ 1885.

For impeachment, see ante ¶ 1875, and see Witnesses, VI.

Necessity of diligence to find and produce absent witness, see ante § 338.

Showing as to possibility of taking deposition, see ante § 339.

Grounds for admission, see ante §§ 338-342.

¶ 1903. The proof of inability to find a witness should be full and convincing, and the sufficiency of such proof is largely in the discretion of the trial court, which will not be reviewed in the absence of evidence of gross abuse.—Krouse v. Detroit United Ry. Co., 170 Mich. 438.

¶ 1904. The absence of a witness from the state so as to permit his testimony at a former trial to be read, is sufficiently shown by the affidavit of a deputy sheriff that he was unable to find him and was informed he was out of the state, and by testimony of an attorney looking after his business, that on certain dates the attorney had received letters from him postmarked at a distant city where the witness was said to be.—Wheeler v. Jenison, 120 Mich. 422.

¶ 1905. As a foundation for introducing the testimony of a witness taken on a former trial of a personal injury suit, defendant proved that he had searched for the witness by going to the witness' former address and by looking for his name in the city directory, and was unable to find him. No showing was made that the witness was dead or out of the jurisdiction of the court, or that all reasonable efforts to find him had been diligently made. Held, the evidence taken at the former trial was properly excluded.—Krouse v. Detroit United Ry. Co., 170 Mich. 438.

¶ 1906. It is not an abuse of discretion to admit the testimony of a witness given on a previous trial of an action, wherein he was fully cross-examined by counsel for the opposite party, and it appearing that whereabouts of the witness was unknown and could not be ascertained by diligent search and inquiry.—Karwick v. Pickands, 181 Mich. 169.

¶ 1907. Evidence held insufficient to show that plaintiff's illness was so severe and of such permanent character that he could not testify so as to render admissible evidence in another case in which he testified as to the validity of the claimed contract involved in both cases.—Neal v. Novelty Leather Works, 198 Mich. 598.

§ 344. ——Stipulations for admission.

¶ 1908. Under a stipulation that the "testimony" of a witness who was examined and cross-examined on a former trial might be used, as taken down by the official stenographer, as evidence, it is error to exclude the cross-examination, after having admitted the direct, even though at the request of the party who has conducted such cross-examination.—Campau v. Traub, 27 Mich. 215.

§ 345. Sufficiency of proof of declaration; exact words or substance.

Inadmissibility of hearsay to prove hearsay, see ante § 312.

Means and sufficiency of proof of former testimony, see post § 346.

Competency of witness who has heard part only of the statement, see post § 347.

Stenographer's transcript as means of proof of admission made in testifying, see also post ¶ 2762.

Effect of declarations in conflict with acts of declarant, see post § 608.

Mode of examination and cross-examination to bring out whole conversation, see Examination of Witnesses, I, II.

Admissibility of negative evidence that conversation was not heard, see ante § 80.

¶ 1909. Witnesses are not required to rehearse verbatim, but may give the substance of what occurs and is said in the dealings to which they testify.—Willard v. Fralick, 31 Mich. 431.

¶ 1910. While a witness testifying to declarations of a party, or to conversations, should give the words used if able to do so, yet a general answer embodying the substance or purport is not objectionable where that is all the witness can recollect.—Chambers v. Hill, 34 Mich. 523.

¶ 1911. The substance or effect of a conversation may properly be given in evidence even when the witness cannot remember the exact conversation itself; and the question in how many conversations between the witness and one of the parties a certain subject involved was referred to is a proper preliminary to an inquiry into the details of the conversation.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 1912. Testimony of a witness as to a conversation is not to be rejected because he cannot reproduce the exact words.—Steers v. Holmes, 79 Mich. 430.

¶ 1913. The competency of a letter offered as a narration from recollection of particular facts constituting an admission by another is tested first of all by the ability of the writer to testify that it accurately states his knowledge and recollection at the time.—Draper v. Brown, 153 Mich. 120.

¶ 1914. A letter stating that a person "offers his wife's mortgage on the house and lot he occupies," is not admissible as evidence of an admission by the husband alluded to, it being the witness' conclusion as to the effect of what was said.—Draper v. Brown, 153 Mich. 120.

§ 346. Means and sufficiency of proof of former testimony.

See also ante ¶ 1880.

When minutes may properly be read, see ante §§ 337-344.

Minutes kept by attorney, see post ¶ 2602.

Best and secondary evidence of former testimony when transcribed, see ante § 110.

Stenographers' transcripts as documents, see also post § 547.

Sufficiency of proof of substance of statement without exact words, see ante § 345.
Witness to portion only, see post § 347.
Admissibility of deposition of party or witness who has since died, see Depositions § 29.

¶ 1915. It is not necessary that a witness, called to prove what a person since deceased had testified to on a former trial, should be able to recollect the precise words of the deceased witness. It is sufficient if he be able to state that he recollects and can give the substance of the testimony.—Burson v. Huntington, 21 Mich. 415.

¶ 1916. The foundation for admission of a stenographer's minutes of testimony on a former trial is not impeached by the fact that the stenographer could not remember every word.—Lucker v. Liske, 111 Mich. 683.

¶ 1917. The official stenographer or anyone else who heard it is competent to testify to a witness' testimony at a former trial. —Merrill v. Leisenring, 166 Mich. 219.

§ 347. Witnesses to portions of conversation or testimony.

¶ 1918. Witnesses can testify to such parts of a conversation as they have heard, though they did not hear the whole. The weight of their testimony in such case is for the jury.—Pendill v. Neuberger, 64 Mich. 220.

B. REPUTATION AND CHARACTER.

§ 348. In general, what constitutes.

Common remark and bystanders' talk as hearsay, see ante § 310.
Distinction between general reputation and specific rumor, see post § 349.

¶ 1919. Reputation is what others hear of one's character, and any one can testify to it who knows what it was at the time in question.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

§ 349. General reputation and specific facts.

¶ 1920. The character for chastity of a plaintiff suing for slander can only be assailed by general reputation, not by specific acts.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 1921. To show the value of a horse, evidence of the general reputation of fast trotters of horses of the same blood is admissible, but it is inadmissible to name particular horses and to give their reputed time as trotters; and if such testimony is admitted, it is error to exclude rebutting evidence that certain horses of such blood have not developed into fast trotters.—Ellis v. Simpkins, 81 Mich. 1.

§ 350. When admissible.

To prove identity of persons, see also ante § 324.
Particular traits and manifestations of character, see post §§ 352-355.
Best evidence of appointment and character of officials and personal representatives, see ante § 126; see also Estates of Decedents, ¶ 1034.
General reputation to prove partnership, see Partnership, I.
Professional reputation and standing as element in value of professional services, see Values.
Character evidence in prosecutions for crime, see Indictment, VIII, B.
Evidence of effect of malicious prosecution on reputation, see also Damages § 316.
Relevancy of character for carefulness and thrift in action for death as bearing on damages, see Death by Wrongful Act § 24.

¶ 1922. Proof of the character of parties is allowed in criminal cases, but rarely as independent testimony in civil suits, though it might perhaps be proper to cross-examine a witness thereon where it would bear on his belief as to their sincerity.—Howard v. Patrick, 43 Mich. 121.

¶ 1923. In civil cases evidence of defendant's good reputation, unless the proceedings put it in issue, is inadmissible.—Fahey v. Crotty, 63 Mich. 383.

¶ 1924. Evidence of defendant's good character is inadmissible in a civil suit for assault and battery.—Pokriefka v. Mackurat, 91 Mich. 399.

¶ 1925. In an action against policemen and another for assault and battery on one who opposed the unlawful making of a sewer trench on his land it is immaterial that one of the policemen was long in service and never was arrested.—Zube v. Webber, 67 Mich. 52.

¶ 1926. Evidence of the bad reputation of one named as executor in a will offered for probate and of testator's knowledge of it is admissible on the question of testamentary capacity.—McGinnis v. Kempsey, 27 Mich. 363.

¶ 1927. The reputation of the house a witness rooms in is immaterial to the issue so long as the party in whose interest he is testifying is not responsible for it.—Taylor v. Adams, 58 Mich. 187.

¶ 1928. In an action for the price of logs sold it appeared that after a scaler mutually agreed upon had scaled a portion of the logs his place was by agreement filled by another scaler who scaled all of the logs. Held, that evidence of the first scaler's reputation was immaterial, his scale not being in contro-

versy and his reputation not in question.—Malone v. Gates, 87 Mich. 332.

¶ 1929. Evidence of defendant's good character is inadmissible in an action of assumpsit to recover money alleged to have been misappropriated by defendant while a clerk for plaintiff.—Adams v. Elseffer, 132 Mich. 100.

¶ 1930. The fact that a party to a civil action is asked, on cross-examination, questions implying, by inference, wrongdoing upon his part, does not entitle him to introduce testimony as to his general reputation.—Munroe v. Godkin, 111 Mich. 183.

§ 351. ——In libel and slander.

Evidence of reputation, professional standing, and the like as bearing on damages from libel or slander, see Damages § 315.

¶ 1931. One who sues for libel puts his previous reputation in issue.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 1932. Plaintiff in an action of slander cannot introduce evidence of his good reputation unless it has been attacked, even though on his own cross-examination questions discreditable to his character were asked.—Hitchcock v. Moore, 70 Mich. 112.

¶ 1933. In an action for slander in charging a horse-jockey with theft in that he retained the winnings of defendant's horse, evidence of plaintiff's general reputation for dishonesty in failing to account to the owners for the winnings of horses driven by him, is admissible on the question of damages, but not to support a plea of justification.—Finley v. Widner, 112 Mich. 230.

¶ 1934. In an action for libel brought by a member of the legislature charged with having bribed and improperly influenced other members, testimony as to the reputation of the legislature, or of individual members thereof, except plaintiff, is inadmissible.—Randall v. Evening News Ass'n, 97 Mich. 136.

§ 352. Sobriety or temperateness.

¶ 1935. In an action against a liquor-seller for damages from the killing of plaintiff's husband by an intoxicated person, evidence of the husband's habits as a drinking man is admissible.—Brockway v. Patterson, 72 Mich. 122.

¶ 1936. In a wife's suit for damages to her means of support occasioned by the killing of her husband by a person intoxicated with liquor obtained from the defendant, evidence that the person causing the death was in the habit of getting drunk is admissible.—Doty v. Postal, 87 Mich. 143.

¶ 1937. One sued for an injury caused by his servant's careless driving cannot be allowed to show that such servant was a temperate man and not addicted to the use of intoxicating liquors.—Williams v. Edmunds, 75 Mich. 92.

§ 353. Disposition, peaceableness or quarrelsomeness.

Admissibility of evidence of plaintiff's quarrelsomeness as bearing on self-defense, see Assault § 27.

In criminal cases, see Indictment, VIII, B; Homicide, VII.

¶ 1938. In an action for assault and battery evidence as to defendant's good reputation, or of his reputation as a peaceable citizen, is inadmissible.—Fahey v. Crotty, 63 Mich. 383.

¶ 1939. Where a person charged with assault has been allowed to show that his reputation is that of a peaceable and law-abiding citizen, he cannot complain that he has not been allowed to prove by his neighbors that it was not that of a man who would be likely to commit such an assault.—Alford v. Vincent, 53 Mich. 555.

¶ 1940. The quarrelsome character of one who sues for assault and battery cannot be shown unless known to defendant before the assault.—Culley v. Walkeen, 80 Mich. 443.

¶ 1941. In an action against a liquor-seller for damages from the killing of plaintiff's husband by an intoxicated person, evidence that the husband was quiet when sober and quarrelsome when drunk is admissible as bearing on the question of his intoxication and contributory negligence.—Brockway v. Patterson, 72 Mich. 122.

¶ 1942. In an action by lessees for forcible eviction, evidence that defendant, the lessor, was a hard-tempered and dangerous man is admissible for the purpose of showing the effect of his actions and threats upon plaintiff's conduct in leaving the premises, and to rebut the statement of defendant's counsel, made during the opening of the case, that though defendant did chase plaintiffs off and did have a gun it was done under advice of counsel and without intent to hurt any one.—Baumier v. Antiau, 79 Mich. 509.

§ 354. Chastity and morality.

Inadmissibility of specific facts, see also ante ¶ 1920.

Mode and means of proof, see post § 358.

Reputation of prosecutrix in bastardy proceedings, see Bastards § 9.

Evidence of reputation of party as bearing on adultery in divorce, see also Divorce § 59, ¶ 209.

¶ 1943. Defendant in a civil action for seduction cannot show by way of defense

that his general reputation for chastity has always been good.—Watson v. Watson, 53 Mich. 168.

¶ 1944. Evidence of reputation is not admissible to show adultery in a divorce case, but it may be considered as subsidiary evidence and going to explain the conduct of the parties toward each other.—Marble v. Marble, 36 Mich. 386.

§ 355. Financial repute or credit, honesty and integrity.

¶ 1945. The fact that among his neighbors a man is reputed to be worth a stated sum does not prove that he is, nor is it admissible upon the issue of his making a fraudulent disposition of his property.—First Nat. Bank of Sturgis v. Buck, 56 Mich. 394.

¶ 1946. General reputation as to financial standing is inadmissible to prove fraud.—Bodine v. Simmons, 38 Mich. 682.

¶ 1947. Where an assignment for creditors is attacked as fraudulent, evidence of general reputation that the assignee is insolvent is admissible.—Angell v. Rosenbury, 12 Mich. 241.

¶ 1948. In an action for damages for wrongfully suing out an attachment against a firm, it is proper to show that plaintiff's business reputation was good before the issue of the attachment.—Brand v. Hinchman, 68 Mich. 590.

¶ 1949. In an action for a fraud in which several persons were concerned there was no error in admitting evidence that the reputation of one of them was good the year it was committed; his supposed integrity would be material in determining the reliance the person defrauded might be expected to place in him.—Daniels v. Dayton, 49 Mich. 137.

¶ 1950. In a suit to recover money claimed to have been paid by reason of defendant's false representations, evidence of his good character for honesty and integrity is irrelevant.—Klein v. Bayer, 81 Mich. 233.

§ 356. Reputed qualities and traits of animals.

General reputation or particular facts and rebuttal by particular instances, see ante ¶ 1921.

General reputation of car horse as bearing on negligence in using it, see also Carriers ¶ 616.

¶ 1951. As tending to show the value of a horse of a certain blood, evidence of the general reputation as fast trotters of horses of that blood is admissible, but the reputed time, as trotters, of particular horses cannot be shown.—Ellis v. Simpkins, 81 Mich. 1.

§ 357. Common report and understanding.

General repute as to adverse possession, see also Adverse Possession § 46.

¶ 1952. Evidence of common report as to the area of a piece of land is not admissible to rebut the presumption of fraud arising from a vendor's positive false statements thereon made to his vendee.—Starkweather v. Benjamin, 32 Mich. 305.

¶ 1953. In ejectment where the defendant claims title by adverse possession, it is proper to permit him to show that the land was generally called and spoken of as his in the neighborhood, as this tends to prove the notoriety of his claim of title.—Sparrow v. Hovey, 44 Mich. 63.

¶ 1954. Where the question is whether defendants had maintained adverse possession for fifteen years up to a certain fence, it is error to admit evidence that it was common repute in the neighborhood that the fence was not on the true line.—Atwood v. Canrike, 86 Mich. 99.

¶ 1955. In an action of ejectment evidence of general reputation that land was claimed to be owned by occupant, is admissible in showing adverse possession.—Sanscrainte v. Torongo, 87 Mich. 69.

¶ 1956. Evidence of general reputation and understanding among lumbermen of the state that a certain log-scale was adopted is inadmissible where the issue is whether that or another scale was in use on a certain lake or river.—Headley v. Hackley, 50 Mich. 43.

¶ 1957. Evidence of general knowledge and rumor among the employees of a street railway company that a car had been on the road ever since it was built is hearsay and irrelevant in a suit for injuries received by a passenger.—Wormsdorf v. Detroit City R. Co., 75 Mich. 472.

§ 358. Mode and means of proving reputation.

See also ante ¶¶ 1793, 1919.

Presumption as to continuance of reputation unchanged, see ante § 40.

Competency of witness as dependent on knowledge of reputation in question, see Witnesses, II.

¶ 1958. No one can testify to another's reputation whose knowledge is subsequent and consists of what he has been told the reputation was, for this is hearsay.—Bathrick v. Detroit Post & Tribune Co., 5 Mich. 629.

¶ 1959. On an issue as to chastity of the girl in a civil case for seduction, a question to a witness whether he had heard any remarks made as to her conduct is hearsay.—Badder v. Keefer, 91 Mich. 611.

¶ 1960. Where in an action for slander it had been charged that the woman was of a low character, and defendant had submitted testimony on her general reputation for chastity, the plaintiff was properly

allowed to prove by a witness who had lived in the same town with plaintiff all his life, and who had been a newspaper reporter for three years that he had never heard a word or a suspicion against plaintiff's character, without proving that witness personally knew plaintiff.—Smitley v. Pinch, 148 Mich. 670.

C. ADMISSIONS AND DECLARATIONS AGAINST INTEREST.

1. In general; subject-matter and relation to issues.

Declarations in favor of interest of declarant, see post, VII, E.
Admissions by party or counsel in open court, see Trial, V, A.
Admissions in the pleadings to form the issues on trial, see Pleading, IX; Equity, VII, F.
Admissions by answer, plea or failure to plead in equity, see Equity § 152 et seq.
Admissions at law by pleadings, see Pleading, IX.
Representations and declarations raising estoppels against maker, see Estoppel, III.
Admissibility of confessions of crime and incriminating admissions on trial for crime, see Indictment, VIII, B.

§ 359. In general.

Concessions of disputed matters of law, see post § 360.
Relevancy of admissions to issues, see post § 361.
Competency of declarant or his statements, see post § 362.
Interest or motive of declarant at time of declaration, see post § 363.
Declarations or acts derogating title, possession or boundaries, see post §§ 364, 365.
Admissibility of admissions to rebut testimony, see post § 366.
Foundation evidence of interest, privity, etc., see post § 367.
Nature, form and sufficiency of the declaration or admissive act, and implied admissions, see post, VII, C, 2.
Declarations and acts by others attributable to the party, see post, VII, C, 3.
Scope and effect of admissions and rebuttal of admissions, see post, VII, C, 4.
Admissions to prove promise to marry, see Breach of Promise to Marry § 5.

¶ 1961. The statements or admissions of a party to the record are always admissible against him.—Mears v. Cornwall, 73 Mich. 78; Reiser v. Portere, 106 Mich. 102.

¶ 1962. Where a man voluntarily admits a fact against his interest the ordinary motives of human conduct are sufficient warrants for its belief, and such a statement is evidence for the adverse party.—Merrill v. Leisenring, 166 Mich. 219.

¶ 1963. Where the existence of any valid claim against a vendor in a contract for the sale of logs is in issue, statements to a third person made by the vendee referring to such contract, and tending to refute the existence of any such liability, are competent.—Seligman v. Ten Eyck's Estate, 60 Mich. 267.

¶ 1964. In an action for services rendered by plaintiffs' intestate, a witness to a conversation with intestate may be asked what intestate said as to helping to sell land, where the tendency of the answer will be to negative a portion of the services sued for.—Webster v. Sibley, 72 Mich. 630.

¶ 1965. In an action involving the question of liability for the interest as between the mortgager and a grantee of the premises subject to the mortgage, a witness may state what defendant mortgager said tending to support the theory that he agreed to pay the interest.—Ford v. Savage, 111 Mich. 144.

¶ 1966. The debauching by defendant of plaintiff's wife may, in an action for alienating her affections, be shown by admissions contained in letters written by defendant to the wife.—Mead v. Randall, 111 Mich. 268.

¶ 1967. In an action on an insurance policy, defended on the ground of ill health at the time of making the contract, it is error to strike out testimony of one physician that the insured had told him that he was attended by another physician.—Rhode v. Metropolitan Life Ins. Co., 129 Mich. 112.

¶ 1968. In a claim against an estate upon a note, testimony of a witness as to statements made by the decedent that claimant held her note, was competent as bearing upon the question of whether the note had been paid in full, and whether claimant was entitled to retain possession of it.—Fowles v. Joslyn, 135 Mich. 333.

¶ 1969. In an action against the estate of a decedent for services rendered, plaintiff alleged that decedent contracted to convey to her a certain farm or leave her its value in money, besides paying a weekly compensation in return for her services. Held, that statements of decedent to third persons that he would do well by plaintiff if she would care for him and that he had promised it to her, were admissible as tending to prove such contract.—In re Thompson's Estate, 157 Mich. 669; Forsythe v. Thompson's Estate, Id.

¶ 1970. In an action for fraud, an attorney formerly employed by plaintiff who had several interviews with defendant before suit was instituted, some of which were had when both litigants were present, may testify that defendant admitted the charges, upon which the action was based, to be true, both when the plaintiff was present and when he was

not present.—Priebisch v. Ottenwess, 176 Mich. 476.

§ 360. Concessions or admissions of law.

¶ 1971. Admissions of parties as to conclusions of law cannot bind the court.—Rice v. Ruddiman, 10 Mich. 125; Church v. Holcomb, 45 Mich. 29.

¶ 1972. A concession that defendant is liable for the injury complained of is but the admission of a rule of law, and the court is not bound to act on it, if satisfied that in fact there was no right of action.—City of Detroit v. Beckman, 34 Mich. 125.

§ 361. Relevancy to or connection with matters in issue.

Foundation proofs of connection and relevancy, see post § 367.

¶ 1973. In a suit by commercial agents to recover from their principal the advances, charges and expenses on the sale of merchandise made elsewhere through a correspondent the account of the sale as rendered by the correspondent embracing that principal's goods and others cannot be received in evidence on the ground of contract, since it must accord, and not conflict, with the contract. Otherwise it is merely hearsay.—Coe v. Nash, 28 Mich. 259.

¶ 1973a. In an action upon a life insurance policy, statements made by the insured as to having suffered an abortion which resulted in her death, held to constitute an admission of a breach of the contract of insurance which was based on a warranty that she was not pregnant.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

¶ 1974. Declarations or admissions by an occupant of land as to the character of his possession should be excluded where there is no evidence of the indentity of the land with that in suit.—Brown v. Quinland, 75 Mich. 289.

¶ 1975. In ejectment by the husband of a cotenant against others, a deposition stating that plaintiff's wife before her death said she wanted some property made over to her name to be conveyed to the rightful owners, is inadmissible to show that the title acquired by her to the land in question belonged to defendants, where it appears that the conversation related to other land.—Fenton v. Miller, 94 Mich. 204.

¶ 1976. Where two persons are engaged in purchasing timber and manufacturing it into lumber, their admissions of joint liability, made when they purchased the timber from a third person, are admissible in evidence in an action against them for hauling logs, as the purchase, hauling and sawing constitute but one transaction.—Dumanoise v. Townsend, 80 Mich. 302.

¶ 1977. In a wife's action against her father-in-law for alienating her husband's affections, plaintiff and her family being Roman Catholics, while the husband and his family were Protestants, testimony of defendant's statement in the presence of plaintiff and her aunt, that "he would rather see his son dead than living with a Catholic" is competent, but further statements by him derogatory of a picture of the Virgin Mary which was hanging upon the wall in plaintiff's house, are irrelevant.—Rice v. Rice, 104 Mich. 371.

¶ 1978. In a suit by a nurse to recover for services rendered to an injured employee of a defendant corporation, the testimony of the attending physician that he had charged his own services to defendant on his books was incompetent, although it was claimed that defendant had authorized the physician to employ plaintiff.—Hodges v. Detroit Electric Light & Power Co., 109 Mich. 547.

¶ 1979. In an action for compensation under a contract to furnish a tug and boom to inclose 500,000 logs, both tug and boom to be under the direction of the defendant, it was error to permit testimony of statements of the captain of the tug that the boom would hold over 500,000 feet of logs of less than average size, for the purpose of sustaining a claim that defendant was damaged by deficiency in the size of the boom to take 510,000 feet.—Hebard v. Shaw, 123 Mich. 514.

¶ 1980. In an action by a tenant of one of several apartments in a building against the landlord for damages from a fire caused by an unswept chimney flue in his apartment, testimony by the tenant of another apartment of a conversation with the agent of the landlord relative to cleaning the chimney, is properly excluded, since a new duty to plaintiff could not have arisen from any conversation with another tenant.—Cooper v. Lawson, 139 Mich. 628.

¶ 1981. In an action for negligence by a tenant against his landlord to recover damages for a fire caused by an unswept chimney flue in his apartment, testimony as to whether a former tenant of another apartment permitted anybody to use a ladder which was the only means of access to the roof, is properly excluded, since his assumption of control over the ladder would not fix his rights nor those of plaintiff so as to deny plaintiff access to the roof to clean the flue.—Cooper v. Lawson, 139 Mich. 628.

§ 362. Competency of declarant or his statements.

Inadmissibility as parol evidence varying writings, see ante § 155, ¶ 784.

Capacity of infant or insane person to make admissions, see Infants, I, VII; Insane Persons, II, V.

Exclusion of declarations to physicians, attorneys, priests, or to spouse of declarant as privileged communications, see Witnesses, V.
Exclusion of declarations because equally within knowledge of person deceased, see Witnesses, IV.

¶ 1982. In a suit for alienation of a wife's affections, the defendant sought to show admissions made on the stand by plaintiff in the former trials of the case with reference to the time plaintiff ceased to cohabit with his wife and admissions as to plaintiff's relations with another woman. Held, the testimony was material on the question of damages to show the state of feelings then existing and it was error to exclude it on the theory that under the declaration in the present trial plaintiff could not testify as a witness due to the issues raised by a count added charging adultery.—Merrill v. Leisenring, 166 Mich. 219.

§ 363. Interest or motive of declarant at time.

Acts and declarations by predecessors in title after or before having title as affecting successors, see post §§ 415, 416.
Declarations and utterances as to pain or sickness in presence of prospective witness, see post § 455.

¶ 1983. The declarations of a party in interest, although he is at the time taking measures to divest himself of his interest, or those of an actor, before the transaction is completed, are admissible evidence on the ground of such interest, or relation to the transaction.—Wyckoff v. Carr, 8 Mich. 44.

¶ 1984. Where the question is whether goods for the price of which suit is brought were accepted by defendant, acts of ownership by him after suit brought cannot be shown.—Black v. Delbridge, Brooks & Fisher Co., 90 Mich. 56.

§ 364. Declarations or acts in derogation of title or possession.

Necessity that lands be the same as those in issue, see ante ¶¶ 1974, 1975.
Acts and declarations of agents and privies, see post, VII, C, 3.
Declarations and acts of predecessors binding on successors, see post §§ 414-416.
Res gestæ acts and declarations, see post § 447.
Time of acts or declarations, declarations after or on eve of passing title, see ante § 363.

¶ 1985. The declarations of a party in interest are always admissible in derogation of his own title.—Hogan v. Sherman, 5 Mich. 60.

¶ 1986. Declarations as to the ownership, by a party in possession, are to be received in disparagement of title, not in support of it, unless as res gestæ to make out an adverse holding.—Michigan Paneling Machine & Manufacturing Co. v. Parsell, 38 Mich. 475.

¶ 1987. Action on a promissory note in the name of the payee. Held competent to prove the admission of the plaintiff that he did not own the note, and did not know who did; that it was given for money won at cards by a third person, and made payable to him without his knowledge or consent.—Hogan v. Sherman, 5 Mich. 60.

¶ 1988. A statement of the lessee to effect that he was holding not under lease but under levy is admissible as tending to show termination of lease as against him.—Munroe v. Moloney, 67 Mich. 83.

¶ 1989. Where it is proper for a person suing a bank for the amount of a deposit which he made in another's name, but claims as belonging to himself, to prove his title to it, he may properly show everything connected with the origin and history of the deposit, and the other person's statements in derogation of his own interest.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

¶ 1990. Statements by one tenant in common recognizing the title of another tenant in common are admissions against interest and admissible in evidence.—Loranger v. Carpenter, 148 Mich. 549.

§ 365. ——As to boundaries or extent of possession.

By predecessor in title, see post § 414.
Res gestæ affecting boundaries, see post § 448.

¶ 1991. In ejectment for land which defendant claims was not included in the deed under which plaintiff's title is asserted, plaintiff, if the deed is ambiguous, can show such conjoint acts of the parties thereto as tend to show their understanding of the location of the boundary and that stakes placed by them were so placed to define it.—Moran v. Lezotte, 54 Mich. 83.

¶ 1992. There was testimony tending to show that a house standing on A.'s ground on the shore of a lake had, on account of the shore's washing away, been moved back upon B.'s land without his consent. Held, that a conversation between A. and B., in which A. made a statement in disparagement of his title, and in which they arrived at an understanding with reference to the house, was admissible.—Hoffman v. Clark, 63 Mich. 175.

¶ 1993. In an action of trespass, it is competent to show admissions of the defendant, who participated as chairman in an early survey, as to the correctness of the survey.—Sherrard v. Cudney, 134 Mich. 200.

§ 366. Rebuttal or contradiction by admissions.

Admissions receivable in rebuttal of declarant's testimony, see also ante ¶ 448.
Necessity of foundation, see post § 367.
Admissions and declarations to impeach or discredit witness, see Witnesses, VI, D.

¶ 1994. Where one who is sued by a woman for seduction denies that he ever had intercourse with her, testimony of his admissions that he is the father of her child is competent.—Rabeke v. Baer, 115 Mich. 328.

§ 367. Foundation evidence of interest, privity, etc.

Burden of proving foundation facts, see ante § 69.
Sufficiency of evidence of genuineness of receipt ascribed to party, see post § 589.
Admissions made in diverse capacity or right, see post § 372.
Settlements made with or offers to third persons, see post § 396.
Foundation proof of agency or privity where declaration is made by another person, see post §§ 437-439.
Knowledge or hearing of statement to qualify witness thereto, see also Witnesses, II.

¶ 1995. In connection with testimony by his wife in defendant's presence that money was in the bank to pay plaintiff, a materialman and laborer, testimony that the premises belonged to defendant's wife is material as bearing upon her interest in the subject, and is admissible.—Evans v. Montgomery, 95 Mich. 497.

¶ 1996. It is unnecessary to lay a foundation for impeachment before showing former contradictory testimony as an admission.—Cady v. Doxtator, 193 Mich. 170.

¶ 1997. Where testimony is of such a character as to constitute an admission of the party, it is not necessary to lay the foundation for its reception, or even to cross-examine the party on the subject.—Merrill v. Leisenring, 166 Mich. 219.

¶ 1998. A fire policy was defended on the ground that there was false swearing as to losses by insured and her servant respecting the property destroyed. Some of it was found concealed and removed. A witness was asked whether she had seen plaintiff after the fire and had any conversation with her in which witness was warned not to say anything about the whereabouts of any of the property, and was then asked if witness had had any "such conversation with any one." Held that the question was improper without some thing to show its materiality.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 1999. Evidence that a solicitor who has filed an answer for defendant, lately an infant, was employed, not by him personally, but by his father, who represented that he was authorized by the son to employ counsel, but who, when examined as a witness in the cause, gave no testimony upon the question of such authority, is insufficient in the absence of any other evidence on the subject to bind the son on the theory of an affirmance by answering. Upon such evidence there is no presumption of the solicitor's authority to put in the answer; the father's representations were mere hearsay upon a question not provable, and which, if true, admitted of easy proof at the proper time by competent evidence.—Carrell v. Potter, 23 Mich. 377.

¶ 2000. Where two witnesses in a will probate contest, testify to the same state of facts as to the payment of a sum of money, the opposite party cannot introduce declarations of one not a party, affecting rights of a party, under the claim that the similarity of testimony of such two witnesses shows that they are guilty of a conspiracy, where there was no other evidence tending to show conspiracy.—Henrich v. Saier, 124 Mich. 86.

¶ 2001. It must be presumed that the plaintiff in an action under a city ordinance for damages for injury to his automobile sanctioned a statement in his declaration that his automobile was driven by his agent and servant, so as to authorize the receipt in evidence of such pleading as an admission in a subsequent action wherein the parties were reversed for damages for injury to such defendant's automobile in which second action a violation of a statutory duty to maintain lights on such plaintiff's automobile was alleged, and it was pleaded as a defense in the second action that the automobile was driven without the consent or knowledge of the owner, and where the plaintiff in such former action testified at that trial in support of the allegations in the declaration.—Cady v. Doxtator, 193 Mich. 170.

2. Nature, form and sufficiency of admission; implied admissions.

§ 368. In general.

Substance of the declaration or act and its relevancy to the issues, see ante VII, C, 1.
Relevancy and connection of admissions to subject of suit, see ante § 361.
Certainty or ambiguity of the admission, see post § 369.
Completeness of the admission, see post § 370.
Voluntariness of the admission, see post § 371.
Representative, joint or official acts and declarations, see post §§ 372-374.
Testimony in other proceedings or admissions therein, see post § 376.
Oral and written admissions, see post §§ 375, 377-384.
Implied and tacit admissions from conduct or silence, see post § 385 et seq.
Claims and assertions of right as implied admissions, see post § 388 et seq.
Offers of compromise as admissions, see post §§ 394-396.
Effect of declarations and acts by third persons, predecessors, representatives, privies, and agents of party to bind him, see post, VII, C, 3.

Admissions and confessions excluded as privileged communications, see Witnesses, IV, V.
Admissions by party or counsel in open court in the cause for purpose of dispensing with proof of issues, see Trial. V.

¶ 2002. The declarations and admissions which bind the party making them, and which he is estopped to deny, are declarations or admissions of facts by which the rights of others are or may be affected, and must be made with a purpose of affecting or influencing the judgment or action of another. But the loose conversations of one respecting the effect of a particular act upon himself can affect no right of any other party, and consequently are not binding upon any one.—Porter v. Henderson, 11 Mich. 20.

§ 369. Ambiguous, noncommittal or uncertain statements.

Loose talk, see also ante ¶ 2002.
Statements to two or more persons jointly, see post § 373.
Scope, effect and construction of the admission, see post § 440.
Intendment against person speaking, see post § 441.

¶ 2003. A letter stating that the writer has sold a certain make of pianos "for the best" is not to be construed as an admission that he sold them as superior to another make; things may be "best" in the sense of ranking in the very first class without being superior to each other, and one piano may be best for one purpose and another for another.—Whittemore v. Weiss, 33 Mich. 348.

¶ 2004. A statement by an employer, soon after an accident to an employee, "that he would see him through all right, and not to worry," is not a confession or admission of liability, and evidence of the making of the same is inadmissible in a suit for damages by the employee.—Kinney v. Folkerts, 78 Mich. 687.

¶ 2005. Where a man was sued for an injury done by his driver, it was held proper to exclude evidence that, when he was called on with regard to a settlement of damages, he said it made no difference to him how the suit went—that if it went against him his driver would have to pay the damages. This did not tend to show any recognition of liability.—Mabley v. Kittleberger, 37 Mich. 360.

¶ 2006. The fact that a letter, while stating that the writer is "hard up," makes no claim against the person to whom addressed, has no tendency to show that such person was not indebted to the writer, and it is properly excluded when offered for that purpose.—Burt v. Long, 106 Mich. 210.

¶ 2007. Defendant and one Bolin were interested in organizing a new corporation, selling its stock, and inducing the new corporation to buy a certain proprietary food. Defendant wrote a letter to Bolin in which he made a false statement as to the profits from said food, and there was evidence that said letter was intended by him to be used by Bolin to induce purchase of the stock in the new corporation. Plaintiff was thereby induced to buy stock. Held, that in an action of deceit, the letter was admissible in evidence though by its general trend it purported to be written for another purpose.—Diel v. Kellogg, 163 Mich. 162.

¶ 2008. A freight bill upon which appears an indorsement, "102 cases short" with signature and date, made by an authorized agent of the carrier at the point of destination, constitutes an admission of shortage and of nondelivery though the person who made it states that it meant only that a claim of that much shortage was made.—Oceana Canning Co. v. King, 195 Mich. 628.

§ 370. Fragmentary or incomplete admissions.

Uncertain or noncommittal statements, see ante § 369.
Incomplete answer by witness, see post § 376, ¶ 2024.

¶ 2009. Proof of an admission cannot be excluded merely on the ground that it does not cover a whole series of transactions.—Stansell v. Leavitt, 51 Mich. 536.

§ 371. Fear, threats or favor inducing admissions.

See also post ¶ 2032.
Rule as to involuntary confessions of crime, see Indictment, VIII, B.

¶ 2010. An effort to make a suspected person confess a wrong already committed is not unlawful if undue means, fraud, illegal compulsion or duress are not used.—University of Michigan v. Rose, 45 Mich. 284.

§ 372. Statements made in different capacity or relationship.

See also post ¶ 2299.
Individual and partnership declarations and admissions, see post § 420.
Official acts and declarations and writings, see post § 374.
Declaration by agent in dual capacity as res gestæ in one and self-serving in other, see post ¶ 2567.

¶ 2011. An administratrix as such brought a claim against an estate in which she was a distributee. Held, the evidence that she had admitted that her personal claims were settled was inadmissible.—Howard v. Patrick, 38 Mich. 795.

¶ 2012. On the issue of gratuitousness of services not within the line of duty of a trustee of a religious corporation, but rendered by such a trustee who was also an attorney, recognition by other trustees and the

curate as individuals of the attorney's right to compensation is inadmissible as against the corporation; though their official acts and sayings would have been admissible.—Cicotte v. St. Anne's Catholic Church, 60 Mich. 552.

¶ 2013. Declarations of an admissive character by one speaking in the capacity of bank president respecting the knowledge of the bank that the bonds lacked a consideration, are not admissible against him suing as a trustee in representation of an estate owning the bonds by title coming through the bank.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 2014. In an action by a father's estate against a son's, the fact that the administrator of the latter had presented a claim against the former can have no bearing on the relations of the two intestates, where ownership to property is claimed because of a partnership between them, though if his decedent had lived and presented the claim, it might possibly have shown inconsistency in his position.—Howard v. Patrick, 43 Mich. 121.

¶ 2015. The assignee of a note replevied a stock of goods said to be mortgaged as security. It had previously been mortgaged to the assignor. There was a dispute as to whether the mortgage was then in force. Held error to exclude evidence that, before assigning the note, the assignor had, as commercial reporter, reported the stock freed from mortgage.—Cadwell v. Pray, 41 Mich. 307.

§ 373. Statements to two or more persons jointly.

¶ 2016. The fact that the letters written by defendant were addressed to his stepfather and his mother jointly, will not render them incompetent when offered by the stepfather in an action brought by him to recover money advanced defendant for educational purposes, as evidence of the receipt of the money, and of the fact that it was a loan, and not a gift, whether construed as admissions of a liability to plaintiff individually, or of a joint liability; neither would such letters prevent plaintiff from proving the liability to be several instead of joint.—Cairbre v. McQuillan, 151 Mich. 590.

§ 374. Official acts, declarations and writings.

Acts and declarations by persons sustaining dual capacities, see ante § 372.

¶ 2017. A county treasurer's entries on his official books of the balances remaining at the end of his term are evidence against him as to the extent of their admissions, and the burden was on him to show that he paid over to his successor the balance appearing there.—Van Ness v. Hadsell, 54 Mich. 560.

¶ 2018. In an action against an attaching officer the appraisal under his writ is admissible against him as some evidence of the value of the attached property.—Worthington v. Hanna, 23 Mich. 530; Hunt v. Strew, 33 Mich. 85; Densmore v. Mathews, 58 Mich. 616.

¶ 2019. In an action for assault and battery, whatever defendant said, by way of admission, upon the trial of a criminal action growing out of the same transaction, is admissible, but what the police justice said to him at the trial is incompetent.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 2020. A bill of sale from an alleged owner to another person with indorsement of record by the grantor (he being register of deeds at the time), found among the grantor's papers after his death, is admissible to show that he was not the owner being offered for that purpose only and not to show title in the grantee.—Fenton v. Miller, 94 Mich. 204.

¶ 2021. In an action against a prosecuting attorney for legal services rendered by plaintiff as his assistant, proof that defendant promised to tell the supervisors that the bill was right, and ought to be paid, is no evidence of a recognition of personal liability, or of the actual rendering of the services.—Engle v. Chipman, 51 Mich. 524.

§ 375. Oral admissions where writing is requisite.

¶ 2022. The statements of a decedent as to what he had already done with his business are admissible in a suit concerning the right of another to carry it on as partner, but not as evidence of an intention to transfer it as by an oral will.—Howard v. Patrick, 43 Mich. 121.

¶ 2023. On the question whether defendant owned a certain lot of land or leased a right of way over it, a declaration of defendant to his tenants when giving them a lease, that he had the right of way to use the premises for a passage, is admissible, though the lease was in writing.—Ledyard v. Morey, 54 Mich. 77.

§ 376. Testimony or admissions in other proceedings.

By pleadings in other case, see post § 381.
Admissibility of whole testimony to explain admissions away, see post ¶ 2347.
Stenographers' transcripts as evidence, see also post § 547.
Admission before justice on trial as admission requiring proof de novo on appeal from justice, see Justices of the Peace, V, C.
Conclusiveness in subsequent trials of matters admitted in open court by party or counsel, see Trial, V, A.

¶ 2024. The answer of a witness to a question does not constitute an admission where counsel interrupts him before the sentence

is completed, and it cannot be told what the completed answer would have been.—White Pine Lumber Co. v. Manufacturers Lumber Co., 191 Mich. 390.

¶ 2025. Admissions by a party to the record may be shown by his opponent whether made upon the witness stand or elsewhere, and those who heard them made may be called to testify to them.—Potter's Appeal, 53 Mich. 106.

¶ 2026. Testimony given by a party containing material admissions, is always competent against him in any action, whether the same may be given orally or in written answers and interrogatories propounded.—Merrill v. Leisenring, 166 Mich. 219.

¶ 2027. In an action for assault and battery, whatever the defendant said, by way of admission, upon the trial of a criminal action growing out of the same transaction, is admissible, but what the police justice said to him on such trial is incompetent.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 2028. The admissions of a son in testifying on the trial of a contest over the probate of his father's will are competent to show that he was a tenant under his father at the time of the latter's death.—Johnson v. Johnson, 70 Mich. 65.

¶ 2029. Statements of plaintiff's counsel in opening the case to the jury on a former trial are not admissible on the second trial as admissions binding plaintiff.—Evans v. Montgomery, 95 Mich. 497.

¶ 2029a. In an action by a daughter involving the genuineness of a note in her favor signed by her mother, since deceased, the testimony of the daughter as defendant in a chancery suit brought by her mother to set aside certain deeds to the daughter, is admissible as bearing on the probability of its being made, where the daughter was examined at length relative to transactions between her mother and herself on and after the date of the note in issue and which probably would have involved it.—Mack v. Cole's Estate, 130 Mich. 84.

¶ 2030. In proceedings to enforce the separation of grades and to assess damages an admission made by the attorney for petitioner at a former trial, made only for the purpose of expediting the trial, and which in effect was that if the tenant's witnesses were called they would testify that the damages amounted to a certain amount, is properly rejected on a second trial.—City of Detroit v. C. H. Little Co., 146 Mich. 373.

¶ 2031. Evidence of witnesses in a previous case involving a claim for damages for injury to an automobile due to a collision with another automobile that the plaintiff testified that the person driving his car was driving it with his knowledge and consent, and as his agent and servant, is admissible as an admission in a subsequent action for similar damages in which the parties are reversed.—Cady v. Doxtator, 193 Mich. 170.

¶ 2032. Testimony illegally taken but voluntarily given in the probate court upon an oral examination where the statute provides for written interrogatories as to money and effects in the witness' hands belonging to an intestate estate, is admissible as such person's declaration against interest in a suit by the administrator to obtain a reassignment of an insurance policy which such person claims was absolutely assigned to him by the intestate.—Lilley v. Mutual Benefit Life Ins. Co., 92 Mich. 153.

¶ 2033. An affidavit made by a party to an action and one made by his solicitor at his request and filed in a judicial proceeding, are competent, not only as impeaching evidence, but also as admissions made by the party.—Cornelissen v. Ort, 132 Mich. 294.

§ 377. Statements, reports and writings as admissions.

Invalid deed as evidence of grantor's mind inconsistent with claim made by him, see post ¶ 2589.

Notation of shortage on freight bill as admission, see ante ¶ 2008.

Authority of agents to make admissions by letter or writing, see post § 429 et seq.

Award of umpire or arbitrator as admission, see post § 435.

¶ 2034. Where the president of defendant company in an action for wages testifies that he has no reason to doubt the correctness of a statement taken from the books of the company which show an amount due plaintiff, the statement is admissible as showing an admission by defendant.—Keel v. Wilson Fruit Juice Co., 176 Mich. 345.

¶ 2035. A copy of an annual inspection report of a place of employment, made by an indemnity insurance company and furnished to plaintiff, the insured, stating that there were no dangerous agencies employed, and that no minors were employed in violation of law, is admissible against it in an action by the assured to recover damages paid for injuries sustained by a minor employed in operating a dangerous machine in violation of statute.—Great Lakes Laundry Co. v. Aetna Life Ins. Co., 184 Mich. 294.

¶ 2035a. A coroner's verdict voluntarily furnished to the defendant by the beneficiary of a life insurance policy after proofs of death were made is not admissible in evidence as an admission of its contents.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

§ 378. Entries and charges on account books.

Statement made up from books and proved correct, see also ante ¶ 2034.

Bills and accounts rendered or stated, see post § 379.

Books of account as documentary evidence, see post VIII, B.

¶ 2036. Entries against a particular person on the plaintiff's business books are not conclusive evidence that some other person is not liable for the amount charged, and they may be explained or contradicted by parol testimony.—Lyon v. Chamberlain, 41 Mich. 119.

¶ 2037. Charging goods to the person receiving them is not conclusive evidence that the vendor relied upon him to pay for them and not upon some other person who had promised to do so; especially if the form of the entry is "John Doe, by order of Richard Roe."—Larson v. Jensen, 53 Mich. 427.

¶ 2038. The books and accounts of a deceased trustee relating to the trust fund are admissible as admissions by him as to its condition and in recognition of a claim against it.—Chipman v. Kellogg, 60 Mich. 438.

¶ 2039. The act of a party defendant, claiming title to chattels against plaintiff in replevin who took them under a mortgage, in charging them to the mortgagor, and stated accounts to the mortgagor wherein the chattels appeared as debits are not admissions to plaintiff that the title was in or had passed to the mortgagor; where such charges and accounts were mere bookkeeping entries. —Hood v. Olin, 68 Mich. 105.

¶ 2040. A statement of account taken from a book of a deceased person is competent as in the nature of an admission, and cannot be objected to on the ground that proper foundation was not laid where the book is admitted in evidence.—Raub v. Nisbett, 118 Mich. 248.

¶ 2041. In an action to recover for goods sold, the defense being that defendant made the purchase for a corporation of which he was manager, plaintiff's books of account showing that the goods were charged to defendant individually with evidence that defendant saw the entries and made no objection, are admissible.—Love v. Ramsey, 139 Mich. 47.

¶ 2042. Book entries may be received against one who is shown to have examined them and agreed to pay the account as there shown.—Baxter v. Reynolds, 112 Mich. 471.

§ 379. Accounts rendered or stated.

Entries and charges in books of account, see ante § 378.

Books exhibited and not challenged, see ante ¶¶ 2041, 2042.

Inadmissibility of bill rendered as evidence of value of services, see also Attorneys ¶ 153.

Bill rendered as binding admission of value of services, see also Attorneys ¶ 154.

¶ 2043. In an action by an attorney against his client for services, a bill rendered by the former is no evidence for the latter of the value of the services.—Romeyn v. Campau, 17 Mich. 327; Gartner v. Beller, 54 Mich. 333.

¶ 2044. Where a debtor denies the correctness of a bill tendered to him by the creditor, and rejects it altogether, the creditor in an action is not precluded from recovering beyond the services and prices specified in the bill.—Romeyn v. Campau, 17 Mich. 327; Wright v. St. Louis Sugar Co., 146 Mich. 555.

¶ 2045. Where a bill rendered for services in driving logs is kept a month and credit is then given for its amount on a bill rendered, this amounts to an acknowledgment of liability, and binds unless it is impeached for fraud or mistake.—Bewick v. Butterfield, 60 Mich. 203.

¶ 2046. Where a man had a written agreement with his daughter-in-law whereby she was to receive the proceeds of the sale of certain property after specified charges against it had been paid him, the fact that he had afterwards, and before sale, sent her a statement of an account between themselves containing items not covered by the agreement, will not bind her to the deduction of so much from the amount due her under it, in the absence of evidence that she had examined the account or consented to such deduction.—Fraser v. Fraser's Estate, 42 Mich. 275.

¶ 2047. Where itemized statements, presented monthly, of goods sold, showing the balances claimed to be due, are allowed to pass unquestioned, satisfaction with the same and with the balances, is implied.—Rossman v. Bock, 97 Mich. 430.

§ 380. Receipts and acknowledgments of payment or delivery.

Distinct and unrelated receipts, see ante § 95.

Canceled check passed between strangers, see ante ¶ 1790.

Receipt for payment made by other in party's interest, see also post ¶ 2121.

Best evidence of contents, see ante § 120.

Foundation for secondary evidence, see ante § 150, ¶ 745.

Applicability of parol evidence rule to receipts and acknowledgments, see ante §§ 190-192.

Receipts as res gestæ, see post § 473.

Tax receipts as documentary evidence, see post § 540.

Receipts as evidence of accord and satisfaction, see Accord and Satisfaction § 17.

Receipt as evidence of bailee's right of possession to grain, see Bailments ¶¶ 3, 4.

¶ 2048. A receipt of notes for collection, signed by defendant and another, is not admissible to establish a sole liability against defendant, but it may be received to show

plaintiff's right to the money if other evidence shows its collection by defendant.—Kimball v. Kimball, 16 Mich. 211.

§ 381. Statements and recitals in pleadings.

Served copy of complaint in another suit as an admission, see also ante ¶ 573.

Presumption that pleading was by party's authority, see ante ¶ 2001.

Pleadings by deceased persons as admissions against successors, see post § 409.

Pleadings in other cases as documentary evidence, see post § 548.

[Note. The admissions by plea, answer or demurrer for the purpose of joining and settling the issues are regulated by the law of pleading. See Pleading, IX, X; Equity, VII, F. They are admissions in the case itself, as distinguished from admissions against interest made by allegations or want of allegations in pleadings used by the party.]

Effect of pleadings in equity as evidence in the cause, see Equity § 164 et seq.

Sufficiency of bill to make answer admissive in character, see also Equity, ¶ 614.

¶ 2049. Where a bond and defeasance were treated as a mortgage and foreclosure was had thereon, a petition by defendant to open the foreclosure decree on the ground that the bond was drawn for double the debt amounts to an acknowledgment of a mortgage indebtedness.—Scriven v. Hursh, 68 Mich. 176.

¶ 2050. Where the issue is whether a certain mortgage sale has been made, papers served upon defendant by the general solicitors of the same plaintiff in a former lawsuit, stating that a sale had been made, should go to the jury as admissions by plaintiff of such sale.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315.

¶ 2051. Where a plaintiff in an action under a city ordinance for damages for injury to his automobile sanctions a statement in his declaration that his automobile was driven by his agent and servant by testifying in support of such allegation, such declaration is admissible as an admission in a subsequent action by such defendant against such plaintiff for damages for injury to such defendant's automobile, in which a violation of a statutory duty to maintain lights on such plaintiff's automobile was alleged, and in which it was pleaded as a defense that the automobile was driven without the knowledge or consent of the owner.—Cady v. Doxtator, 193 Mich. 170.

¶ 2052. Where defendants in chancery had answered in another suit attacking the same transaction, their answer, if meant to be an admission, is admissible as such, though never filed in the suit for which it was drawn.—Matson v. Melchor, 42 Mich. 477.

¶ 2053. The petition of one claiming a gift of notes of which she was the maker, which petition was presented to the probate court asking the executors to surrender the notes to her and not to include them in the estate, and which petition did not legally state facts constituting either a gift or a trust of the notes for her but a mere promise to deliver them to petitioner, and sickness preventing performance of that promise, cannot be used as evidence in her favor but may be an admission against her that the gift was executory and void.—Botsford v. Bradfield, 141 Mich. 370.

§ 382. Statements and recitals in contracts.

Written portion of contract as tantamount to admissions, see ante ¶ 646.

Proposals to make contract or settlement, see post §§ 394-397.

Preparatory drafts, see post § 397.

Words "value received" in bill or note as evidence of consideration, see also Negotiable Instruments, XIV; Non-negotiable Paper.

¶ 2054. Where by a written contract defendant promised plaintiff to pay a third person a sum therein recited to be due to him from the plaintiff, it was held not necessary, in a suit on the contract, to give other proof that plaintiff was so indebted.—Tefft v. McNoah, 9 Mich. 201.

¶ 2055. The recital, in a bond to stay proceedings, of a judgment against the principal obligor, concludes the parties as an admission of the fact recited.—Healy v. Newton, 96 Mich. 228.

¶ 2056. The sureties in a bond are bound by the recitals in the instrument as admissions.—Brockway v. Petted, 79 Mich. 620.

§ 383. Statements and recitals in deeds and grants.

¶ 2057. Recitals in a patent were received as evidence of the time when the lands described in it were earned by the railroad company for whose benefit they were granted.—Johnson v. Ballou, 28 Mich. 379.

¶ 2058. A man gave a deed of bargain and sale without covenants, but reciting that at its date he had entered the land as described in a certain certificate of purchase. He afterwards obtained a patent. Held, that the recitals in the deed and patent were evidence as against all the world that conveyance had been made before the patent issued.—Fisher v. Hallock, 50 Mich. 463.

¶ 2059. The grantee in a quitclaim deed is at least prima facie bound by a recitation in such deed that a contract for the sale to him of the land has been assigned by him and has not been reassigned.—Smith v. Ryerson, 98 Mich. 588.

§ 384. Statements contained in invalid writings.

Oral statements where writing is requisite, see ante § 375.

Proposals to contract and offers not carried into contract, see post § 397.

¶ 2060. An invalid agreement may be used as a parol admission of the facts recited in it, and open to explanation and contradiction as such.—Hickey v. Hinsdale, 12 Mich. 99.

¶ 2060a. A conveyance or contract to convey, though invalid as such, may be admissible as evidence of the value of services rendered on promise of compensation, where the conveyance was intended to be the compensation.—In re Williams' Estate, 106 Mich. 490; Sammon v. Wood, 107 Mich. 506.

¶ 2060b. Where a son makes a claim against his father's estate for services performed and there is evidence of a promise by the father to pay his son therefor, notes executed by the father payable at his death to his son that were never delivered to the son but to the executor are admissible as evidence of what the father considered the services of the claimant were worth.—Abel v. Roosenraad, 173 Mich. 93.

§ 385. Implied from conduct, secretiveness and denials of fact.

See also ante ¶ 1860.
Implication from silence, see post § 386.
Implication from omission to reply to letters, see post § 387.
Implication from assertion or nonassertion of claim, see post §§ 388-391.
Implication from payment or tender, see post § 392.
Implication from listing or payment of taxes, see post § 393.
Implication from compromise or offer to compromise and settle, see post §§ 394-396.
Implication from proposal or offer to make contract or legacy, see post §§ 397, 398.
Implication from subsequent actions, see post §§ 399, 400.
Silence in face of assertion as an implied admission, see post § 386.
Acts done by agent in procuring testimony for trial, see also ante ¶ 465.
Presumption against party refusing to testify or adduce available witnesses or evidence, see ante §§ 63-65.

¶ 2061. Where, in replevin for a horse, defendant insisted that he had obtained it in a trade, plaintiff was allowed to prove that he had unsuccessfully sought and inquired for it after defendant took it away, since this tended to show that defendant had secreted it or kept it out of the way, and was conscious that an absolute trade had not been made and that he had obtained no right to the horse or to the possession of it.—English v. Caldwell, 30 Mich. 362.

¶ 2062. In a suit for negligently setting a fire which spread and burned plaintiff's pile of wood, evidence that defendant, when asked if he had set the fire, gave an evasive answer, is admissible to prove that he set the fire.—Rowe v. Bregenzer, 161 Mich. 684.

§ 386. Silence in the face of assertions of fact.

Failure to object or assent to book account as exhibited, see also ante § 378.
Retention of account rendered without objection, see ante § 379.
Omission to reply to letters, see post § 387.
Necessity that assertion be heard or communicated, see post § 402.
Report of inspection as admission against party receiving it, see ante ¶ 2035.
Effect of silence in face of charges under express contract calling for lesser amount, see also Contracts ¶ 1557.
Estoppel by silence under duty to speak, see Estoppel, III, B.

¶ 2063. A statement of a fact by one party to a case in the other's presence, and not denied, is admissible as evidence of the fact so stated.—Atwood v. Cornwall, 28 Mich. 336.

¶ 2064. The silence of an employee when his employer stated to a fellow employee in his presence that the former was to have a dollar a day, and the latter should have the same, ought not to be taken as an admission of the truth of such statement in his suit for wages; at least not in the absence of any showing that he in fact heard it, or that it was made in such a way as to call upon him to deny it if untrue; and the rejection of evidence of such statement is not error.—Barry v. Davis, 33 Mich. 515.

¶ 2065. Where one of two parties gives an account of transactions between them, which the other, though a witness in a suit relating thereto, does not dispute or offer in any manner or degree to disprove, it is fair to presume that its general correctness is conceded.—Lacy v. Wilson, 24 Mich. 479.

¶ 2066. In an action to recover for plastering a house, where defendant claims that the work was done for his contractor, evidence that after the completion of the work defendant's wife stated to plaintiff in her husband's presence that the money was in the bank to pay for it is admissible, defendant's silence being a tacit admission of the fact.—Evans v. Montgomery, 95 Mich. 497.

¶ 2067. In ejectment involving a disputed boundary, evidence of the statement by the defendant's husband in her presence and without dissent on her part that he moved the division fence at his own expense, and did not notify plaintiff to build half of it, because if he had plaintiff would have objected to the removal, is admissible.—Sanscrainte v. Torongo, 87 Mich. 69.

¶ 2068. Evidence that, on a former trial in justice's court of an action for breach of warranty, the defendant was present, and heard all of plaintiff's testimony, but made no denial thereof, is admissible.—Connell v. McNett, 109 Mich. 329.

¶ 2069. Statements by one who conducted a mercantile business for his wife, that cer-

tain accounts transferred by him to his brother were to be used in paying the wife's creditors, are admissible in evidence as the admissions of the assignee, where they were made to creditors in the assignee's presence and were not contradicted by him.—Mathews v. Forslund, 112 Mich. 591.

¶ 2070. The fact that a person having notice that a deposition is being taken, fails to deny the matters contained therein, will not be regarded as an admission of their truth, where the controversy with regard to which the deposition is being taken is being tried in a court without jurisdiction.—O'Dell v. Goff, 153 Mich. 643.

¶ 2071. Evidence that an officer who sold to plaintiffs at public sale a one-half interest in a city lot stated to the persons present at the sale that the lot lay between the north wall and the south wall should have been received in a suit in ejectment, based upon the location of the dividing line between the north half and the south half of such lot, where the defendant was present at the sale and heard the officer's statement but made no objection.—Scott v. Baird, 145 Mich. 116.

§ 387. Omission to reply to letters.

¶ 2072. Omission of a party to a suit to answer a letter written to him by the other party pending the litigation cannot be treated as an admission of the adverse party's claims.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 2073. Omission to answer a letter does not, ordinarily, raise a presumption of the truth of facts therein stated, but regard must be had to the relations of the parties, the nature of the correspondence, and the questions involved; and a letter in repose to and in affirmance of a questioned fact is admissible as part of the res gestæ.—Rutter v. Collins, 96 Mich. 510.

¶ 2074. Failure to answer statements against the interest of an indorser, contained in a letter from the payee and relating to a promise to pay the note in question, was not construed into acquiescence in the truth of the statements.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

§ 388. Assertion or nonassertion of claim or suit.

¶ 2075. A city officer rendered certain services to the city which were not within the scope of his duties. Held, that they could not be shown to be gratuitous by evidence that he made no claim for compensation in conversation with third persons who would have no authority to make compensation or fix the amount of it. But his statement to such third persons that he made no claim or that he did not expect or desire pay would have been competent.—McBride v. City of Grand Rapids, 49 Mich. 239.

¶ 2076. A man bought a steam engine and other machinery to put into a mill which he was building, but it was expressly stipulated that title thereto should not pass until it was fully paid for. He afterwards sold the mill to his uncle without having paid for the machinery, and the owner thereof, after demanding it, brought trover for it against the purchaser. It appeared that defendant knew his nephew was embarrassed and had indorsed his paper and took the property to save himself. Held proper, in support of the action, to show that, before buying, defendant had a conversation with plaintiff in which he admitted that he knew there was something about the latter's claim; that his nephew had not paid for the machinery; that defendant had been to see if plaintiff had any chattel mortgage on it and did not find any; and that when he purchased he had not said anything to his nephew about the matter or asked him if plaintiff was paid, and had not said anything to plaintiff though he had frequent opportunities to do so.—Ingersoll v. Barnes, 47 Mich. 104.

¶ 2077. A claim against an estate was rejected by the commissioners thereon. On appeal the claimant sought to raise his figures. Held proper to show in defense that the claim as originally presented was smaller. Such a showing would not be conclusive, but the original claim would be in the nature of an admission as to value.—Ludlow v. Pearl's Estate, 55 Mich. 312.

¶ 2078. In an action to recover for services, the fact that plaintiff had previously sought to recover the debt by action against a third person is immaterial where such action proceeded upon guaranty, which the court in that action held to be void because oral.—Lemiette v. Starr, 66 Mich. 539.

§ 389. ——Claim and proofs of insurance loss.

¶ 2079. Proof of loss furnished an insurer is evidence against him who furnished it of the facts therein stated, being in the nature of an admission; but it is open to explanation.—John Hancock Mut. Life Ins. Co. v. Dick, 117 Mich. 518.

¶ 2080. In an action on an insurance policy, affidavits in the proofs of loss submitted by the plaintiff to the effect that the insured committed suicide, and in the plaintiff's proofs of loss submitted to other insurance companies, are admissible as evidence and not subject to withdrawal upon showing that the affiants had no personal knowledge of the fact; and an instruction to disregard the affidavits if the affiants did not know the facts is erroneous.—Wasey v. Travelers' Insurance Co., 126 Mich. 119.

§ 390. Claims of title or possession in general.

After passing title on to another, see ante ¶ 1984.

Admission by claiming common source, see post § 391.

Estoppel by inconsistent claim of title or right, see Estoppel, III, B.
Assignment of right as admission of fact of title, see also Assignments ¶ 75.
Promise to pay for goods as admission of bailee establishing his liability, see Bailments ¶ 39.

¶ 2081. Claim of title under tax deeds is an admission that the property has been transferred by general government so as to become taxable.—Solomon v. Grosbeck, 65 Mich. 540; Tillotson v. Webber, 96 Mich. 144.

¶ 2082. The declarations of a party in possession, as to the nature and extent of his right, are admissible in ejectment against him to show that he and plaintiff claim from the same source, and that plaintiff has the paramount title.—Eames v. McGregor, 43 Mich. 313.

§ 391. Claiming common source of title.

Pleading common title in ejectment as admission, see Ejectment § 36.
Estoppel to deny common title, see Estoppel, III, B; Ejectment.

¶ 2083. Parties in ejectment who claim title from a common source mutually admit the title of him from whom they derive title. —Eames v. McGregor, 43 Mich. 313; Van Den Brooks v. Correon, 48 Mich. 283.

¶ 2084. If both parties in ejectment claim through deeds which refer to a plat as recorded, the claim must be regarded as an admission of the plat, and of its being recorded, if a record is necessary.—Johnstone v. Scott, 11 Mich. 232.

¶ 2085. Where the defendant in ejectment undertakes to establish title in himself derived from the same person through whom the plaintiff claims, and sets up no other right in himself, it seems that he must be regarded as admitting the title of the person through whom he thus claims.—Johnstone v. Scott, 11 Mich. 232.

§ 392. Making payment or tender or delivery.

¶ 2086. Payment by the defendant to the plaintiff, pending an action of assumpsit, of part of the demand to recover which the action is brought, is not equivalent, in its effect as an admission of the cause of action, to a payment of money into court.—Galloway v. Holmes, 1 D. 330.

¶ 2087. Where a railroad company, after the destruction of property by fire alleged to have originated from sparks from a defective engine, upon a claim being made for a sum covering the amount of the insurance as well as the additional loss, after the receipt of the insurance money, pays the balance of the claim to avoid litigation, and it does not appear that the railroad company denied liability or that the payment was made with any understanding, express or implied, that evidence should not be given of the fact of payment, and it appears that it was not the result of a compromise but was an ordinary settlement in which the question was one of liability as to amount, held that such payment was admissible as an admission in an action by the insurer against the railroad company to compel reimbursement for the amount paid on the policy.—Michigan Mut. Home Ins. Co. v. Pere Marquette Ry. Co., 103 Mich. 429.

¶ 2088. An order signed by a wife jointly with her husband, directing that a note which belonged to her should be delivered to certain persons "as collateral security to their account against" the husband, amounts to a recognition or admission by her that the note was to go into their hands to secure payment of the amount owing them by her husband.—Hall v. Johnson, 41 Mich. 286.

§ 393. Assessment or payment of taxes.

¶ 2089. Plaintiffs in ejectment cannot affect a claim of long continued adverse possession by showing that the land was assessed to their ancestor for several years after his death, when it does not appear that defendants' ancestor, who had paid the taxes, had anything to do with having them assessed to plaintiffs' ancestor.—Dubois v. Campau, 28 Mich. 304.

¶ 2090. In a suit to set aside a husband's deed to his wife as fraudulent as to creditors, the fact that the land was assessed to the husband for several years after the execution of the deed, and while it was unrecorded, can have no weight, it appearing that he attended to his wife's business affairs, and paid the taxes from the products of the land.—Wooden v. Wooden, 72 Mich. 347.

§ 394. Offers of compromise or settlement.

Offers to buy, sell or lease as admissions, see post § 395.
Settlements with or offers to others to settle, see post § 396.
Proposals to enter into contract, see post § 397.
Proposals to make legacy or devise in compensation, see post § 398.
Testimony that third person said he was sent to make settlement as hearsay, see ante ¶ 1774.
Offer to pay damages as res gestæ, see post ¶ 2474.
Offer to arbitrate breach of warranty as res gestæ, see post ¶ 2447.
Admissibility for other purpose of testimony tending to show offer, see ante ¶ 496.
Consummated settlement as bar to original claim, see Accord §§ 10-14; Composition with Creditors; Releases, II.
Instructions as to evidentiary force, see Instructions, V, VI.

¶ 2091. All admissions not expressly made to make peace, and all independent facts

admitted during negotiations for settlement, are, as a general rule, admissible in evidence.—Manistee National Bank v. Seymour, 64 Mich. 59; Michigan Mut. Home Ins. Co. v. Pere Marquette Ry. Co., 193 Mich. 429.

¶ 2092. Offers made in negotiations for compromising suits involving titles cannot be used as admissions of fact.—Campau v. Dubois, 39 Mich. 274.

¶ 2093. Unaccepted offers by way of compromise, whether liberal or not, cannot affect the legal rights of parties.—Chandler v. Allison, 10 Mich. 460.

¶ 2094. In a claim against an estate upon a note made by decedent, testimony of offers on the part of decedent or his estate to come to a settlement with claimant is inadmissible, unless it is shown that the note was included in such offer.—Passmore v. Passmore's Estate, 60 Mich. 463.

¶ 2095. An offer of compromise is inadmissible in evidence and cannot constitute a waiver.—Richards v. Continental Ins. Co., 83 Mich. 508.

¶ 2096. An offer of compromise cannot be considered as an admission of liability, and evidence thereof is incompetent in an action for damages for injuries sustained through defendant's negligence.—Montgomery v. Allen, 84 Mich. 656.

¶ 2097. An offer of compromise does not tend to show that a debt was not contracted fraudulently, and hence by the usual rule is inadmissible on a motion to dissolve an attachment.—Finlay Brewing Co. v. Prost, 111 Mich. 635.

¶ 2098. In an action for obtaining goods by fraudulent representations, the admission of evidence of the defendant's offer to settle and his counsel's comments thereon is error.—Musselman Grocer Co. v. Casler, 138 Mich. 24.

¶ 2099. An agreement to compromise a case may be binding, but concessions made in an ineffectual attempt to reach a settlement are not binding upon either party.—Rikerd Lumber Co. v. Hoertz, 146 Mich. 386.

¶ 2100. In a suit by a plaintiff contractor on a building contract, evidence of an offer by defendant to compromise the claim is inadmissible.—Germain v. Union School Dist. City of Stanton, 158 Mich. 214.

¶ 2101. In a suit for commissions for the sale of real estate, it is error to admit in evidence a letter from defendant offering a certain sum as a compromise.—Crane v. Ross, 168 Mich. 623.

¶ 2102. An offer to settle a note by turning over bank stock in payment of it is inconsistent with a theory that it was made solely for accommodation and as collateral to another note already discounted for the real party.—Manistee National Bank v. Seymour, 64 Mich. 59.

§ 395. ——Proposal to buy, sell or lease.

¶ 2103. Attempts or offers to buy up claims do not necessarily admit their validity.—Chapin v. Hunt, 40 Mich. 595; Wallen v. Rossman, 45 Mich. 333.

¶ 2104. An offer to buy a claim does not estop one to deny its validity: so held where creditors negotiate for a chattel mortgage which was void as to them.—Wallen v. Rossman, 45 Mich. 333.

¶ 2105. In an action for damages to a dock owner caused by the construction of a bridge near the dock which tended to prevent vessels from stopping at the dock, the fact that plaintiff has offered to lease part of the property to defendant has no proper bearing in the case.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 2106. An unsuccessful attempt by one of two partners to settle and cancel a lease which he claims was executed by his copartner in the firm name without authority, is not evidence of ratification.—Koch v. Endriss, 97 Mich. 444.

§ 396. Settlements or offers to settle with others.

¶ 2107. Compromising with one person does not amount in law to admitting liability to a stranger to the compromise, even if his claim grows out of the same transaction.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 2108. In a proceeding by judgment creditors under How. St., § 8091, making garnishees liable on account of property of the principal defendant in their possession, etc., and which is or was held by a conveyance or title void as to creditors of the principal defendant, it is not error to refuse to allow plaintiffs to show that the garnishees had settled with certain other creditors of the principal defendant, and the record of the judgment in a case between defendants and other parties was properly rejected.—Gumberg v. Treusch, 103 Mich. 543.

¶ 2109. In an action for personal injuries to plaintiff caused by an engine which he was driving falling through a bridge which defendant township was required to keep in repair, evidence that the township paid for taking the engine out of the stream into which it fell, is inadmissible, since any settlement made with the owner of the engine could not affect the rights of plaintiff, the driver.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 2109a. In the prosecution of a claim against an estate, testimony as to a settlement between claimant and an heir of decedent who was dead at the time of the trial and who had no authority to bind the estate is properly excluded in so far as it evinced an attempt at compromise, but a part of it amounting to an admission of the amount claimed should be admitted.—Fox v. Barrett's Estate, 117 Mich. 162.

§ 397. Proposals to contract and unexecuted drafts.

¶ 2110. A paper rejected as a contract may nevertheless by admissions contained therein bind the parties to it.—Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

¶ 2111. Statements made in a paper proposed as a contract may have weight, if intelligently and deliberately made as admissions of fact, even though the proposition is not accepted, but another contract is made; but if they are made by way of concession and compromise they may be entitled to no weight whatever.—Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

¶ 2112. Writing, prepared as a contract but not signed, and admitted by the parties to contain a correct statement of an oral agreement entered into by them is competent evidence of the oral agreement.—Grand Rapids Chair Co. v. Lyon, 73 Mich. 438.

§ 398. Proposal to make legacy or devise.

¶ 2113. Statements by decedent of intention to recompense may be received in evidence to show an understanding or agreement that services previously rendered decedent over a period of two years by claimant against the estate for such services, were to be paid for; but such testimony should be limited to the showing of such agreement and the mention of amounts should not be received on the issue of reasonable value.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 2114. Testimony of decedent's lawyer as to what decedent said to him relative to executing a codicil to her will to add a bequest to claimant equal to the amount of her claim against decedent's estate was inadmissible, in an appeal from the commissioners' decision on such claim, as bearing upon the value of claimant's services.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 2115. Evidence that decedent undertook to execute a codicil to her will to add a bequest to claimant equal to the amount of her claim for reasonable value of attendance and services rendered to decedent, is not admissible, to show such value on appeal to the circuit court from the decision of the commissioners disallowing the greater part of such claim.—Luizzi v. Brady's Estate, 140 Mich. 73.

¶ 2116. Where a claim is made against an estate for compensation for services, in addition to services rendered under a contract by which compensation was provided by a life lease of certain property, and an oral promise to pay for such additional services is set up, an unsigned codicil to a will made by deceased which gave to claimant some money and property is inadmissible on the question of the value of the services where it is not shown under what circumstances the writing was made, nor whether he intended the provision to take the place of the contract or intended it as a gift.—Oliver v. Jessup's Estate, 137 Mich. 642.

§ 399. Subsequent acts as admissions of negligence.

[Note. Subsequent acts, such as taking of precautions not before taken or the making of repairs, while usually admissible for the purpose of showing dominion over or responsibility for the place in question or for the purpose of showing conditions, are usually excluded as evidence of blame or liability. The exclusion is not only based on the nonadmissive character of such acts but also on their lack of any tendency to prove neglect or liability at the time of the accident or injury. For this reason the cases on this subject are treated in the specific topics hereafter referred to.]

Relevancy and competency in actions for negligence of acts done and statements made after injury, see Negligence, V; and see also Carriers §§ 89, 211-215; Highways, XII, H, XIII, B; Master and Servant, III; Railroads, VIII; Street Railways, IV.

¶ 2117. It is inadmissible to show, in behalf of plaintiff suing for negligent injury, that after he had been injured all laborers were required to sign contracts waiving all damages on account of injuries from the same source, and that danger signals were put in the shops.—Fox v. Peninsular, White Lead & Color Works, 84 Mich. 676.

¶ 2118. In an action for damages by a person injured in a street car accident through the company's alleged negligence, it is incompetent for the plaintiff to prove that after the occurrence the defendant stationed a watchman at the place.—Felske v. Detroit United Ry., 166 Mich. 367.

§ 400. ——Making repairs and changes.

See also note under § 399, ante.

Repair of bridge after accident as evidence of negligence, see also Bridges § 16.

¶ 2119. As bearing on neglect to repair it is not competent to show in what manner the city repaired the bridge after the accident.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 2120. In an action against a railroad company for negligent injury, where one of the acts complained of was the defendant's

permitting a building to remain near the crossing where the accident occurred, which act was not in fact negligence, although the jury were not so instructed, evidence of the removal of the building by defendant after the accident is not admissible.—Thompson v. Toledo, A. A. & N. M. R. Co., 91 Mich. 255.

3. Statements and acts by third persons, privies, representatives, and agents.

§ 401. By third persons in general.

Statements to or by third persons not admissive in nature or effect, see also ante VII, A.
Res gestæ declarations by others than party, see post VII, D.
Nonadmissive declarations and acts by third persons, see ante VII, A.
Admissive character of declaration, form of admission and relevancy to issues, see ante VII, C, 1, 2.
By parties in joint or preceding interest to party to be affected, see post § 405-418.
By parties in concert or in common relationship, see post §§ 419-425.
By agents and representatives of parties, see post §§ 426-435.
By public officers, see post § 436.
Foundation proofs of privity or agency, see post §§ 437-439.
Statements by persons referred to for information, see post § 434.
By pledgee, see also post ¶ 2549.
Conversation by lessor with another tenant than plaintiff, see ante ¶ 1980.
Writings emanating from third persons as hearsay, see ante § 316.

¶ 2121. A receipt for money paid in the alleged interest of a third party is not evidence against him.—Storrs v. Scougale, 48 Mich. 387.

¶ 2121a. In an action on a certificate of insurance an application made by insured to another fraternity with a pretended rejection indorsed thereon by that company's medical examiner, is not competent to prove a rejection, or that decedent had the disease upon which such rejection was claimed to have been based.—Pudritzky v. Supreme Lodge Knights of Honor, 76 Mich. 428.

¶ 2122. In an action upon a contract of hire, where defendants claim that plaintiff was not a competent workman, and that they found fault with his work, a letter written to defendants rejecting some of plaintiff's work was not admissible in the absence of evidence that a conversation occurred about it to show that defendants were dissatisfied or that the work was not well done.—Koehler v. Buhl, 94 Mich. 496.

§ 402. Statements not heard or communicated to party to be affected.

See also ante ¶¶ 1850, 2122.
Statements by admitting party in other's absence, see ante § 359.
Particular relationship, common interest or representation enabling declarant to make admissions binding on party, see post § 404 et seq.
Partner's declarations as to fact of partnership in absence of copartner, see post § 422.
By husband or wife in other's absence, see post §§ 424, 425.
Res gestæ acts in party's absence done by another, see also post ¶ 2509.
Declarations by another in presence of party's agent, see also post ¶ 2515.
Self-serving writings not brought to notice of other party, see post ¶ 2555.

¶ 2123. In an action for breach of promise to marry, evidence of interviews between the father of plaintiff in her absence and the defendant is properly excluded.—Bennett v. Beam, 42 Mich. 346.

¶ 2124. In an action by a person injured by a vicious animal kept by defendant with knowledge, etc., a statement by a former owner of the animal that it is "ugly," made while removing it to defendant's premises and in defendant's absence, is inadmissible.—Brooks v. Taylor, 65 Mich. 208.

¶ 2124a. One urging a claim against an estate cannot make testimony for himself out of the transactions of his attorney not brought home to the decedent or included in any dealings known to him or authorized by him.—Passmore v. Passmore's Estate, 60 Mich. 463.

¶ 2125. The declarations of a third party from whom defendant bought the property in suit, made in plaintiff's absence, to the effect that he owned the property, are inadmissible in defendant's favor although such third party has since died.—Carr v. McCarthy, 70 Mich. 258.

¶ 2126. In an action for damages from the sale of liquor to plaintiff's husband, the husband's statements after the injury ensuing from the sale, but on the same night while seeking help, as to how it occurred, are inadmissible for the wife.—Brockway v. Patterson, 72 Mich. 122.

¶ 2127. In a suit by a husband to recover damages for the alienation of his wife's affections, for criminal intercourse with her, and for enticing her away from home, it is error to allow plaintiff to testify to a conversation had with his wife, before their marriage, in the absence of defendant, such testimony being hearsay.—Carter v. Hill, 81 Mich. 275.

¶ 2128. In an action to recover for defendant's selling liquor to plaintiff's husband, evidence of a conversation between plaintiff and her attorney in defendant's absence as to her forbidding such sale, is hearsay and inadmissible.—Radley v. Seider, 99 Mich. 431.

¶ 2129. In an action for the value of land which defendant agreed to convey to plain-

tiff in exchange for other lands, while it was competent to show that defendant took the abstract of the property to his attorney's office, it was not competent to show what took place there in the absence of the plaintiff.—Dikeman v. Arnold, 83 Mich. 218.

¶ 2130. An admission by the owner of an equity in pine lands that he had no authority to sign in behalf of the legal owner a contract for cutting the pine cannot affect the contractor when made in the latter's absence.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 2131. The statements of one partner that notes given by him in the firm name were used in his private business, made after the notes were given and not in the presence of the payees, are not competent evidence of such fact in a suit upon the notes against the firm.—Towle v. Dunham, 84 Mich. 268.

¶ 2132. In replevin for a colt where plaintiff claims to be the vendee of the dam and sole owner of both, evidence of conversations between the alleged vendor and third persons not in plaintiff's presence, tending to show that sale was not made to plaintiff, but to the execution defendant, is inadmissible.—Merritt v. Stebbins, 86 Mich. 342.

¶ 2133. In an action involving the location of a boundary line, evidence of what the surveyor said to defendant's grantor relative to the line is inadmissible where plaintiff's grantor was not also present at the interview.—Olin v. Henderson, 120 Mich. 149.

¶ 2134. In a proceeding to have the defendant declared a trustee of a fund for the benefit of certain infants, statements made by the deceased owner of the fund in relation to having provided for such infants, not made in the presence of the defendant, are incompetent.—Koeppen v. Harms, 124 Mich. 84.

¶ 2135. In an action against a husband and wife on a promissory note signed by the wife and indorsed by the husband, evidence of conversations between defendants is incompetent in the absence of a showing that they were in the presence of the cashier of plaintiff bank or were communicated to him.—National Lumberman's Bank v. Miller, 131 Mich. 564.

¶ 2136. A settlement between plaintiff and the township board, of a controversy over the flow of storm waters, in which plaintiff agreed to allow such surface water to flow in its natural channel, across his land, and thence across the land of defendant, made in the absence of defendant, had nothing to do with determining the natural channel over the land of defendant, and in an action for unlawful obstruction of a waterway, its introduction in evidence was prejudicial to defendant.—O'Connor v. Hogan, 140 Mich. 613.

¶ 2137. An agent's unauthorized subsequent declaration as to a boundary is inadmissible to show good faith of a trespasser over such boundary especially where it does not appear that the trespasser was informed of what the agent said.—Gates v. Rifle Boom Co., 70 Mich. 309.

¶ 2138. Where the good faith of a chattel mortgage is in issue, evidence of advice given to the mortgagor, in the mortgagee's absence, by one who had done the business for both parties, "as to what disposition he could make of his property so as to cover it up," cannot be received to affect the mortgagee's rights.—Ganong v. Green, 71 Mich. 1.

¶ 2139. The conduct and statements of a bankrupt after the sale of certain property at the bankruptcy proceedings, not brought to the knowledge or made in the presence of the purchaser, are not admissible when offered in evidence by a creditor of the bankrupt, in an attachment suit against such purchaser to show the title to that or other property disposed of by the sale in bankruptcy, or to dispute the validity of the purchaser's claim.—Preston v. Newcomb, 149 Mich. 512.

¶ 2140. The absence of defendant when plaintiff and a third person orally agreed to sell a chattel conditionally to such third person, who defaulted in the condition, is not an objection to proof of the conversation as showing the contract and the want of title in the third person through whom defendant claims.—Fifield v. Elmer, 25 Mich. 48.

§ 403. ——Statements to interpreter.

¶ 2141. In a transaction between two persons communicating through the medium of an interpreter, the person furnishing the interpreter is concluded by statements made to the latter, and it would not be necessary to show that such statements were communicated by the interpreter to him; but it would be otherwise with an outside person who would question his good faith in the transaction.—Highstone v. Burdette, 61 Mich. 54.

§ 404. By witness out of court.

¶ 2142. It is not competent to show that one of the witnesses in a slander case had conceded the existence of a certain contract, which bore on a question of mitigation, since the witness is not a party and his admissions are not material.—Ellis v. Whitehead, 95 Mich. 105.

§ 405. By parties joined or related in interest.

See also ante ¶ 1976.

As to land claims and boundaries, see also ante §§ 364, 365.

Recitals in bonds as admissions binding sureties, see also ante § 382.
By equitable owner as affecting legal owner, see also ante ¶ 2130.
By copartners, see post §§ 420-422.
By parent, child or relative, see post § 423.

¶ 2143. Where the interest is joint, if the effect of an admission by one of the parties interested is to create an obligation—as, for example, where it is an admission that a condition precedent has been performed—it is evidence only against the party making it.—Thompson v. Richards, 14 Mich. 172.

¶ 2144. The admissions of one of two vendees that the machine bought worked well are not binding upon the other, who was not present when such statements were made.—Osborne & Co. v. Bell, 62 Mich. 214.

¶ 2145. The admissions of one of several parties on the same side are admissible against him, but not evidence to affect the others, unless there is some joint interest or privity of design between them.—Dawson v. Hall, 2 Mich. 390.

¶ 2146. Where two persons are jointly interested on one side of a contract the acts of one of them, in behalf of both, bind both.—Cook v. Blake, 98 Mich. 389.

¶ 2147. Whether the admissions of a surety are proper evidence to bind a cosurety, quære.—Mathews v. Phelps, 61 Mich. 327.

¶ 2148. A surety, who, in an action upon a bond against both principal and surety, calls the principal as a witness, is bound by admissions made by the principal.—People v. Traves, 188 Mich. 345.

§ 406. ——Parties to bills and notes.

¶ 2149. Where dealings between the parties to a note would be admissible as against a defendant collaterally interested with the maker to show nonpayment, it seems that the maker's admissions would be.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 2150. The admissions of one joint maker of a note are not evidence against another.—Rogers v. Anderson, 40 Mich. 290.

¶ 2151. Statements made by the drawer of a draft, or his attorney, after the draft has been transferred to a bona fide holder are incompetent to show mala fides of the holder, when it is not shown that such statements were authorized by the holder.—Texarkana Nat. Bank v. Stillwell & Co., 121 Mich. 154.

§ 407. By coheirs or colegatees.

See also ante ¶ 2109a.

¶ 2152. The declaration of one of several heirs as to the title of property cannot bind the interests of the others.—Shaw v. Chambers, 48 Mich. 355.

§ 408. ——As to competency of testator or validity of will.

Declarations and admissions by decedent as affecting heirs, see post § 412.

¶ 2153. Although the declarations of a sole devisee are competent to show undue influence in the making of a will, those of one of several devisees or legatees are inadmissible.—O'Connor v. Madison, 98 Mich. 183.

¶ 2154. Where a will is contested on the ground of testator's mental incapacity, testimony of statements to the effect that testator was crazy, made by one of the legatees prior to testator's death, is inadmissible.—In re Lefevre's Estate, 102 Mich. 568.

¶ 2155. The sole beneficiary and devisee in a will is the privy of his own devisee and executors, and where the latter after his death seek to probate such will, admissions by him of a later and revoking will are admissible against them.—In re Lamble's Estate, 97 Mich. 49.

§ 409. Declarations by decedents in general.

Respecting advancements or gifts, see post § 410.
Respecting undue influence or mentality, see post § 412.
Respecting contents of will, see post § 413.
By predecessor in title affecting such title, see post §§ 414-416.
Bookkeepers' entries in decedent's books as admissions binding estate, see post § 411.
Nonadmissive declarations by decedents, see ante § 336.
Settlement made by heir since deceased, see ante ¶ 2109a.
Self-serving declarations, see post § 488.
Exclusion of testimony to declarations by decedent as matters equally within knowledge of deceased person, see Witnesses, IV.
Rule as to dying declarations in homicide cases, see Homicide, VII, B.

¶ 2156. A party's death before the suit is heard does not exclude evidence of his admissions.—Matson v. Melchor, 42 Mich. 477.

¶ 2157. Admissions and declarations of a deceased trustee in respect to the trust fund are receivable to show the condition of the fund and his recognition of a claim against it.—Chipman v. Kellogg, 60 Mich. 438.

¶ 2158. A bill filed and sworn to by a person who is deceased is evidence against his heirs to prove what might be proved by his declarations.—Chipman v. Thompson, W. 405.

¶ 2159. Statements of a grantor since deceased, made in defendant's absence, that a deed was delivered to defendant, grantor's daughter and heir at law, to be delivered to the complaining grantee, likewise a daugh-

ter and heir, upon her mother's death, are admissible in evidence, being an admission by one with whom defendant was in privity relative to a matter provable by parol.—Brown v. Stutson, 100 Mich. 574.

¶ 2160. The statement of a mortgagee since deceased that he and the mortgagor had arranged about putting in wheat on the mortgaged land, is admissible, when testified to by a third person, in support of a claim against his estate.—Dayton v. Dakin's Estate, 103 Mich. 65.

¶ 2161. Where a death benefit certificate is made payable in the first instance to a beneficiary therein named, and no right is reserved in the member to change the beneficiary by will or otherwise, the statements of the member, made after the issue of the certificate, to the effect that she had misrepresented her age in her application, are not admissible in evidence for the purpose of defeating an action by the beneficiary on the certificate.—Tessman v. Supreme Commandery of United Friends, 103 Mich. 185.

§ 410. ——As to advancements or gifts.

¶ 2162. A testator's certificate reciting that he had advanced a stated sum is not admissible to prove that an advancement was actually made, though it is admissible, if the payment itself is otherwise proved, to show decedent's purpose to treat it as an advancement.—McClintock's Appeal, 58 Mich. 152.

§ 411. ——Bookkeepers' entries and statements.

Admissions by bookkeepers, effect to bind employers, see post § 429, ¶ 2267.

¶ 2163. Entries made by bookkeeper upon the books of a deceased person during his lifetime, and by his express direction, are competent as admissions against the estate.—Bliss v. Plummer's Estate, 103 Mich. 181.

§ 412. By testator evincive of undue influence or mental condition.

Declarations evincive of mental state or condition as exceptions to hearsay rule, see ante § 335.

Declarations by heirs and legatees as admissions, see ante § 408.

As to contents of will, see post § 413.

¶ 2164. Where undue influence on the part of testator's wife in procuring him to make a will is charged, decedent's statements that he regretted the marriage, that he was not master at home, that he was afraid of his wife, etc., were held admissible.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 2165. Declarations made by a testator before or after the will's execution in opposition to its dispositions are admissible as bearing on mental capacity at the time of execution, but are not competent upon the distinct fact of undue influence.—Harring v. Allen, 25 Mich. 505.

¶ 2166. A testator's declarations showing a change of mind in regard to the disposal of his property and an actual alteration thereof are admissible where a will is contested on the ground that there was a later will.—In re Hope's Appeal, 48 Mich. 518.

¶ 2167. Evidence of testator's declarations both before and after the making of the will are admissible for the purpose of showing his state of mind.—Haines v. Hayden, 95 Mich. 332.

¶ 2168. Testimony of a devisor's statements that she intended the devisees should have her property, is competent where the will is contested for mental incompetency and undue influence.—McHugh v. Fitzgerald, 103 Mich. 21.

¶ 2169. Declarations by a testator that he intended to provide by will for certain relatives are admissible in so far as his state of mind is material in the contest of a will for mental capacity and undue influence, but not for the purpose of showing that undue influence was exerted over him by other legatees.—Bush v. Delano, 113 Mich. 321.

¶ 2170. Where a will is contested on the ground of testator's mental incapacity, his declarations as to his intended disposition of his property, even though made as long as thirteen years before the making of the will may be shown, and in the absence of proof of such change of purpose, the remoteness of time when the declarations were made bears rather upon the weight of the testimony than its admissibility.—In re Lefevre's Estate, 102 Mich. 568.

¶ 2171. Statements made by a testator after the execution of the will, tending to show that he then entertained an insane delusion against a relative, are inadmissible to prove the existence of a delusion at the time the will was made, where the transactions to which such statements related were likewise subsequent to the will.—In re Merriman's Appeal, 108 Mich. 454.

¶ 2172. Where a will is contested on the ground of testator's mental incapacity, evidence of acts or statements of his tending to show that he was irritable rather than incompetent, is not admissible.—In re Lefevre's Estate, 102 Mich. 568.

¶ 2173. Declarations of a testator as to whether a preferred son asked testator to make a will are inadmissible.—In re Fay's Estate, 197 Mich. 675.

§ 413. By testator to contents of will.

Best evidence of contents, see ante § 135.

¶ 2174. Where, in contesting the probate of a will, evidence of the existence and

fraudulent concealment or destruction of a later will has been adduced from other sources, statements of the testatrix are admissible to show the contents of such later will.—In re Estate of Lamble, 97 Mich. 49.

§ 414. By predecessor in title or estate.

Declarations made before interest attached, see post § 415.
By mortgagor or mortgagee, see post § 417.
Listing and assessment to one party's ancestor for taxes as admission by ancestor of other, see ante ¶ 2089.
By alleged prior owner in absence of claimant, see ante ¶ 2132.
Letter by predecessor's agent to show delivery of deed, see post ¶ 2257.
By pledgee as affecting subsequent holder, see also post ¶ 2549.
By other party's predecessor in absence of party or his predecessor, see ante § 402.
Construction and effect of admission, see post ¶ 2345.
Res gestæ declarations by predecessors, see post §§ 447, 448.
Estoppel of successors by acts of predecessor, see Estoppel, III, C.

¶ 2175. Admissions made in the lifetime of a person since deceased and against his interest, are admissible against his estate.—Walsh v. Backus, 183 Mich. 527.

¶ 2176. Admissions in disparagement of title made by one who is the holder thereof are competent evidence against him and those claiming under him.—Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

¶ 2177. Declarations by an original grantee before parting with his title may be shown in an action of ejectment brought by parties claiming under him, if adverse to the claims made by them.—Moran v. Lezotte, 54 Mich. 83.

¶ 2178. On a bill by complainant to set aside a deed on the ground of his mental incompetency to execute it, admissions by the grantee as to grantor's incompetency are admissible in evidence against grantee's heirs.—Benson v. Raymond, 142 Mich. 357.

¶ 2179. Where ejectment against the widow and heirs of one who had been in possession long enough to claim adversely was brought by a recent grantee of the previous owner, defendant could show admissions in disparagement of his title, made by such grantor, while defendant's ancestor was in possession; and defendant could also prove statements by decedent, showing that his possession was meant to be adverse.—Youngs v. Cunningham, 57 Mich. 153.

¶ 2180. Conversation between an attachment debtor and his grantee, tending to show that the deed, which was dated some time before the levy of the attachment, was not delivered until after, is admissible in evidence in an action of ejectment against a later grantee.—Cook v. Knowles, 38 Mich. 316.

¶ 2181. Evidence of conversations between two adverse claimants of personal property, having a legitimate bearing upon the title as between them was admissible, though had in the absence of defendant, who claims as vendee of one of such claimants.—Doyle v. Dobson, 74 Mich. 562.

¶ 2182. In ejectment for lands the boundaries of which are left uncertain through the latent ambiguity of a former deed, evidence is admissible that the grantor therein pointed out the boundary when the plaintiff in ejectment bought afterwards. This grantor owned the adjoining land, and his statements were in derogation of his own title to extend over the line pointed out.—Purkiss v. Benson, 28 Mich. 538.

¶ 2183. The declarations of a former owner as to the location of, and acquiescence in, a boundary line, made while he was still the owner, are admissible against his grantees.—Jones v. Pashby, 67 Mich. 459.

¶ 2184. In an action of ejectment the statements of a bill in chancery filed by plaintiff's grantor against defendant, which statements disclaim title to the strip of land for which the action is brought are admissible in evidence in behalf of defendant.—Mowers v. Evers, 117 Mich. 93.

¶ 2185. The declarations of the grantor of land, contemporaneous with the making of the deed, made for the purpose of settling the street boundary, are admissible as against him and those holding under him.—Rix v. Smith, 145 Mich. 203.

§ 415. ——Declarations prior to interest.

Declarations made after parting with interest, see post § 416.

¶ 2186. On a bill by complainant to set aside his deed on the ground of his mental incompetency to execute it, admissions and declarations by the grantee as to the incompetency made before she acquired title are inadmissible in evidence against heirs of the grantee.—Benson v. Raymond, 142 Mich. 357.

§ 416. ——Declarations after interest ceased or grant made.

Declarations on eve of divesting title, see ante ¶ 1983.
Declarations made before acquiring title, see ante § 415.
Testator's declarations after making will as evincive of status at time of making, see ante § 412.

¶ 2187. A grantor's admissions to third persons after conveyance made cannot be shown to affect his grantee.—Blanchard v. Moors, 85 Mich. 380.

¶ 2188. On the question of good faith a conversation of the seller and a third person after title had passed, and not in the vendee's presence or hearing, is inadmissible. —Buckingham v. Tyler, 74 Mich. 101.

¶ 2189. A grantor's declarations made after a conveyance are not admissible to impeach the title conveyed.—Fenton v. Miller, 94 Mich. 204.

¶ 2190. Statements made by a vendor of chattels after the sale, tending to impeach its validity, are inadmissible as against the vendee.—Vyn v. Keppel, 108 Mich. 244.

¶ 2191. Statements made by the assignor of an insurance policy after he has parted with its possession are not admissible to defeat the title of the assignee.—Muncey v. Sun Ins. Office, 109 Mich. 542.

¶ 2192. In a suit in ejectment against a life tenant holding by lease, it is not admissible to introduce in evidence the statements of her grantor as to his title made in a will executed after the making of said lease.—Tyler v. Wright, 164 Mich. 606.

¶ 2193. In trover by a vendee for the value of property attached by the vendor's creditors, where the sale to plaintiff was attacked as void as against the creditors, statements of the vendor made after the attachment to a third party are inadmissible.—Lewis v. Rice, 61 Mich. 97.

¶ 2194. The declaration of a vendor in an alleged fraudulent sale made immediately after creditors had attached the property and while such vendor was not with the goods, that she claimed to be in possession thereof, cannot be used in a suit by the vendee claiming by a prior good faith purchase against the attaching officer, the vendee not being bound thereby.—Pickard v. Bryant, 92 Mich. 430.

¶ 2195. Declarations of grantor of lands with regard to such lands made subsequent to the passing by deed of grantor's title therein, are incompetent and should not be received as evidence.—Rix v. Smith, 145 Mich. 203.

¶ 2196. The subsequent acts and declarations of the parties to an assignment for creditors may be resorted to for the purpose of showing its fraudulent character.—Baldwin v. Buckland, 11 Mich. 389; Flanigan v. Lampman, 12 Mich. 58; Smith v. Mitchell, 12 Mich. 180.

¶ 2197. The rule allowing great latitude of inquiry into the good faith of assignments should not be so broad as to admit evidence of subsequent acts of the assignor designed to give the assignment a fraudulent appearance.—Frankel v. Coots, 41 Mich. 75.

¶ 2198. The acts and declarations of the assignor, made after the assignment was signed and delivered, but before the schedules were made out and attached, and while he was engaged in preparing them, are competent evidence to show fraud.—Wyckoff v. Carr, 8 Mich. 44.

§ 417. By mortgagor or mortgagee.

See also ante ¶ 2160.

¶ 2199. In a suit between a mortgagee of chattels and the mortgagor's attaching creditors, evidence of an estimated value made by the owner and mortgagor is inadmissible to bind the mortgagee.—Rosenfield v. Case, 87 Mich. 295.

¶ 2200. Statements made by a mortgagor of chattels, inimical to the interests of the mortgagee, are properly excluded in an action between the latter and a third person, in the absence of testimony tending to connect the mortgagee therewith.—First Nat. Bank v. Marshall & I. Bank, 108 Mich. 114.

§ 418. By person in possession.

By one cotenant recognizing other's title, see ante ¶ 1990.

¶ 2201. In garnishment proceedings against a chattel mortgagee, declarations made in his absence by those in apparent possession of the goods, tending to show that the garnishee was then in possession, are not admissible.—Krementz v. Howard, 109 Mich. 466.

§ 419. By coconspirators and persons in concert of action.

Acts and declarations amounting to res gestæ, see post § 475.

Foundation proofs of conspiracy, see post § 438.

Of acts of others to show concert in monopoly, see Combinations § 10.

Admissions of coconspirators and accomplices against each other in prosecutions for crime, see Indictment, VIII, B.

¶ 2202. In conspiracy to commit an actionable wrong, everything said, done or written by any one of the conspirators in furtherance of the common purpose is a relevant fact against each; but such facts occurring before the conspiracy are not relevant as against any but those who accomplish them or are present when they are accomplished.—Hamilton v. Smith, 39 Mich. 222.

¶ 2203. Where two persons conspire or unite in a common purpose to withhold certain goods from a third person, each is responsible for what the other does and says in furtherance of the common purpose.—Cadwell v. Pray, 86 Mich. 266.

¶ 2204. Where some testimony has been introduced tending to show a conspiracy to defraud, evidence of statements made by

one of the conspirators, in furtherance of the common purpose, is admissible against the others.—Jansen v. McQueen, 112 Mich. 254.

¶ 2204a. The books of a partnership are competent against a defendant company in a suit by the receiver of the firm on claims by partnership customers, where by the law of a former appeal it was settled that such company, doing business with the firm, knew that it was practicing fraud on its customers. —Austin v. Hayden, 176 Mich. 331.

¶ 2204b. Declarations of a coconspirator are inadmissible to prove fraud where the conspiracy has not been shown.—Kimble v. Gillard, 177 Mich. 250.

¶ 2205. Where there is evidence from which it may be inferred that the transactions involving the purchase and transfer of goods were collusive, everything said, done or written by any one of the parties to the combination, in furtherance of the common purpose, is deemed the act of all.—Gumberg v. Treusch, 103 Mich. 543.

¶ 2206. Where two defendants are interested together in a transaction in which they have used a questionable note, the acts and statements of either in regard to any part of the transaction, even if made in the other's absence, may be put in evidence; so, also, to show their animus, may the statements made by either to third parties as to the responsibility of the maker of the note, though such statements related instead to other notes made by him, which they had endeavored, at about the same time, to trade off in similar transactions. The acts and representations of a third person present at the transaction in question, indicating that he was acting in concert with the defendants in fraudulent dealing with such notes, are also admissible to show animus.—Beebe v. Knapp, 28 Mich. 53.

¶ 2207. Complicity in fraud with joint defendants against whom there is direct evidence is provable by showing that all the defendants have been engaged together in similar transactions and that the act was done under a general agency for the particular defendant, who had previously proposed to participate with the others in a series of frauds of the same character.—Dayton v. Monroe, 47 Mich. 193.

¶ 2208. In an action for assault and battery, evidence of violence or of the consequences of violence committed by one who is not a party to the suit is admissible when circumstances tend to show that the person committing it was co-operating with defendant.—Miller v. Sweitzer, 22 Mich. 391.

¶ 2209. The president of a mutual aid society organized for fraudulent purposes, edited a newspaper which was used to advance the interests of the enterprise. Held, that statements published in such paper were admissible in evidence in a suit to recover money fraudulently obtained.—Timmerman v. Bidwell, 62 Mich. 205.

¶ 2210. In an action against two defendants to recover money alleged to have been obtained of plaintiff upon a worthless mortgage executed by a third person, plaintiff may testify to statements made to him by one of the defendants after the mortgage was given, in laudation of such security, as tending to show his concert of action with his codefendant who was active in procuring the money.—Stubly v. Beachboard, 68 Mich. 401.

¶ 2211. In an action against plaintiff's father-in-law for alienation of the affections of plaintiff's wife, sayings and doings by the mother-in-law are admissible against defendant where they were acting in concert.—Edgell v. Francis, 66 Mich. 303.

§ 420. By copartners.

After dissolution or before partnership formed, see post § 421.
As to fact of partnership, see post § 422.
Individual and firm books of account, see post § 523.
By representatives of partners, see ante ¶ 2014.
Acts and declarations amounting to res gestæ, see post § 477.
Scope of agency as limiting agent's authority to make admissions, see post §§ 429-431.
Mutual authority of partners to make binding acknowledgments, see Partnerships, IV, A.
Admissibility of partner's admissions under Uniform Partnership Act, see Pub. Acts 1917, No. 72, § 11.

¶ 2212. A partner's declarations cannot bind his associates in concerns foreign to the partnership, nor can his admissions bring such matters within the scope of the business.—Heffron v. Hanaford, 40 Mich. 305.

¶ 2213. Where the authority of a partner to speak for his associates is not shown, his statements, so far as concerns them, are mere hearsay.—Heffron v. Hanaford, 40 Mich. 305.

¶ 2214. The acts and declarations of a partner actually engaged in a venture in his own name cannot be proved for the purpose of fixing a liability upon the partnership in respect to such venture.—Lockwood v. Beckwith, 6 Mich. 168.

¶ 2215. A partner's private books are not evidence between partners as to partnership matters.—Kinney v. Robinson, 66 Mich. 113.

¶ 2216. In a suit between two partnerships, the testimony of one defendant that he paid one of the plaintiff's his share of an account due from defendant's firm to plaintiff's firm is not admissible either to bind the latter firm as to the amount, or to show a dissolution of the partnership, it not appear-

ing that either party acted for his firm.—Welch v. Palmer, 85 Mich. 310.

¶ 2217. In an action of replevin, where the issue was whether a proper demand had been made for the return of a safe sold under conditional contract of sale, a question propounded to a witness for plaintiff as to what conversation he had had with a member of the firm of which defendant, who had personally bought the safe, was a member, held properly excluded.—Detroit Safe Co. v. Myer, 192 Mich. 215.

§ 421. ——After dissolution or before partnership.

¶ 2218. One partner cannot, after the dissolution of the firm, create a new partnership contract by his admission, or revive a claim against the firm which has been barred by the statute of limitations. But except as to claims so barred by the statute, and others coming within a similar reason, the admission of one partner, made after such dissolution, having reference to previous actual partnership dealings or transactions, stands upon the same ground, and is evidence against the firm in like manner as if made before the dissolution.—Pennoyer v. David, 8 Mich. 407.

¶ 2219. A partner's admission, made after dissolution, must be confined to cases where there has been in fact previous partnership dealings with the plaintiff, or some transactions with the firm out of which a partnership liability to the plaintiff might have originated; and the fact that there might have been such dealings or such transactions must be shown by some evidence outside of the admission itself.—Pennoyer v. David, 8 Mich. 407.

§ 422. ——As to fact of partnership.

Admissions by agent of partner as to partnership, see post ¶ 2266.

Incompetency of agent's declarations to establish agency or disputed authority, see post § 439.

¶ 2220. An admission by one of two defendants, sued as partners, that such relation exists, made in the absence of his codefendant, while not admissible to prove the partnership as against the absent defendant, is admissible for that purpose as against the defendant making the admission.—Armstrong v. Potter, 103 Mich. 409.

¶ 2221. Declarations by each of two alleged copartners made at different times are admissible to show the partnership if the court in its instructions to the jury limits the use of such testimony so that it cannot be considered except as evidence against the defendant making the particular declaration.—Chamberlin v. Fisher, 117 Mich. 428.

¶ 2222. Statements made by persons who have been partners, but after the firm has dissolved and its debts have been assumed by another member, are immaterial in seeking to show the liability of a nonconsenting partner for bonds specially deposited, the firm not having been organized to receive such deposits and getting no profit from them.—Hatheway's Appeal, 52 Mich. 112.

¶ 2223. In an action against alleged partners, testimony of statements by one partner who has defaulted is inadmissible to show the partnership relation.—Scholtz v. Freud, 128 Mich. 72.

§ 423. By parent, child or relative of party.

¶ 2224. Statements or admissions of children in their father's lifetime cannot be received to affect his estate.—Campau v. Dubois, 39 Mich. 274.

¶ 2225. A mother's admissions that her child was warned to avoid the danger cannot release the child's right of action for injury.—Power v. Harlow, 57 Mich. 107.

¶ 2226. Admissions of indebtedness made by one who has robbed a bank are not conclusive upon his relations, who, having given their note to the bank in settlement of such indebtedness, are at liberty, when sued by the bank, to show that he did not owe the amount claimed.—Buck v. First Nat. Bank, 27 Mich. 293.

¶ 2227. Plaintiff in an action on an insurance policy made affidavit that certain property had been burned, but on search it was found concealed. A witness for defendant testified as to what plaintiff said while this search was going on, but it was proper to exclude his testimony as to what the plaintiff's mother, a stranger to the case, had said on that occasion.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 2228. Statements by the father of the owner of an automobile which was damaged by fire while in the possession of the vendor in order to be made by him to comply with a warranty, that they would not pay for any repairs, when made in the presence of the son and where the father had been conducting negotiations are admissible against the vendor in an action to recover for such repairs.—Helber v. Schaible, 183 Mich. 379.

¶ 2229. Evidence that defendant's brother attempted, upon his own responsibility and without respondent's knowledge or consent, to settle a bastardy case, has no tendency to show guilt, and is inadmissible.—People v. Hawks, 107 Mich. 249.

§ 424. By husband or wife against each other.

Statements in absence of party to be charged and not communicated to him or her, see ante § 402.

Acts and declarations as res gestæ affecting other spouse, see post § 476.

¶ 2230. A wife is not bound by her husband's unauthorized admissions or state-

ments concerning her property.—Dawson v. Hall, 2 Mich. 390; Wright v. Towle, 67 Mich. 255.

¶ 2231. In replevin brought against a wife to get possession of property mortgaged by her husband, who had absconded, testimony of what the husband had said and done was inadmissible, unless the acts or statements had been in her presence or with her knowledge.—Campbell v. Quackenbush, 33 Mich. 287.

¶ 2232. In a suit against the wife as the undisclosed principal of the husband, the testimony of a witness as to a conversation with the husband, held several months after the transaction, and in the absence of the wife, is inadmissible.—Schweyer v. Jones, 152 Mich. 241.

¶ 2233. Where a wife's admissions are not confined to acts of agency they cannot be used against her husband in an action of contract against him, unless where they are res gestæ, and admissible as acts instead of relations of facts.—Rose v. Chapman, 44 Mich. 312.

¶ 2234. In an action involving a sale to a woman through her husband, the latter's admissions after his wife's title has vested, and when he is not acting in her business, are properly excluded; and his admissions as to past transactions cannot bind her if they are not part of the res gestæ. — Stansell v. Leavitt, 51 Mich. 536.

¶ 2235. In lessees' action for forcible eviction from premises jointly owned by defendant and his wife, testimony of wife's violent acts in presence of and acting with husband is admissible as part of transaction, but not such acts done in his absence, unless it is shown she was then acting under his counsel or direction.—Baumier v. Antiau, 65 Mich. 31.

¶ 2236. Admissions by a husband, not brought home to his wife, concerning his purpose in transferring his property to her, are not admissible.—Whelpley v. Stoughton, 112 Mich. 594.

¶ 2237. A wife's statements, made in her husband's absence, as to property sold by a third person to him are hearsay, and cannot be shown to bind him.—Hunt v. Strew, 33 Mich. 85.

¶ 2238. A wife is bound by such statements of her husband as he has made in the course of a business conducted in her name but wholly by him.—Leland v. Collver, 34 Mich. 418.

¶ 2239. Where a wife's right to property is derived under a contract with her husband, which contract is contested for fraud, any acts or declarations of his tending to show the fraudulent nature of the contract, and brought to her knowledge, are evidence against her.—Wright v. Towle, 67 Mich. 255.

¶ 2240. What the husband said and did when buying lots is imputable to his wife, where he caused the deeds to be made to her in her name and she relies thereon.—Conlin v. Masecar, 80 Mich. 139.

¶ 2241. In ejectment the admissions against interest of the husband who is a co-defendant with his wife are admissible in evidence against him.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 2242. In an action against a liquor-dealer for selling to plaintiff's husband, remarks made by the husband tending to exculpate the dealer, but not as part of any transaction in dispute, are inadmissible in evidence; they could not bind plaintiff.—Kehrig v. Peters, 41 Mich. 475.

¶ 2243. In an action by a woman for injuries caused by her horse shying at a hole in a bridge and backing through the railing over the side of the bridge or its abutment, it is proper to strike out what her husband, not a witness, once said about the horse "always being afraid of bridges since he got through the T. bridge," such statement having been volunteered by defendant's witness and plaintiff not being bound by such statement either because of her relation to the declarant or because he owned the horse.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 2244. The husband's statement, in pledging his wife's stock to secure his debt, that he was authorized to do so does not tend to prove such authority.—Just v. State Sav. Bank of Ionia, 132 Mich. 600.

¶ 2245. In an action to charge a married woman with a loan made to carry on a business claimed to be hers, declarations by her husband, who is not a party to the action, to the effect that she is the sole owner of the goods, are inadmissible where not res gestæ of any act done by him and at most nothing but a declaration of his agency for her.—Coldwater Nat. Bank v. Buggie, 117 Mich. 416.

¶ 2246. In an action of trover by a wife to recover for the unlawful conversion of an automobile which was taken by defendant sheriff under an execution against the husband, held that a certified copy of an application for an automobile license made by the husband was properly excluded where there was no claim that such application was made in the presence of the wife, and there was no testimony that she authorized it to be issued to her husband.—Jaddatz v. Great Harbor Lumber Co., 194 Mich. 273.

§ 425. ——In crim. con. and alienation suits.

See also ante ¶ 1966.

Relevancy of the statement, see ante § 361, ¶ 1977.

Acts and declarations when done in concert of purpose, see also ante § 419.

To show conspiracy between husband and wife, see post ¶ 2329.
Res gestæ bearing on affection or want of it, see post § 450.

¶ 2247. In an action against a father-in-law for taking and detaining plaintiff's wife, the wife's statements in her father's absence made to a stranger reflecting upon her parents were held hearsay and inadmissible.—Edgell v. Francis, 66 Mich. 303.

¶ 2248. In an action crim. con., the wife's statements to her husband, in the absence of defendant, as to her relations with the latter, are inadmissible as evidence of his guilt.—Dalton v. Dregge, 99 Mich. 250.

¶ 2249. In criminal conversation plaintiff may introduce in evidence letters from his wife to defendant and received by the latter, which were written under circumstances that refute presumption of collusion, and which tend to show the alienation of her affections and the criminal intimacy charged.—Dalton v. Dregge, 99 Mich. 250.

¶ 2250. Where a husband sues his father-in-law for depriving him of his wife's company, and it appears that defendant and his wife were acting in concert, the doings and sayings of defendant's wife may be shown against her husband.—Edgell v. Francis, 66 Mich. 303.

¶ 2251. In criminal conversation, statements by the wife not in the husband's presence that he knew of her misdeeds and did not object and that she had taken care and had good witnesses are erroneously admitted where there is no evidence of conspiracy.—Smith v. Hockenberry, 138 Mich. 129.

§ 426. By trustees, guardians, and the like.

By deceased trustee, see also ante ¶ 2157.
General authority of executors and administrators as representatives of estate or heirs and distributees, see Estates of Decedents, IV, A.
Representative capacity and authority of trustees, see Trusts.

¶ 2252. The guardian ad litem of an infant defendant in a bill to annul a marriage cannot bind her by his admission that she procured the marriage by fraud.—Cooper v. Mayhew, 40 Mich. 528.

§ 427. By agents in general.

See also ante ¶ 2228.
By corporate officers and agents, see post § 432.
By attorneys at law, see post § 433.
By referees, umpires and arbitrators, and scalers, see post §§ 434, 435.
By parent, child or relative of party, see ante § 423.
By husband or wife of party, see ante §§ 424, 425.
By trustee, guardian or representative, see ante § 426.
Subagent's declarations, see post § 428.
Pertinency and relevancy of declaration to agency and authority, see post §§ 429-431.
Necessity and sufficiency of foundation proof of agency and authority, see post §§ 437, 439.
Inadmissibility of agent's declarations to establish the agency or the authority to make the admission, see post § 439.
Statement by agent as to location of boundary, see also ante ¶ 1839.
Admissions by other agent to show fact of agency, see post ¶ 2323.
Acts and declarations amounting to res gestæ, see post §§ 478-484.
Admissibility of parol proofs of agent's negotiations as showing fraud in written agreement, see ante § 156.
Admissibility of letter to agent in connection with agent's use of it to deceive, see also ante ¶ 2007.
Declarations in distinct capacities or agencies, see also ante § 372.
General authority of agents, see Agency, II.
Admissibility of agent's declarations as complementary of evidence that agent made certain statements, see also Agency ¶ 41.

¶ 2253. Where one party has voluntarily made his trustee or agent the ostensible principal, and the only one capable of legal action, he will be bound by the admissions of such trustee or agent.—Hogan v. Sherman, 5 Mich. 60.

¶ 2254. The agency having been fully proved, a letter written by the manager of the defendant's railroad to an attorney of a grantor, afterwards plaintiff in ejectment, stating that the deed from the latter to the defendant did not cover the land in dispute, that it must have occurred through mistakes, etc., was properly admitted, as were conversations between the manager and the attorney.—McCammon v. Detroit, L. & N. R. Co., 66 Mich. 442.

¶ 2255. To render the declarations of an agent or servant admissible against the principal they must be in the nature of original, and not hearsay evidence. They must not only be made during the continuance of the agency, but must relate to transactions depending at the very time.—Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607.

¶ 2256. The statements of an agent, where made in the course of his employment and while engaged in the business of the principal, are binding upon the principal because they are a part of the res gestæ; but no agent is employed to make admissions outside of his employment.—Hall v. Murdock, 119 Mich. 389.

¶ 2257. Letters written by an agent of the testatrix at her direction to her attorney, directing him to deliver a deed in his possession to one of her daughters, and especially cautioning him to see that the deed was

regularly executed and delivered to prevent trouble after her death, are admissible, in an action by another daughter to set aside the deed, to show delivery of the deed and the intention of the testatrix as to the disposition of her property, since they are her declarations though through her agent.—Price v. Hagle, 171 Mich. 455.

§ 428. ——By agent's servant or subagent.

See also post ¶ 2528.

¶ 2258. An accommodation acceptor of paper may properly seek information from the agent or manager of a bank to which the paper is to be paid as to the condition of the person whom both understand to be really responsible on it. And in a suit by the drawee against the acceptor the latter may show his condition and the agent's statements or admissions.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 2259. Statements by an employee of a firm that has been hired to run logs cannot bind the log-owner in a statutory proceeding against him to recover compensation for breaking his log-jams.—Butterfield v. Gilchrist, 53 Mich. 22.

§ 429. Pertinency of statements to scope of agency.

See also ante ¶¶ 2255, 2256.

Relevancy of statement or act to issues in case, see also ante ¶¶ 1978, 1979.

Scope of partnership as limiting authority to make admissions, see ante § 420.

Relation of res gestæ to scope and exercise of agency at time, see post § 482.

Conversations by broker with purchaser to show latter's willingness to make bargain, see also Brokers § 38.

¶ 2260. Statements of one invested with apparent authority relating to the subject-matter of the transaction are properly admitted.—Cronk v. Mulvaney, 168 Mich. 346.

¶ 2261. The principal is not bound by statements made by his agent outside the scope of his agency.—Andrews v. Tamarack Min. Co., 114 Mich. 375; Maxson v. Michigan Cent. R. Co., 117 Mich. 218.

¶ 2262. The statement of an agent not in the performance of his duty is inadmissible as against the principal.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

¶ 2263. The admission of testimony of a general agent as to a statement indicating defendant's liability for the claim in suit, as to which the agent had no original knowledge, and which was no part of the res gestæ of any transaction, was reversible error.—Butters Salt & Lumber Co. v. Vogel, 135 Mich. 381.

¶ 2264. Liability for negligence cannot be established by hearsay admissions of an employee who has no authority to make such admissions, and they constitute no part of the res gestæ.—Rouston v. Detroit United Railways, 151 Mich. 237.

¶ 2265. In suit for the value of timber cut by defendant's contractor on plaintiff's land, the declaration of the contractor, made while he was still lumbering for defendant, that he had cut timber on what turned out to be plaintiff's land and delivered it to defendant, is admissible.—Ayres v. Hubbard, 71 Mich. 594.

¶ 2266. Where the surviving partner of a banking firm, being sued for deposits, denies the existence of the partnership, but evidence has been given thereof, the statements of the cashier, whose general agency has been established, made to plaintiffs when contemplating future deposits, as to the existence of the firm, are admissible in evidence as part of the res gestæ.—Wright v. Weimeister, 87 Mich. 594.

¶ 2267. A bookkeeper's admissions, he having no agency or authority in the subject-matter, cannot bind his employer in an action against the latter upon a contract made with the plaintiff's assignor.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 2268. Where, by the terms of H.'s contract to mine ore for A., a mining company, the amount due H. is to be determined by the railroad weigh bills, which are in the possession of A.'s bookkeeper, statements by the latter as to his reasons for refusing to allow H. to see and copy such bills are admissible against A.—Anvil Mining Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Mich. 876.

¶ 2269. The fact that an underground captain was, with respect to the underground mining operations, the alter ego of defendant, would not make his admissions, not within the scope of his agency, and tending to show negligence binding upon it.—Andrews v. Tamarack Min. Co., 114 Mich. 375.

¶ 2270. In an action against a mining corporation for the death of a miner killed by falling walls, the testimony of the mining captain, who had charge of all the underground work, given at the coroner's inquest over the body of the deceased, that he had ordered precautions to be taken to avoid accident, because he did not consider the place safe, is inadmissible, where it is offered, not for purposes of impeachment, but to prove the substantive fact, that defendant, through its agent, had knowledge of the danger.—Andrews v. Tamarack Min. Co., 114 Mich. 375.

¶ 2271. Defendant, a real estate dealer, sent one Marshall to plaintiff to get an option on plaintiff's lot, and followed up the option obtained by Marshall, and had the lot conveyed to a third person. Held, defendant

was bound by Marshall's statements made to plaintiff.—Walling v. Poulsen, 160 Mich. 392.

¶ 2272. In a suit for injuries due to the negligence of an automobile owner's chauffeur, the statements of said chauffeur made on the occasion of the accident are not admissible to bind defendant, where the evidence clearly shows he was acting outside the scope of his authority in taking out the automobile on the occasion in question.—Riley v. Roach, 168 Mich. 294.

¶ 2273. Admission of testimony tending to prove that either before or after a certain storm from the effects of which upon defendant's tent in which plaintiff was attending defendant's show plaintiff was injured, certain employees of defendant admitted that the tent was not properly erected or made statements from which the inference of defendant's negligence would arise, held to be erroneous; otherwise, if at any time responsible officers and agents of defendant made such admissions.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 2274. The statements of a steamboat clerk who is not shown to occupy any position of general agency are not admissible to bind the corporation that employs him, as to matters not within the scope of his employment.—Ward's Cent. & P. Lake Co. v. Elkins, 34 Mich. 439.

¶ 2275. In an action against a railroad company by one who claims he has a contract with it to be employed for life, the statements of a division superintendent of the road made several years after the making of the alleged contract, that the company had given plaintiff a life job, are inadmissible to establish such contract, both because the superintendent had no authority, and because not having been made at the time of the contract, the statements are not part of the res gestæ.—Maxson v. Michigan Cent. R. Co., 117 Mich. 218.

¶ 2276. Upon the issue whether the goods in question were delivered by defendant to connecting carrier, evidence of a statement made by defendant's agents after the return of the goods at the shipper's direction, to the point of shipment, to the effect that the goods had never left defendant's line of road, is material as an admission; but where it does not appear that such agent knew, or could have known, to what point the goods had traveled, or in whose custody they were found when ordered to be returned, or that he sought the information, or that it was part of his duty to thus inform himself, the statement was merely a gratuitous one, and proof of it incompetent.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

¶ 2277. What a scaler said and did while making a scale of logs and his declarations against the correctness or honesty of the scale may be shown, where the scale is in evidence to prove quantity.—Malone v. Gates, 87 Mich. 332.

§ 430. ——Statements after the fact.

See also ante ¶ 2275.
By corporate officer after the fact, see post ¶ 2297.
Subsequent statement not made known to principal, see also ante ¶ 2137.
Declarations as res gestæ after time of principal occurrence, see post § 484.
Subsequent conversations by broker with other party as evidence against principal, see also Brokers ¶ 153.

¶ 2278. In an action against the principal, the admissions of an agent, after his agency has terminated, are inadmissible.—North v. Metz, 57 Mich. 612.

¶ 2279. Admissions of an agent, made after the fact, and entirely unconnected with any act of agency, are not evidence of the fact.—Bowen v. Rutland School Dist. No. 9, 36 Mich. 149.

¶ 2280. Evidence of the statement of an agent made nine months after he had sold property for his principal, that he knew at the time of the sale that it was good for nothing, is inadmissible to affect the rights of his principal.—Horner v. Fellows, 1 D. 51.

¶ 2281. Where, during litigation, a former agent of one of the parties makes admissions, they cannot be shown in the case unless for their bearing on his own credibility as a witness.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 2282. In an action for the price of an article sold, declarations of the vendor's agent after the contract was completed, and not in the vendor's presence, as to the bargain, are not admissible except to impeach such agent's testimony, in which case his attention must first be called to such statements.—Platt v. Broderick, 70 Mich. 577.

¶ 2283. An agent's declarations as to a past transaction are inadmissible to bind the principal.—Maxson v. Michigan Cent. R. Co., 117 Mich. 218; Andrews v. Tamarack Mining Co., 114 Mich. 375.

¶ 2284. In a suit to recover for injuries received by being kicked by defendant's bay mare, while plaintiff was inspecting her with a view to purchase, evidence on plaintiff's part that an employee of defendant, who had charge of the barn in which the injury was received, testified on the trial of the case in justice's court that there was a bay mare in the barn at the time that was a kicker, is inadmissible.—Ablard v. Fort Wayne & B. I. R. Co., 104 Mich. 147.

¶ 2285. Plaintiff went to defendant's office to buy of him a boat. One Dake, in defendant's employ, called up defendant by telephone and the contract was thus made. Dake had no authority as agent except to transmit defendant's offer. In a suit for breach of the sale contract, plaintiff was permitted to testify as to a conversation had between him and Dake outside of the office, just after the bargain had been concluded, relative to the time of payment. Held, this admission was reversible error, as Dake had no authority to bind defendant. —Baker v. Temple, 160 Mich. 318.

¶ 2286. Where the plaintiff in his declaration seeks to recover only for a wrongful expulsion from defendant's train at a certain station, he cannot introduce in evidence a conversation between himself and defendant's conductor occurring three hours after leaving the station.—Pierson v. Illinois Cent. R. Co., 159 Mich. 110.

¶ 2287. Although plaintiff had stated there was no retraction made in an action for libel against one who sent a letter to a newspaper, which published it, it is error on cross-examination to admit an unauthenticated letter to plaintiff, assuming to exonerate plaintiff and condemn defendant, purporting to have been written by the editors of the paper; since it is hearsay and is not authenticated.—Kovacs v. Mayoras, 175 Mich. 582.

§ 431. ——Explanations of accidents and injuries.

¶ 2288. In a suit against a street railway company for injuries received by a passenger the testimony of a witness to a conversation between the driver and the superintendent, after the accident, in which the driver stated that he had reported the car as having a bad brake, etc., is inadmissible to bind the company with notice of the defect claimed.—Wormsdorf v. Detroit City R. Co., 75 Mich. 472.

¶ 2289. In an action against a carrier for injuries to a passenger riding on an electric car, the declarations of the motorman, made eighteen hours before the accident, that his car was not working well, are inadmissible, because not part of the res gestæ, and as made by one without authority.—Rouston v. Detroit United Ry., 151 Mich. 237.

¶ 2290. Admissions of negligence made by the foreman of a section crew, whose handcar collided with plaintiff's vehicle, made in a conversation with witness the day after the collision, are inadmissible in an action against the railroad company for damages resulting from the collision.—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 2291. In an action for personal injuries caused by an explosion of a boiler, admissions of the foreman of the defendant corporation, made after the accident and not in the scope of his agency, are not admissible to bind the defendant corporation.—Beunk v. Valley City Desk Co., 128 Mich. 562.

¶ 2292. In an action for personal injuries against an electric railway, conversations with the motorman some time subsequent to the accident are admissible to impeach the witness but not as substantive testimony of defendant's negligence.—Butler v. Detroit, Y. & A. A. Ry., 138 Mich. 206.

¶ 2293. Admissions made by the driver of an automobile, the owner of which was injured by being violently thrown about upon running into an excavation in a highway, as to the speed of the car, are not admissible as substantive evidence in an action by the owner for damages for personal injuries, where they were made some time after the accident and not in the presence of the plaintiff.—Loose v. Township of Deerfield, 187 Mich. 206.

¶ 2294. In an action to recover damages for personal injuries sustained by a passenger on an interurban car in a collision between such car owned by one defendant and a moving van owned by a codefendant, alleged conversations between the driver of the van and the superintendent and the motorman of the interurban owner more than a half hour after the accident as to its cause, held not admissions of the van owner, as such driver was not an agent authorized to admit facts or make statements involving liability of his principal.—Hyatt v. Leonard Storage Co., 196 Mich. 337.

§ 432. By corporate officers or agents.

Personal or representative nature of declaration, see ante § 372.

Bank cashiers and agents, see ante §§ 429-431.

Res gestæ acts and declarations, see post § 479.

Admissibility of corporate books of account, see post § 524.

Authority of bank officers to make admissions, see Banking § 58.

Statements of single directors out of session and not incident to official act, see also Corporations ¶ 426.

General authority of officers and agents to bind corporation, see Corporations, XVII.

Statutory rule as to admissions by members as evidence against corporation in suits by or against it, see Jud. Act, chap. XVII § 57; Comp. L. 1915, § 12545.

¶ 2295. Evidence is admissible against a corporation of acts of its officers and agents within the scope of their employment.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99,

¶ 2296. In an action for a balance claimed to be due the plaintiff for services as superintendent of a corporation, a certificate by the treasurer of the company, who was also consulting director, that the company was indebted to plaintiff in a given sum for balance of salary, is not admissible in evidence as an admission binding on the company in the absence of any showing of authority in such treasurer and consulting director to make such admissions.—Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327.

¶ 2297. In an action against a company for the price of goods ordered by its agent, it is not error to exclude testimony as to a conversation with one of the company's officers concerning the agent's connection with it where such conversation took place after the orders were given, when the one who took the orders was absent and there is no evidence that such officer had authority to bind the company by his admissions.—Rothschild v. Sugar Beet Products Co., 174 Mich. 237.

¶ 2298. In a suit against a corporation by an agent for an accounting as to commissions on goods sold the statements and admissions of the president and general manager, and the treasurer, who constitute a majority of the directors and are both officially and actively engaged in the business, relative to the existence of a contract with plaintiff, are competent evidence.—Neal v. Novelty Leather Works, 198 Mich. 598.

¶ 2299. The individual recognition by the trustees of a corporation of a cotrustee's right to compensation for services is not admissible, but their acts and statements in their official capacity are.—Cicotte v. St. Anne's Catholic Church, 60 Mich. 552.

¶ 2300. In an action by the holder in due course of notes purchased by the holder, who was an officer of a corporation, from the corporation, held that evidence as to a conversation between the maker and the treasurer of the corporation relative to payment of the notes, was inadmissible.—Poss v. Meader, 189 Mich. 323.

§ 433. By attorneys at law.

Award by lawyer as referee, see post ¶ 2309.
Admissions by attorneys in open court in trial of the case, see Trial, V.
General authority of attorneys at law to bind clients, see Attorneys, II, C.

¶ 2301. A note written by plaintiff's attorney before suit, and expressing the opinion that defendant is not liable, is not admissible in evidence for the defense.—Farmers' Mut. Fire Ins. Co. v. Bowen, 40 Mich. 147.

¶ 2302. A solicitor has no authority to make admissions for his client in a proceeding, as for a contempt, to enforce a civil remedy.—Scott v. Chambers, 62 Mich. 532.

¶ 2303. A statement of the attorney for the defendant in an attachment suit made at the time the judgment was rendered, that he could defeat the judgment but had made up his mind to let plaintiff take judgment, is inadmissible to show fraud and collusion on the attorney's part, for by itself it has no such tendency.—Hunt v. Strew, 33 Mich. 85.

¶ 2304. A railroad company is not bound by the statements of its local attorney, whose authority is limited to matters specially entrusted to him, concerning a matter in which he has not been employed.—Fletcher v. Chicago & N. W. R. Co., 109 Mich. 363.

¶ 2305. In an action against a railroad company for malicious prosecution in causing the arrest of plaintiff for knowingly receiving stolen property, statements made by the local attorney for the road that there had been considerable feeling over the stealing from the company, that they thought plaintiff had been at the head of it, and that they wanted to put a stop to it, are inadmissible, where the attorney had no general authority, and had not been employed in the matter in question.—Fletcher v. Chicago & N. W. R. Co., 109 Mich. 363.

¶ 2305a. In an action on a mutual benefit certificate, a letter written by plaintiff's attorney to defendant order, relating to the assessments paid, is properly admitted for defendant where there is no question as to the authority of the attorney.—Brown v. Great Camp of Knights of Modern Maccabees, 167 Mich. 123.

¶ 2306. Letters from an attorney, containing an admission of the receipt of notices claiming rent and asserting a purpose of holding a bankrupt lessee, are not admissible against the lessee, where the attorney was employed in the bankruptcy proceedings only and no competent evidence brought receipt of the notices home to the lessee.—Stewart v. Sprague, 71 Mich. 50.

§ 434. By persons referred to for information or decision.

¶ 2307. Where a party claiming property alleged to have been transferred to him for the purpose of defrauding creditors was inquired of by a creditor as to his responsibility and referred the creditor to the business men of a place where he had formerly resided to ascertain in regard to such responsibility, held, that this reference did not authorize the statements of the business men of such place, made in answer to the inquiries of the creditor, to be given in evidence (on the ground of agency) on behalf of the officer who subsequently attached such property at the suit of the creditors.—Rosenbury v. Angell, 6 Mich. 508.

¶ 2308. Where it appeared in a suit involving the character of a promissory note that one of the defendants had referred the

plaintiff to the maker of the note for information, it was held that any statements made by the maker in reference to the note at that interview were as much a part of the res gestæ as if made in the defendants' presence, or even as if made by themselves. —Beebe v. Knapp, 28 Mich. 53.

§ 435. ——Award of umpire, arbitrator or scaler.

Scale made by selected person as binding on parties, see also Contracts § 185.

Admissibility of arbitrator's award when not intended to bind, see also Arbitration ¶ 107.

¶ 2309. Evidence of a parol submission to a lawyer and of his award between the parties is admissible against one of them and in favor of the other as an implied admission.—Cady v. Walker, 62 Mich. 157.

¶ 2310. Where an employee of the owner of timber is accepted by the contractor as scaler, and, at the request of the contractor, prepares a scale on which he also keeps an account of the logs in such a way as to disclose how many feet are cut by each of the contractor's employees, thereby furnishing the contractor a basis for paying his men, such scale is admissible in evidence against the owner in an action by the contractor to recover for work and labor on the contract after failure of owner to furnish funds pursuant to contract.—Brooks v. Bellows, 192 Mich. 109.

¶ 2311. Where, under a contract for grading a road-bed, the plaintiff's work is to be under the direction of and subject to change by the engineer in sole control, a conversation between plaintiff and such engineer, acting for defendant, though in defendant's absence, is admissible.—Bush v. Brooks, 70 Mich. 446.

§ 436. By public officers.

¶ 2312. An unnecessary memorandum of assessment of damages by the clerk on a default is not binding on the plaintiff on the theory of a reliance on the facts stated.—Danielson v. Dyckman, 26 Mich. 169.

¶ 2313. Evidence of what a person deputized to serve an execution said as to his authority from the execution plaintiffs, when he returned a prior execution and took out the one in question in the suit, is admissible against such plaintiffs.—Harvey v. McAdams, 32 Mich. 472.

¶ 2314. Statements made by a highway commissioner to third persons are inadmissible to show that the township had notice of defects in a bridge whereby injury was done, if such statements were not made until after the injury took place nor while the commissioner was in the discharge of his duties.—Stebbins v. Township of Keene, 55 Mich. 552.

¶ 2315. In an action for injuries sustained by the breaking of a bridge, statements by the one who was overseer of highways at the time of the accident, made some eighteen months thereafter, that he had not regarded the bridge as safe, are inadmissible.—O'Neil v. Township of Deerfield, 86 Mich. 610.

¶ 2316. In an action for assault and battery, although what the defendant said, by way of admission, upon the trial of a criminal action growing out of the same transaction, is admissible, what the police justice said to him on such trial is incompetent.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 2317. In an action against the warden of a penal institution of the state to recover for the cancellation of a contract, evidence is not admissible on behalf of the plaintiff as bearing on the question whether grounds existed for the cancellation, to show an attempt by his assignor to bribe a member of the board of control, since the state could not be affected by it.—McDowell v. Fuller, 183 Mich. 639. (Per Brooke, C. J., McAlvay, Stone and Ostrander, JJ.)

§ 437. Foundation proof of agency or privity.

See also ante ¶¶ 1999, 2254, 2287.

Burden of proving foundation facts, see ante § 69.

Necessity of proof of connection, see also ante ¶ 2122.

Presumption that declaration in an action was authorized by plaintiff so as to charge him by admissions therein, see ante ¶ 2001.

Foundation for letter by stenographer's testimony, see post ¶ 2652.

Inadmissibility of agent's declarations to prove agency or authority to make the admission, see post § 439.

Order of proof of agency and declarations by the agent, see Trial, V, B.

Evidence of agency in general, see Agency §§ 9, 10.

Evidence of agent's authority in general, see Agency §§ 40, 41.

¶ 2318. In a suit against a railroad company for extra services as station agent, it was shown that plaintiff was requested by two agents of the company to take charge of the station; but it was not shown that the agents had any authority to act. Held, that evidence was inadmissible in behalf of plaintiff to show what one of the agents said to him about taking the position at the station.—Grand Trunk R. Co. v. Nichol, 18 Mich. 170.

¶ 2318a. Where a son sends one who wishes to buy land of him to bargain with the father, saying that he will agree to whatever bargain they shall make, the person sent is authorized to regard the father as the son's agent for the purpose of the bargain, and the father's statements while negotiating the sale will bind the son.—Reeves v. Kelly, 30 Mich. 132.

¶ 2318b. Evidence sufficiently shows that one whose brother, now deceased, had given a mortgage to a third person was the mortgagor's agent, so that his acts and admissions in regard to a second mortgage claimed to have been given and received in satisfaction of interest that had accrued on the first mortgage were binding upon his principal, the two having "worked and acted together" and consulted each other on this and other transactions.—Blair v. Carpenter, 75 Mich. 167.

¶ 2319. A letter and published statements in a newspaper are admissible against persons in charge of the paper, where the letter was written by their manager purporting to admit the responsibility of those composing the company, and the published statements and other evidence identified the persons under whose authority the admissions were made.—Callam v. Barnes, 44 Mich. 593.

¶ 2320. In an action by the wife against a saloon keeper and his bondsmen for illegal sale of liquor to the husband, where the defense offers in evidence a receipt in full and testimony of payment of $10.00 for a discharge of all liability, it is error in attempting to show fraud or duress to admit testimony that three different persons told the plaintiff that the defendant had threatened to have her arrested as a common prostitute, without connecting up their statements with the defendant by showing previous authority or ratification.—Boydan v. Haberstumpf, 129 Mich. 137.

¶ 2321. In an action for damages by a vendee of land for fraudulent representations made by the vendor, it is proper to admit evidence of the representations made by the vendor's agent in vendor's absence on a showing that said vendor told the plaintiff said agent was acting for him in selling the land.—Wegner v. Herkimer, 167 Mich. 587.

¶ 2322. In an action of ejectment, evidence that defendant attempted to purchase plaintiff's interest as cotenant is inadmissible on the question of adverse possession, where the authority of an attorney to represent defendant in the purchase was not shown.—Croze v. Quincy Min. Co., 199 Mich. 515.

¶ 2323. The agency of one alleged agent cannot be shown by the admissions, declarations, and recognition of another agent of the same principal unless the latter be one authorized to make those admissions.—Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270.

§ 438. ——Of conspiracy or concert.

Mere similarity of testimony as evidence of conspiracy by witnesses, see ante ¶ 2000.

General evidence and indicia of conspiracy, see Conspiracy § 6.

Foundation proofs in criminal cases, see Indictment, VIII, B.

¶ 2324. In conspiracy to commit an actionable wrong, things said, done or written by any one of the conspirators in furtherance of the common purpose are not relevant as against any but those who accomplish them or are present when they are accomplished, and they cannot be admitted as against the rest unless there is prima facie ground for believing in the existence of a conspiracy.—Hamilton v. Smith, 39 Mich. 222.

¶ 2325. Declarations of one conspirator are inadmissible in proof of the conspiracy, though they may perhaps be evidence against his associates after the conspiracy is made out.—Solomon v. Kirkwood, 55 Mich. 256.

¶ 2326. Defendant in an action brought by a woman for an indecent assault upon her may properly put in evidence statements made by plaintiff's husband, tending to show that the action was brought to carry out a scheme contrived by the husband's wife for extorting money; and these statements are admissible even though made in the wife's absence. But the conspiracy must be clearly made out to render such evidence admissible, and good practice requires that it should be shown before the statements are proved.—Mawich v. Elsey, 47 Mich. 10.

¶ 2327. Where, in an action for negligent injury it appeared that one who had been injured in the same accident with plaintiff, after recovering judgment against defendant, furnished apartments for plaintiff, took general management of her suit, and was to receive a share of her recovery; defendant might show what such person said about not wanting plaintiff to attend the trial, and what plaintiff said about a letter received from such person about the trial, as bearing on a conspiracy between the two to extort money from defendant.—Cole v. Lake Shore & M. S. R. Co., 81 Mich. 156.

¶ 2328. Declarations of a coconspirator are admissible as to a party to the conspiracy, but not until the existence of conspiracy has been otherwise established.—Kimble v. Gillard, 177 Mich. 250.

¶ 2329. In criminal conversation, statements by the wife not in the husband's presence that he knew of her misdeeds and did not object and that she had taken care and had good witnesses are not admissible to show the husband a coconspirator and they furnish no evidence of connivance.—Smith v. Hockenberry, 138 Mich. 129.

§ 439. ——Declarations or assumptions by agent that he is such or has authority.

Res gestæ as evidence of authority, see post § 480.

Husband's declaration of agency for wife, see ante ¶ 2245.

Admissions by one agent that another is agent, see also ante ¶ 2323.

Incompetency of partner's declarations to establish partnership relation, see ante § 422.

Admissibility of agent's direct testimony that he is agent or has authority, see Agency §§ 9, 40.

¶ 2330. That one assumed to do an act as another's agent cannot be shown as evidence of his authority so to do it.—Reynolds v. Continental Ins. Co., 36 Mich. 131.

¶ 2331. Agency cannot be established merely by dealings between the alleged agent and a third person.—North v. Metz, 57 Mich. 612.

¶ 2332. The acts and declarations of one who assumes to be acting as the agent of another are not evidence against the supposed principal until the fact of agency is established by other evidence.—Hatch v. Squires, 11 Mich. 185; Carpenter v. Continental Ins. Co., 61 Mich. 635.

¶ 2333. Agency is not proved by the alleged agent's own acts or statements alone. —Hatch v. Squires, 11 Mich. 185; Kornemann v. Monaghan, 24 Mich. 36; McDonough v. Heyman, 38 Mich. 334.

¶ 2334. The acts, statements or declarations of an alleged agent are inadmissible to establish his agency.—Davis v. Kneale, 97 Mich. 72; Somerville v. Wabash R. Co., 109 Mich. 294; Coldwater Nat. Bank v. Buggie, 117 Mich. 416; Fontaine Crossing & Electrical Co. v. Rauch, 117 Mich. 401; Theisen v. Detroit Taxicab & Transfer Co., 200 Mich. 136.

¶ 2335. Agency cannot be established by testimony as to the statements of the alleged agent relating to the fact or to the possession of any of the indicia of agency.—Henneberger v. Matter, 88 Mich. 396.

¶ 2336. An alleged agent's declarations are inadmissible in proof of his authority or of its extent.—Bacon v. Johnson, 56 Mich. 182; Ironwood Store Co. v. Harrison, 75 Mich. 197; Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253; Henneberger v. Matter, 88 Mich. 396; Swanstrom v. Muskegon Imp. Co., 91 Mich. 367.

¶ 2337. An agent's authority cannot be established by his own declarations or admissions.—Ward v. Dunnebecke, 184 Mich. 703.

¶ 2338. Declarations by an agent as to the extent of his authority are inadmissible to prove such authority.—Superior Drill Co. v. Carpenter, 150 Mich. 262.

¶ 2339. In an action for the rent of a saloon defendant sought to show that during the period sued for the premises were occupied by another person. Held admissible to introduce the statement of such person to strangers that the saloon was not his but he was running it for defendant. Such statements would be relevant to the question whether the occupant was holding in his own right, but they could not bind defendant as admissions that he himself was in possession. —Jacobs v. Callaghan, 57 Mich. 11.

¶ 2340. Declarations by a person claiming to be an agent, and constituting part of his transactions as such, may be shown as res gestæ on the question of his authority.—Haughton v. Maurer, 55 Mich. 323; Hirschmann v. Iron Range & H. B. R. Co., 97 Mich. 384.

¶ 2340a. The statements of an alleged agent as to his agency, made in a matter not connected with his principal, have no tendency to prove such agency.—Ironwood Store Co. v. Harrison, 75 Mich. 197.

¶ 2340b. In an action for the price of goods sold and delivered to defendant's alleged agent, orders for goods drawn by him on third persons in which he purported to act as defendant's agent, but which were not shown to have been recognized by them in any way, are not admissible to show the agency.—Ironwood Store Co. v. Harrison, 75 Mich. 197.

¶ 2341. When there is evidence tending to show ratification of an alleged agent's acts, his admissions and declarations, although not competent to establish the fact of agency, are competent to show ratification.—Mally v. Excelsior Wrapper Co., 181 Mich. 568.

¶ 2342. In an action against a father for board furnished his son, the son's false representations as to his authority to bind his father are insufficient to bind the father.—McCrady v. Pratt, 138 Mich. 203.

¶ 2343. A lessee, having testified that he had no authority to effect an alteration of a writing after he and his colessee had signed it, cannot be shown to have had authority by proof of declarations made out of court to the contrary; but such testimony is proper to impeach his denial of authority.—McPherson v. Pinch, 119 Mich. 36.

¶ 2344. In an action to which he is not a party and not directly involving the goods the declaration against interest of one in possession of goods is not admissible to show that he is in possession as defendant's agent. —Coldwater Nat. Bank v. Buggie, 117 Mich. 416.

4. Scope and effect of admissions, and explanation of rebuttal.

§ 440. Scope, effect and construction of the admission.

Conclusiveness and unimpeachability of admissions, see post § 602.

Inconclusiveness of entries of charges on account books, see also ante ¶¶ 2036, 2037.
Admissions in bond as binding on sureties, see ante § 382.
Rule of intendment against person making admission, see post § 441.
Admissibility of admissions constituting res gestæ where declarant only is bound, see also post ¶ 2356.
Admission of factum of instrument as dispensing with formal foundation proofs of execution, see post § 519.
Sufficiency of proof by admissions only, see post § 582.
Weight and unimpeachability of evidence consisting in admissions, see post §§ 594, 602.
Consideration of admission as a whole, see also post § 596.
Declarations contradicted by declarant's actions, see post § 608.
Admission made to railroad "system" as admission in favor of member of system, see also Carriers ¶ 246.
Unsworn answer in equity as an entire admission not receivable in fragments, see also Equity ¶ 659.
Of admissions in the pleadings to form the issues, see Pleading, IX; Equity, VII, F.
Of admissions in open court by party or counsel, see Trial, V, A.

¶ 2345. Declarations of a grantor in his lifetime of an intention to give property to certain children are not competent to establish a delivery of a deed to them, where such instrument was not mentioned by the grantor.—Broffee v. LeFils, 183 Mich. 100.

§ 441. ——Construction of admission against maker.

¶ 2346. Where a defendant admitted the receipt by himself of one of two certain amounts from the plaintiff's intestate, but omitted on the trial to show which, it was held proper to charge him with the larger sum.—Bigelow v. Paton, 4 Mich. 170.

§ 442. Explanation and rebuttal of admissions.

See also ante ¶ 455.
Inconclusiveness of receipts and acknowledgments in writing, see also post § 603.
Of entries on account books, see ante ¶¶ 2036, 2037.
Of admissions contained in invalid instrument, see ante ¶ 2060.
Of admissions made in proofs of loss, see ante ¶¶ 2079, 2080.
Admissibility of complementary portions of admissive conversation or declaration, see ante § 91.
Res gestæ of scale made and in evidence, see post ¶ 2449.
Parol to contradict or explain written receipts, see ante §§ 190, 191.
Burden of proving mistake or other facts rebutting admission, see ante § 66, ¶ 361.

¶ 2347. Where the testimony of a plaintiff given at a former trial is introduced in evidence to show admissions made by him, all that was testified to by the plaintiff upon the subject on the former trial is competent evidence as explanatory matter.—Merrill v. Leisenring, 166 Mich. 219.

¶ 2348. To overcome the effect of the giving of orders for wages and payment of them by the opposite party, the one against whom they are urged may show that he had no knowledge of the form of the orders, as in that case they could not operate against him or tend to show that he was not acting merely as defendant's agent, and there was nothing in their payment by defendant to estop plaintiff from showing the circumstances under which they were drawn.—Boyce v. Martin, 46 Mich. 239.

§ 443. ——Contrary statements.

Letter to overcome effect of original pleading put in evidence though since amended, see ante ¶ 470.

¶ 2349. Where a claim for services is made against an estate and the claimant proves that the intestate has made declarations tending to show that he expected to pay for the services, the defense cannot be allowed to show that he has made declarations of a different character.—Van Fleet v. Van Fleet, 50 Mich. 1.

D. RES GESTÆ.

§ 444. In general; nature and admissibility.

Spontaneousness of utterances, see post § 445.
Nature and circumstances of the utterance and facts manifested, see post §§ 446-456.
Particular acts and subjects and res gestæ thereof, see post §§ 457-467.
Time of the utterance and relation and connection with event, see post §§ 468, 469, 484.
Demeanor or writings as res gestæ, see post §§ 470-474.
Acts of agents and persons in privity to party as res gestæ admissible in the case, see post §§ 475-484.
Declarations evincive of thoughts, intents and mental condition of declarant, see ante §§ 329-335.
Res gestæ rule as applied in trials for crime, see Indictment, VIII, B.
[Note. Since the res gestæ are the circumstantial parts and utterances characterizing and comprised within the principal event or fact in issue, it must follow that no exact distinction and classification of cases illustrating the res gestæ rule is possible. In addition to the cases collected here, the specific topics should be consulted in those parts dealing with admissibility of evidence.]

¶ 2350. To make statements admissible as res gestæ they must be spontaneous, made at or near the time and place of the accident, and so closely connected with the occurrence as to be evoked and prompted by it.—Ber-

nard v. Grand Rapids Paper Box Co., 170 Mich. 238.

¶ 2351. The exception to the hearsay rule permitting unsworn statements that are spontaneous exclamations to be viewed as part of the res gestæ is based upon the fact that such exclamations by virtue of their origin have a peculiar trustworthiness. —Rogers v. Saginaw-Bay City Ry. Co., 187 Mich. 490.

¶ 2352. The conditions under which unsworn statements that are exclamations are admissible as a part of the res gestæ under the exception to the hearsay rule are that there is a startling occasion, startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting; that the statement must have been made before there has been time to contrive and misrepresent; and the statement must relate to the circumstances of the occurrence preceding it.—Rogers v. Saginaw-Bay City Ry. Co., 187 Mich. 490.

¶ 2353. A party's statement made at and during the time of a transaction is admissible as showing what the transaction was. —Towle v. Dunham, 84 Mich. 268.

¶ 2354. The res gestæ of a transaction are usually significant and tend to enlighten the jury upon the matters in issue; and they are not to be shut out by proffered admissions of the other party.—Baumier v. Antiau, 79 Mich. 509.

¶ 2355. The whole of a conversation containing words complained of as slanderous is admissible as part of the res gestæ.—Ellis v. Whitehead, 95 Mich. 105.

¶ 2356. Admissions of parties may be admissible in evidence as part of the res gestæ, even though they cannot bind any one else.—Callam v. Barnes, 44 Mich. 593.

¶ 2357. Where a party is sued in trover for goods seized by him under a chattel mortgage given to him by his codefendants, who were a majority of the directors of an incipient corporation, he cannot, in explaining how he came to take the mortgage, narrate statements of such codefendants concerning their previous dealings with plaintiff, as such statements are hearsay and not needed to describe the res gestæ.—Doyle v. Mizner, 42 Mich. 332.

Admissibility in proceedings under compensation acts for death of employee of statements made by deceased, see note, 5 N. C. C. A. 917-924.

§ 445. Spontaneousness; answers to questions.

As to spontaneousness, see also ante ¶¶ 2350, 2352.

Statements of reasons or explanations, see post § 446.

Exclamations and complaints of pain and sickness, see post §§ 453-456.

Burden of proving foundation fact of spontaneity, see ante ¶ 372.

¶ 2358. In a suit for the death of a child killed by a street car, evidence that the motorman, fifteen or twenty minutes after the accident, admitted he was to blame, is not competent where a large crowd assembled about the car and assaulted and intimidated the motorman.—Feldman v. Detroit United Ry., 162 Mich. 486.

¶ 2359. Statements of decedent, in an action for personal injuries resulting in his death, are not admissible as res gestæ where it appears that they were made over a mile away from the place where the accident occurred, and an hour afterwards, that decedent was not unconscious during all of this interval, and that such statements were not spontaneous and voluntary, but were drawn out by questions.—White v. City of Marquette, 140 Mich. 310.

¶ 2360. In an action against an express company for damages on account of the death of an express messenger resulting from a fall sustained by such express messenger when he stepped out from his express car under the misapprehension that a baggage truck was in position alongside the car so that he could step upon it, evidence in the deposition of such express messenger taken before his death, that, after he had fallen, he yelled, "Who pushed the truck?" and that the baggageman answered, "Your own man did it!" is hearsay, and is not admissible as part of the res gestæ because it is not spontaneous.—Chapman v. United States Exp. Co., 192 Mich. 654.

¶ 2361. In an action by an administratrix against a street railway company for damages for injuries claimed to have resulted in death of deceased, evidence held insufficient to show that an exclamation of deceased was spontaneous so as to be admissible as part of the res gestæ under the exception to the hearsay rule.—Rogers v. Saginaw-Bay City Ry. Co., 187 Mich. 490.

¶ 2362. A man who took a traction-engine down a slope and across a bridge was injured by the breaking of the bridge, and it being claimed, in defense to his action for the injury, that he came down the slope with steam on, he showed that at the top he told the engineer to shut it off, and that the engine was propelled by horse alone. Held proper to show also that the engineer had answered that he had shut off the steam; his answer was res gestæ.—Stebbins v. Township of Keene, 55 Mich. 552.

§ 446. Statements of reason, purpose or explanation.

Subsequent statements, see post § 468.

Explanations and statements of cause of accident or injury, see post § 469.

Res gestæ of possession or claim, see post §§ 447, 448.
Statements at time of recording instrument, see post § 461.

¶ 2363. Where a druggist brought an action of libel based on a newspaper article which charged him with making and selling counterfeit Haarlem oil, proof that purchasers from plaintiff returned the oil, and gave the printed article as a reason for not keeping it, is admissible without calling such persons as witnesses. Reasons given in connection with such return are part of the res gestæ, and not to be treated as hearsay.—Steketee v. Kimm, 48 Mich. 322.

¶ 2364. Conversation clearly connected with the facts in issue is admissible in evidence as explanatory of the facts and as part of the res gestæ.—Stewart v. Brown, 48 Mich. 383.

¶ 2365. In breach of promise suit, letter by plaintiff replying to letter sent by defendant in reply to note sent by her, and affirming a fact questioned by his letter, is admissible in her behalf as part of the res gestæ.—Rutter v. Collins, 96 Mich. 510.

¶ 2366. Where the question was whether a $200 note from defendant to his mother had been paid, evidence that defendant, on leaving the house with $208 stated that he was going to pay his mother, was not admissible as part of the res gestæ.—Schulz v. Schulz, 113 Mich. 502.

¶ 2367. In an action for the price of lumber to be used in defendant's house, and which was to have been furnished the builder on credit, he being already in debt to the plaintiff, where the order was entered on the books of plaintiff, the fact that plaintiff's manager saw the foreman after the entry was made and the builder had left, and told him not to fill the order was not a part of the transaction of making the entry on the books and therefore inadmissible as part of the res gestæ thereof as against the defendant.—Tolbert v. Burke, 89 Mich. 132.

§ 447. To characterize possession or claim of right.

As to location of boundaries, see post § 448.
To characterize agent's possession, see post § 481.
Declarations other than res gestæ relative to possession or claim, see ante §§ 325, 329, 330.
Declarations in derogation of title or possession of declarant, see ante §§ 364, 365.

¶ 2368. A wife claimed ownership of a horse as given to her by her husband, and testified that after the gift was made she went to the stable where the horse was kept and gave directions respecting its keeping, and that she afterwards controlled it. Held, that this was admissible as part of the res gestæ and as tending to show that possession was delivered.—Davis v. Zimmerman, 40 Mich. 24.

¶ 2369. A man found several cows damaging his crop, and he impounded them within his own inclosure. The owner of one of the cows, after tendering appraised damages and demanding the cow, brought replevin. The transaction at time of making demand, involved several other cows, but the court refused to permit any inquiry except as to the one for which suit was brought. Held error to exclude evidence of the conversation and dealings as showing defendant's course with reference to consenting or refusing to give up the cattle.—Toomy v. Woodruff, 50 Mich. 31.

¶ 2370. What an attachment defendant said and did with respect to the property attached, at or about the time the writ was served, are competent evidence in an action of trover by one claiming to be the owner and claiming that the attachment defendant was his agent.—Adams v. Kellogg, 63 Mich. 105.

¶ 2371. Where possession is demanded of an officer who has levied execution his statement is properly given in evidence to show on what pretext he acted, it not being offered to bind the execution plaintiff.—Gutsch v. McIlhargey, 69 Mich. 377.

¶ 2372. An insured person, in proving loss by fire, swore to the destruction of a sewing-machine, but in an action on the policy a neighbor who was at the fire testified that she saw the machine standing on the ground, and that next day plaintiff's hired man left it at witness' house for safe-keeping. Held proper to ask what he said on doing so, as part of the res gestæ, and as bearing on the question whether he also had sworn falsely in proofs of loss.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 2373. In an action on a claim involving the genuineness of a note alleged to have been executed by a mother, since deceased, in favor of her daughter, testimony of a witness that he had talked with the claimant daughter about the note shortly after her mother's death and that she told him that she had such note and supposed he knew about it, which knowledge he then denied, is competent on behalf of the estate.—Mack v. Cole's Estate, 130 Mich. 84.

¶ 2374. In an action by a purchaser of stock against the directors of a corporation to recover the purchase price of the stock with interest, under a written agreement to repurchase at the expiration of a certain period on the giving of 90-days' notice orally or in writing, held that evidence of one who accompanied plaintiff to the office of one of defendants immediately after sign-

ing the agreement, on the question whether plaintiff gave oral notice to such defendant of his election to sell the stock to such defendant at such time, that plaintiff told such defendant that he was not purchasing the stock, but that he was merely putting 3 per cent money to work to earn 6 per cent and that he did not intend to hold the stock, and he wanted such defendant to understand that it was expected that he would redeem the stock and pay the purchase price, and interest, at the expiration of the contract, was admissible as part of the res gestæ. —Semer v. Cleary, 199 Mich. 173.

§ 448. ——Location of boundaries.

Subsequent declarations by surveyor, see post ¶ 2475.

Statements at time of drafting instrument, see post ¶ 2440a.

Statements in derogation of one's own boundary or claim, see ante § 365.

¶ 2375. The question being as to the location of a dividing line between lands, the declarations of a former owner of one parcel are admissible to explain the nature and extent of his possession, whether such declarations are in disparagement of title or not.—Bower v. Earl, 18 Mich. 367.

¶ 2376. The declarations of a former owner as to the location of, and acquiescence in, a boundary line, made while he was still the owner, are admissible against his grantees.—Jones v. Pashby, 67 Mich. 459.

§ 449. To show assent or dissent.

Declarations other than res gestæ evincive of declarant's mind, see ante § 334.

¶ 2377. A party can always show by his own testimony that he did not enter into an agreement relied on against him, or voluntarily enter upon the performance of work which had been imposed upon him, but for which he had not been engaged; and he may show this by testimony of what he said at the time he was directed to do such work.—Jones v. Lake Shore & M. S. Ry. Co., 49 Mich. 573.

¶ 2378. In an action supported by attachment to recover rent due on an oral lease of a store building providing that the balance of the year's rent would be due and payable if the tenant vacated the premises before the expiration of his term, held that evidence that the managing clerk of the store stated that defendant had given her orders to "pack up and get out" was admissible as part of the res gestæ.—Spears v. Black, 190 Mich. 693.

§ 450. To characterize feelings or state of mind.

Declarations other than res gestæ evincive of declarant's mind and intents, see ante §§ 329-335.

To show assent or dissent, see ante § 449.

¶ 2379. In an action for criminal conversation evidence of plaintiff's conduct when his wife's offense was communicated to him is admissible to show how he was affected by the disclosure, and as bearing upon the damages.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 2380. In an action crim. con., such part of a conversation between plaintiff and his wife as tends to show his feelings and conduct on learning of her infidelity is admissible as bearing on the question of damages.—Dalton v. Dregge, 99 Mich. 250.

¶ 2381. A letter by a wife to her parents stating that her husband was so unkind to her that she was "sick of her home" is proper res gestæ in an action for alienation based on her subsequent leaving home.—Perry v. Lovejoy, 49 Mich. 529.

¶ 2382. In an action against a father-in-law for taking and detaining plaintiff's wife, the wife's statements during the period of alienation but not in defendant's presence, concerning the reasons why she stayed with her parents, and her feelings and wishes, are admissible as res gestæ; but her statements reflecting on her parents made to a stranger are hearsay.—Edgell v. Francis, 66 Mich. 303.

¶ 2383. Where the defense to a suit upon a promissory note was that it was given in compromise of a criminal complaint against the maker's son-in-law, and was procured through the entreaties of the daughter, whose fears had been played upon by the plaintiff with that purpose, held, that it was competent to show what she stated to her father to induce him to give the note, as that was part of the res gestæ.—Snyder v. Willey, 33 Mich. 483.

What declaration admissible to show mental suffering in actions for personal injuries, see note, 12 N. C. C. A. 399-414.

§ 451. To evince malice, intent, fraud or knowledge.

Subsequent statements, see post § 468.

Writings res gestæ of fraud, see post § 474.

Declarations other than res gestæ showing mind or intent, see ante § 333.

¶ 2384. In an action for slander uttered by a priest from the pulpit evidence of an altercation in the church so connected with the utterance of the alleged slanderous words as to form a part of the res gestæ is admissible as bearing upon the question of malice.—Provost v. Brueck, 110 Mich. 136.

¶ 2385. In cases where fraud is the subject of investigation, the statements of the parties charged with it are admissible in evidence if made before the instrument charged to be fraudulent is completed, or

while it is in preparation.—Wyckoff v. Carr, 8 Mich. 44.

¶ 2386. In an action for fraud in selling plaintiff a second for a first mortgage, it is admissible to show that at the time of making the mortgage defendant said he did not want it to contain an exception in the covenant against encumbrances, as it might prejudice its sale.—Cronkhite v. Dickerson, 51 Mich. 177.

¶ 2387. The manner of making sale under a chattel mortgage, and the statements of the mortgagor with reference to paying his debts when called on before the sale to pay a claim, may be shown in defense to an action of replevin brought by a claimant under the mortgage, if they tend to show collusion and fraud between such claimant and the mortgagor.—Barmon v. Clippert, 58 Mich. 377.

¶ 2388. On the question of fraud in obtaining a signature to a lightning rod contract it was admissible to show a conversation in which defendant agreed to do the work at a stated price and also that later plaintiff presented a writing which defendant thought was a recommendation which he signed on plaintiff's request and reading in part, defendant's vision being poor and plaintiff in a hurry.—Hobbs v. Solts, 37 Mich. 357.

¶ 2389. Where, in a suit for damages for alleged fraudulent representations by which plaintiff was induced to purchase a note, the jury finds that the fraud was committed as claimed, evidence that defendant said he would guarantee that the note would be paid is admissible as a part of the transaction, if the jury finds that such promise was made to aid in the fraud perpetrated on plaintiff.—Averill v. Wood, 78 Mich. 342.

¶ 2390. Where, in an action for the conversion of articles claimed by plaintiff to have been stolen, defendants admit purchasing several of the articles from a third person, but deny plaintiff's claim as to the rest, testimony by such third person that he was paid a certain sum by defendant for the articles admittedly bought from him is admissible as part of the res gestæ to show that the property was got in an apparently honest transaction.—Davidson v. Kolb, 95 Mich. 469.

¶ 2391. Where an action for goods sold is defended on the ground that a greater quantity than that agreed upon was fraudulently inserted by plaintiff in defendant's written order, evidence of the conversation between the parties at the time of procuring the order, and of the circumstances surrounding the transaction, is admissible to prove the fraud.—Shrimpton & Sons v. Rosenbaum, 106 Mich. 68.

¶ 2392. On the issue whether a bank took a fraudulently certified check with notice, it may be shown as part of the res gestæ that when the cashier took the check he expressed doubt of its validity.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

§ 452. To show hearing, attentiveness or consciousness.

To rebut or prove negligence, see post § 465.
Response to command or request, see ante ¶ 2362.

¶ 2393. In an action for injury resulting from a surgeon's unskilfulness in treating a dislocation as a fracture, it was shown that if his diagnosis was correct a grating sound would have been heard on manipulation of the limb. Held, that evidence could be given of remarks made by bystanders at the time of the examination tending to show that they heard such a sound.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 2394. Where, in an action for injuries received at a railroad crossing, a witness has testified that the signals required by the statute were not given, it is proper to reject the question whether, immediately after the accident, the men present talked over the matter of such signals; since testimony cannot be corroborated in that way.—Sanborn v. Detroit, B. C. & A. R. Co., 99 Mich. 1.

§ 453. Exclamations and complaints of pain or sickness.

Utterances incident to medical examination or treatment, see post § 454.
Utterances made to prospective witness or expert, see post § 455.
Narratives and statements as to past sickness or suffering, see post § 456.
Narrative complaints, see post § 456.
Admissible nonexpert testimony as to pain or sickness, see also ante § 236.

¶ 2395. Statements by an injured party concerning his present pains and bodily sufferings furnish the best and often the only evidence of such physical conditions as are not discoverable by sight or other senses of witnesses.—Johnson v. McKee, 27 Mich. 471.

¶ 2396. The declarations of a sick person, made from time to time concerning present sufferings and sensations, are admissible to prove the fact of such sufferings and sensations.—Elliott v. Van Buren, 33 Mich. 49.

¶ 2397. The natural and ordinary exclamations of pain by the plaintiff in an action for personal injuries, called out by her suffering, and not by any motive of making testimony, are admissible in evidence.—Burleson v. Village of Reading, 110 Mich. 512.

¶ 2398. The natural and ordinary exclamations of present pain and suffering by

plaintiff in an action for personal injuries, though made after the commencement of suit, are admissible in evidence, if the surrounding circumstances are free from suspicion. So held where the expressions were made by a child of tender years, in his own home, and in the presence only of the immediate members of the family.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 2399. Evidence of exclamations of present pain and suffering is admissible though made by plaintiff after suit is commenced unless made to one in contemplation of his becoming a witness.—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 2400. In an action for personal injuries persons who had heard the plaintiff complain of pain and suffering after the injury may testify as to the fact that she had made complaints but not in her words and not where made for the purpose of making evidence; but it may be left to the jury with appropriate instructions.—O'Dea v. Michigan Cent. R. Co., 142 Mich. 265.

¶ 2401. Complaints by one who has been injured as to his then condition made at different times subsequent to the injury are not regarded as hearsay, as they are received upon the theory that they are acts rather than declarations.—Loose v. Township of Deerfield, 187 Mich. 206.

¶ 2402. In an action to recover damages for negligent injury, evidence of exclamations of pain made by the injured person is admissible as part of the res gestæ.—Harris v. Detroit City R. Co., 76 Mich. 227.

¶ 2403. Exclamations of present pain and suffering by the person injured, together with his statements as to the location, nature, and extent thereof, are admissible as original evidence.—Will v. Mendon, 108 Mich. 251.

¶ 2404. Exclamations of present pain and suffering from an injury are admissible, in an action to recover damages for such injury.—Hall v. City of Flint, 195 Mich. 638.

¶ 2405. Proof of the condition of a plaintiff in a personal injury case, by her manifestations and complaints a length of time after the accident, was competent as part of the res gestæ.—Beath v. Rapid Ry. Co., 119 Mich. 512.

¶ 2406. Exclamations of pain and suffering are not to be excluded simply because they were uttered long after the injury and after the person uttering them had decided to bring suit for the injury whence they came.—McCormick v. Detroit, G. H. & M. Ry. Co., 141 Mich. 17.

¶ 2407. In a personal injury suit exclamations of pain made by the plaintiff 30 minutes after the injury, are admissible in evidence.—Pruner v. Detroit United Ry., 173 Mich. 146.

¶ 2408. In a personal injury action, the testimony of plaintiff's neighbor as to the exclamations of pain and observed acts of suffering the day after the accident, is admissible.—Schock v. Cooling, 175 Mich. 313.

¶ 2409. Lay witnesses may testify as to the acts, expressions and manifestations of a person immediately after the occurrence of a railway wreck in which he was injured, when not made in anticipation that such laymen would be called as witnesses in his behalf.—Marshall v. Wabash R. Co., 184 Mich. 593.

§ 454. ——Incident to medical examination or treatment.

Explanations of cause of injury made to physician, see also post § 469.

¶ 2410. A physician who is called to treat a person for an injury, when sworn as a witness in a suit to recover damages for the same, may state how the patient described the pain from which she was suffering, and may describe the patient's actions, as tending to inform the jury of the patient's condition.—Ashton v. Detroit City R. Co., 78 Mich. 587.

¶ 2411. In an action for a personal injury the physician who attended plaintiff may testify to declarations of pain made by her immediately after the injury.—Mulliken v. City of Corunna, 110 Mich. 212.

¶ 2412. A physician may testify in an action for personal injuries as to plaintiff's exclamations of pain on an occasion when he was making an examination with a view to treatment.—Heddle v. City Electric R. Co., 112 Mich. 547.

¶ 2413. In an action to recover for personal injuries plaintiff's exclamations of pain while her physician was examining her after the accident may be testified to by such physician and other witnesses.—Butts v. City of Eaton Rapids, 116 Mich. 539.

¶ 2414. Exclamations accompanying pain, and descriptive of personal suffering, are admissible as evidence in a suit for malpractice.—Mayo v. Wright, 63 Mich. 32.

¶ 2415. In an action against a physician for malpractice what the patient said to the doctor concerning his feelings of pain and his sensations, and what the doctor said to the patient in reply or concerning the treatment, are part of the res gestæ, and properly included in a question to an expert witness.—Mayo v. Wright, 63 Mich. 32.

¶ 2416. On a trial for malpractice in a surgical operation, evidence of the patient's exclamations of pain during and after the

operation—some of them in defendant's absence—are admissible as bearing on the alleged malpractice, but not in aggravation of damages.—Hyatt v. Adams, 16 Mich. 180.

¶ 2417. The evidence of a physician as to plaintiff's condition is admissible as against the objection that he was called with the intent of using him as a witness, where the evidence complained of indicates that the physician was called to consult with the attending physician, with regard to the treatment to be pursued in the case.—Judd v. Township of Caledonia, 150 Mich. 480.

¶ 2418. In an action for personal injuries, it is not error to admit testimony of plaintiff's attending physician that plaintiff complained to him that she was unable to sleep. —Marshall v. Saginaw Valley Traction Co., 157 Mich. 541.

§ 455. ——Made to prospective witness.

See also ante ¶ 2417.

¶ 2419. The rule that a physician called for the purpose of obtaining information from which to testify cannot testify as to exclamations of pain by the plaintiff applies only where it appears that the physician was attending him for the purpose of securing evidence.—Leedy v. Hoover, 160 Mich. 449.

¶ 2420. Exclamations of pain are properly excluded from evidence in an action for personal injury, where they were made at a medical examination conducted after the controversy arose, for the purpose of obtaining testimony, and not for treatment.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 2421. A physician employed by a person contemplating suit to make an examination for the purpose of testifying in such suit cannot testify to exclamation of pain made by such person.—Jones v. Village of Portland, 88 Mich. 598.

¶ 2422. Exclamations and statements as to pain and suffering made on an examination by a physician after suit brought for personal injuries, and intended to be given in evidence, cannot be testified to by the physician.—Jones v. Village of Portland, 88 Mich. 598.

¶ 2423. A physician, called to examine plaintiff in an action for personal injuries, for the express purpose of giving testimony, is incompetent to testify to voluntary exclamations made by her, and to the fact that she seemed unable to walk without aid.—McKormick v. City of West Bay City, 110 Mich. 265.

¶ 2424. Testimony by a physician called, not to treat plaintiff but for the purpose of testifying, that plaintiff flinched when he touched him, is inadmissible.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 2425. In an action for personal injuries evidence of a physician not called for the purpose of giving treatment that the plaintiff complained of suffering is inadmissible, such not being the natural expressions of present suffering but voluntary statements made for an ulterior purpose of making testimony.—O'Dea v. Michigan Cent. R. Co., 142 Mich. 265.

¶ 2426. Testimony that the plaintiff when examined by a physician seeking to qualify himself as a witness, flinched on pressure being applied to an injured limb or gave exclamations of pain, is not admissible in an action for personal injuries.—Norris v. Detroit United Ry., 185 Mich. 264.

§ 456. Narratives and statements relating to past injury or sickness.

Involuntary exclamations of pain subsequent to injury, see ante § 453.

¶ 2427. Testimony of statements of present suffering made by plaintiff to another person are competent in an action for negligence, statements of past suffering being excluded.—Lacas v. Detroit City R. Co., 92 Mich. 412; Girard v. City of Kalamazoo, 92 Mich. 610.

¶ 2428. Evidence of what the plaintiff said of having pain about a month after an injury, on pressure being applied by a physician in making a physical examination, is not admissible in an action for personal injuries; but the fact that he flinched under pressure may be shown.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374. (Stone, Ostrander and Steere, JJ., dissenting.)

¶ 2429. It is not competent, in an action for negligent injury, to prove expressions of pain made by plaintiff more than four years after the accident, and after suit brought and about the time expected for the trial.—Laughlin v. Grand Rapids Street R. Co., 80 Mich. 154.

¶ 2430. A witness cannot testify to what plaintiff—who sues for a negligent injury—said to him about her sleeplessness at night, in response to his inquiries made the next morning; such testimony being hearsay.—Kelley v. Detroit, L. & N. R. Co., 80 Mich. 237.

¶ 2431. Where, in an action for negligent injury, one claims that he was hurt by his horse's struggles to extricate itself from a hole in a bridge into which it had stepped, his wife's testimony that after he had released the horse and had started to drive home he stated to her that the horse had hurt his arm, and that he could not hold the lines in his hand, is inadmissible, such statement being hearsay, and not a part of

the res gestæ, or an expression of pain or anguish occurring at the time of the injury. —LaDuke v. Township of Exeter, 97 Mich. 450.

¶ 2432. In an action upon a life insurance policy statements by the insured as to her sickness being due to an abortion performed on her and how it was caused, made to her physicians and to a nurse are not admissible as part of the res gestæ.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

§ 457. Of existence, formation and terms of contract.

Res gestæ of oral contracts, see post § 458.
Res gestæ of performance, acceptance or rejection, see post § 459.

¶ 2433. Where the execution and delivery of a contract were in dispute, one of the parties testified that the other went away while it was being drawn, and that after it was finished he, the witness, said he would sign it and go and get the other party to complete it. The lawyer who drafted it testified that it was drawn under the instructions of both parties while present, but that he thought it was sent to one of them unsigned by the other. He also stated that so far as its terms were concerned it was then finished. Held, that this was admissible as res gestæ, no change having been suggested by one party in the other's absence. —Seligman v. Ten Eyck's Estate, 53 Mich. 285.

¶ 2434. Where the question is whether the delivery of a deed was absolute or conditional, conversations held on the same day the deed and abstract were delivered between grantor and his attorney, and the one who examined the title, to the effect that grantor was about to make a trade and wished to see if the title was perfect, are admissible as part of the res gestæ.—Chick v. Sisson, 95 Mich. 412.

¶ 2435. Where in an action to recover for plastering defendant's house defendant claims the work was done for his contractor, evidence that at the time the agreement between plaintiff and defendant is alleged to have been made, the former told the latter that the contractor already owed him, and that he (plaintiff) would not have anything to do with him, is admissible as part of the res gestæ.—Evans v. Montgomery, 95 Mich. 497.

¶ 2436. Conversations at the time of signing a bond, in substance that it was not to be used unless a third person signed it, are competent as part of the res gestæ.—People v. Sharp, 133 Mich. 378.

¶ 2437. Where the question is whether defendant signed the note in suit before its delivery and before the passage of the property for a part of the purchase-price of which the note was given, plaintiff can show what took place when the note was drawn and signed by the principal debtor, and what was then said as to its delivery, and who were expected to sign as sureties; and it is immaterial that defendant was then absent.—Steers v. Holmes, 79 Mich. 430.

¶ 2438. In trover against administrators for merchandise delivered to their decedent, defendants testified without objection that their decedent was to send it to certain dealers for plaintiff's benefit with instructions not to sell it at less than a stated sum; that he received a letter from the dealers finding fault with the quality of the merchandise, reporting current prices, and asking how to deal with it; that he showed the letter to the plaintiff, who again directed that the merchandise should not be sold for less than the sum stated, but never gave any orders to get it back. Held, that as the case depended on the arrangements made on or after the receipt of the goods by decedent, defendant could show the transactions and all his conversations bearing on the subject: he could also show the report of prices current as part of the res gestæ, and could show by decedent's clerk, who received the merchandise from plaintiff, the agreement that it should be sent to the dealers, who were to determine quality and price.—Van Aukin v. O'Connor, 50 Mich. 374.

¶ 2439. What was said at the time of a treaty by the parties to it, indicating for whose benefit the grant was intended to be made, is admissible in evidence as part of the res gestæ.—Stockton v. Williams, 1 D. 546.

¶ 2440. Statements made at the time of executing a mortgage as to its purpose are admissible as part of the res gestæ.—Albion State Bank v. Knickerbocker, 125 Mich. 311.

¶ 2440a. In ejectment for lands, the boundaries of which are left uncertain through the latent ambiguity of a former deed of conveyance, it was held proper to give in evidence, as res gestæ tending to identify the boundaries, a conversation thereon between the parties to that deed in the presence of the conveyancer who was drawing it up and in accordance with which a change was made in the description.—Purkiss v. Benson, 28 Mich. 538.

§ 458. ——Oral contract.

Self-serving entries to show oral contract, see post ¶ 2552.
Rejected draft as evidence of terms, see also post ¶ 2595.

¶ 2441. In an action on an oral contract it is proper for plaintiff to show whether the other party thereto, in a conversation had at the time it was made, said anything as to his general manner of dealing with other people.—Wilcox v. Ney, 47 Mich. 421

¶ 2442. Where a contract is sued upon as made orally it is proper to allow proof of all of the conversation and negotiations between the parties prior to the conclusion of the alleged contract as bearing on their relations and tending to show the real nature of the agreement.—Owen v. Union Match Co., 48 Mich. 348.

¶ 2443. In an action for breach of a contract which was entered into in view of, and which superseded, an earlier arrangement, all the dealings being oral and continuous, the former arrangement may be shown in evidence.—Brush-Swan Light & Power Co. v. Gardiner, 59 Mich. 424.

¶ 2444. In a suit for wages a conversation between one of the defendants and a third party is admissible if it belongs to the negotiation which led to hiring the defendant, and tended to show that a fixed amount was to be paid him.—Millar v. Cuddy, 43 Mich. 273.

¶ 2445. A defendant sued in trover for the value of a cow may show that he sold the cow by parol bargain to one through whom plaintiff claims title, upon the express condition that title should remain in defendant until payment; that nothing had been paid, and that the condition of sale had neither been performed nor waived. Such conditional sale could only be proved by showing what was said and done between the parties, and the fact that plaintiff was not present could not affect it.—Fifield v. Elmer, 25 Mich. 48.

§ 459. ——Performance, acceptance or rejection.

Res gestæ of scale, measurement of survey, see post § 460.

Evidence of acts done or conversations had by broker as showing efforts to sell, see Brokers, § 38.

¶ 2446. In suing a decedent's estate for work done under contract with the decedent, it is admissible as res gestæ to show that the executor oversaw the work.—McKeown v. Harvey, 40 Mich. 226.

¶ 2447. In an action for breach of warranty, plaintiff may, in order to prove rescission, state his offer to arbitrate, since it is a part of the res gestæ of such rescission.—McNitt v. Henderson, 155 Mich. 214.

¶ 2448. Conversations between the broker and the customer which are a part of the negotiations and are communicated by the broker to the principal are admissible in an action for commissions on the exchange thereby negotiated.—Huff v. Cole's Estate, 127 Mich. 351.

§ 460. Of scale, measurement or survey.

Subsequent declarations of surveyor, see post ¶ 2475.

¶ 2449. When the scale of a deceased scaler of logs is received in evidence in an action for their price, witnesses who were present when the scale was made may testify to the manner of its making and what they did and knew about it, and what the scaler did and said while making it.—Malone v. Gates, 87 Mich. 332.

§ 461. Of recordation of instruments.

¶¶ 2450, 2451. What a grantor said to the register of deeds when leaving conveyances for record was a part of the res gestæ and admissible as explaining the character and intent of his act.—Stevens v. Castel, 63 Mich. 111.

§ 462. Of accounting and settlements.

¶ 2452. In an action involving the settlement of accounts, figuring done by one of the parties when they were trying to settle may be admissible as res gestæ.—Bennett v. Smith, 40 Mich. 211.

§ 463. Of execution of writs, levy and sale.

See also ante ¶ 2371.

¶ 2453. Where possession is demanded of an officer who has levied execution, his statement is properly given in evidence to show on what pretext he acted.—Gutsch v. McIlhargy, 69 Mich. 377.

¶ 2454. Where demand for the property is made of one who has receipted to the sheriff therefor his oral statement to the effect that he would pay the execution is admissible as part of the conversation that took place at the time, and as showing under which clause of the receipt he preferred to be held.—Bowen v. Culp, 36 Mich. 224.

§ 464. Of torts and wrongdoing.

Res gestæ evincive of care or neglect, see post §§ 465-469.

See also topics treating of the specific torts, e. g., Conversion; False Imprisonment; Malicious Prosecution; Trespass; Nuisances; Negligence, V.

Evidence admissible as to acts and appearances in trespass for assault with intent to ravish, see Assault § 25.

Admissibility of letter of plaintiff in breach of promise to marry as part of res gestæ, see also Breach of Promise to Marry § 4.

¶ 2455. The acts, conduct and utterances of an accused party, if of the res gestæ, are competent evidence in a civil case as bearing on his culpability.—University of Michigan v. Rose, 45 Mich. 284.

¶ 2456. Declarations made by one sued for conversion of sheep to witness while the sheep were yet commingled, which commingling was the act constituting the alleged conversion are admissible as part of the res gestæ.—Dunbar v. McGill, 69 Mich. 297.

¶ 2457. In an action under the Civil Damage Act, against a druggist for unlawfully selling intoxicating liquor to plaintiff's husband, it was proper to allow a physician to testify that he had seen plaintiff's husband intoxicated while attending upon plaintiff in her home, that he had seen him drinking there from a bottle, and that he had offered witness a drink, especially since there was testimony showing that plaintiff's husband had secured whisky from defendant in bottles, and had taken it home; this statement was a part of the res gestæ, and might well be found by the jury to be evidence of the drinking of the very whisky sold by defendant.—Leckard v. Van Alstyne, 155 Mich. 507.

§ 465. To prove or rebut neglect or care or skill.

Acts or statements of others than party, see post §§ 466, 467.

Indifference of manner as res gestæ, see post § 470.

Circumstantial evidences of negligence or care, see Negligence, V; and see also specific topics such as Highways, XII; Master and Servant, III; Railroads, VIII; Street Railways, IV.

¶ 2458. Where during a ride the driver of a horse has conversation with his companion as to the horse's appearance and condition, and the conversation tends to show that the driver is exercising due care, it is admissible for that purpose in an action against the driver for injury alleged to have been caused the horse by his ill-usage and neglect.—Pinney v. Cahill, 48 Mich. 584.

¶ 2459. In an action against a street railway company for an injury to plaintiff alleged to have been caused by a driver's negligently allowing the horses attached to his car to be started suddenly forward while plaintiff was alighting, testimony that the driver, who had been driving rapidly between switches, stated that he was behind time and wanted to go on, and that the conductor said not to do so but to wait until the other car came up, is not part of the res gestæ, and does not tend to prove the negligence alleged.—Gardner v. Detroit St. R. Co., 99 Mich. 182.

¶ 2460. In an action for causing the death of a traveler in a vehicle while crossing railroad tracks, it was proper to inquire fully as to what occurred at the time of the accident, including the acts of the deceased's companion, as such occurrences and acts were part of the res gestæ and bore upon the question of the sufficiency of the deceased's caution.—Proper v. Lake Shore & M. S. Ry. Co., 136 Mich. 352.

¶ 2461. Evidence of intoxication of a spectator at a circus, who was injured by the explosion of a firecracker by one of the performers, is admissible as part of the res gestæ.—Herrick v. Wixom, 121 Mich. 384.

¶ 2462. On an issue whether the charterer of a tug was negligent in trying to put too many logs in a boom designed for 500,000 feet, a statement of the tug captain that the boom would hold that many feet of average size logs may be received as res gestæ, where the charterer was at the same time told by his foreman that the boom would be too small.—Hebard v. Shaw, 123 Mich. 514.

¶ 2463. Defendant was using a circular saw in the mill of plaintiff's employer. Plaintiff claimed that while he was oiling the saw under directions of his foreman, defendant struck or jostled him so that he came in contact with the saw. Having testified to this, and the foreman having testified that the plaintiff was under his orders, without which he had nothing to do with the saw, the defendant could show the foreman's instructions to plaintiff, which were material evidence and also part of the res gestæ.—Ribble v. Starrat, 79 Mich. 204.

¶ 2464. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee subject only to the occasional use by tenants of lower floors for the death of an employee of a brewery company engaged in delivering beer to the tenant and due to the alleged negligence of the elevator man in starting the elevator, before decedent was safely upon it, and in which the issue was whether the decedent was rightfully upon the elevator when injured, or whether he had been directed to stay with the team by the one in charge of the delivery, held that evidence of such superior as to telling the elevator operator to "let it go" after the superior was inside and after the operator had heard the superior direct decedent to stay with the team was admissible as part of the res gestæ.—Sikora v. Fellowcraft Club, 189 Mich. 235.

§ 466. ——Acts of others in like or common situation.

Acts and declarations of driver of vehicle, see post § 467.

¶ 2465. In an action against a street railway company for injuries sustained by reason of the collision of an open car, in the front part of which plaintiff was riding, with a car ahead of it, evidence as to what was done by the passengers at the rear end of the forward car when they saw the danger of collision is admissible, as part of the res gestæ, on the question of plaintiff's contributory negligence in preparing to jump from the car.—Holman v. Union St. R. Co., 114 Mich. 208.

¶ 2466. In an action against a street railway company for personal injuries, where it is material whether or not plaintiff acted with due diligence at the time of the accident, and where plaintiff has proved that she

acted as other passengers did, it is competent to prove by a passenger and eyewitness what other passengers did at the time, as being part of the res gestæ.—Smith v. Detroit United Ry., 155 Mich. 466.

¶ 2467. In a suit against a street railway company for injuries sustained by reason of the car suddenly starting just as plaintiff was on the bottom step, preparing to alight, the testimony of her husband that he himself had just alighted and, upon seeing the car start forward, cried out "Hang on," is admissible as part of the res gestæ.—Smith v. Detroit United Ry., 155 Mich. 466.

§ 467. ——Statement or act of driver carrying guest.

Statements of driver as agent or servant of party, see post § 478 et seq.

¶ 2468. In an action for personal injuries sustained by being struck by a street car while riding in a buggy, statements by the driver of the vehicle not made at the time of the accident or in the presence of the plaintiff are inadmissible against the plaintiff.—Edwards v. Foote, 129 Mich. 121.

§ 468. Statements and acts after the time.

Agents' subsequent statements, see post § 484.

¶ 2469. Declarations made by a party subsequent to a transaction, as to his motives or intentions at the time, are not receivable in evidence to affect the rights of others. It is only the intention declared at the time which, as a part of the res gestæ, can bind or affect others.—Dawson v. Hall, 2 Mich. 390; Lewis v. Rice, 61 Mich. 97.

¶ 2470. The exception to the rule that declarations of intent must be contemporaneous is where the statements are made to the party to be affected, under circumstances from which his acquiescence in their truth can fairly be inferred; and then the degree of consideration to which they are entitled depends on the circumstances under which they are made.—Dawson v. Hall, 2 Mich. 390.

¶ 2471. What one sued for assault and battery said after the assault is not admissible to show malice at the time of the assault.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 2472. Evidence as to the appearance of the plaintiff, and the witness' impression of what he said shortly after an alleged assault, are admissible in an action for assault and battery.—Matthews v. Lamberton, 184 Mich. 493.

¶ 2473. In an action for a negligent injury caused by a fire the fire marshal cannot testify to what he heard said next day at the scene of the fire as to its cause.—Cook v. Johnston, 58 Mich. 437.

¶ 2474. In an action for damages for personal injuries sustained as a result of a collision between defendant's automobile and a buggy belonging to plaintiff's husband, evidence that defendant stated almost immediately after the collision occurred that he would pay for the repair of the buggy is admissible as part of the res gestæ.—Jolman v. Alberts, 192 Mich. 25.

¶ 2475. Declarations by a deceased surveyor to his employer that he had made a mistake in a former survey are admissible where such mistake was discovered during the course of the second survey, and the declarations were in direct connection therewith, though it is not apparent whether the surveyor made the declarations in the course of such second survey or afterwards.—Wilcox v. Jenison, 198 Mich. 182.

§ 469. ——Statements and acts relative to injury.

Exclamations, statements and narratives of pain and sickness, see ante §§ 453-456.
Overheard explanations, see also ante ¶ 2473.

¶ 2476. The statement of a party as to the cause of an injury subsequently resulting in his death, not made at the time of the accident, nor necessary or pertinent for medical treatment, is inadmissible as evidence.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 2477. Where a boy who had driven against a foot passenger on the street immediately stopped the horse and came back and said that he did not mean to, the fact was held to be as much a part of the res gestæ as an exclamation would be if made at the moment of the accident.—Cleveland v. Newson, 45 Mich. 62.

¶ 2478. In a widow's action against a liquor seller for damages from the death of her husband caused by an intoxicated person, the husband's statements on the night of the injury as to how it was received are inadmissible.—Brockway v. Patterson, 72 Mich. 122.

¶ 2479. In an action to recover for the illegal sale of liquor to plaintiff's son, who was injured by reason of his intoxication, statements made by the son immediately after the injury to the effect that he did not procure liquor from defendant, are not admissible as part of the res gestæ, since they do not relate to the injury itself.—Van Alstine v. Kaniecki, 109 Mich. 318.

¶ 2480. In an action for an injury caused by defendant's negligently riding his bicycle, testimony that just after the fall he said his bicycle struck a stone which was the cause of the accident, is hearsay and inadmissible.—Myers v. Hinds, 110 Mich. 300.

¶ 2481. Plaintiff was injured while installing a machine under the direction of the

foreman of defendant factory, who was present at the accident. Held, in a suit for injuries the statement of the foreman blaming himself for the accident, made some fifteen or twenty minutes after the accident, and while he was taking plaintiff in the ambulance to the hospital, was not admissible as part of the res gestæ.—Bernard v. Grand Rapids Paper Box Co., 170 Mich. 238.

¶ 2482. In an action for personal injuries alleged to have been caused by a defective sidewalk, statements by plaintiff immediately after the accident are admissible as part of the res gestæ.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 2483. Declarations of the person injured as to manner of injury made after the time of the accident are not part of the res gestæ, and cannot be testified to by an attendant physician any more than by a nonprofessional man.—Merkle v. Township of Bennington, 58 Mich. 160; Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84; Dundas v. City of Lansing, 75 Mich. 499; Jones v. Village of Portland, 88 Mich. 598.

¶ 2484. An injured person's statement to his physician as to the cause and circumstances of his injury is not admissible as res gestæ if not made until time enough has passed for him to be removed and to get the doctor. So held in an action against a township for fatal injury caused by a defective bridge.—Merkle v. Township of Bennington, 58 Mich. 156.

Declarations made immediately on regaining consciousness as part of res gestæ in personal injury cases, see note, 12 N. C. C. A. 35-47.

§ 470. Manner or demeanor as res gestæ.

¶ 2485. A person on being injured by the collision of his buggy with a cart asked the driver of the cart what he meant, and the driver answered in an indifferent and impudent manner that he couldn't help it. Held, that the manner and matter of his reply were part of the res gestæ.—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322.

§ 471. Entries, memoranda or writings as res gestæ.

Pleadings and affidavits in other actions as res gestæ, see also post ¶ 2780.

Notary's certificate of demand, nonpayment and protest, see also ante ¶ 1874.

Res gestæ rule as basis for admission of books of account, see post § 522.

Train and car records and other records of complex nature as admissible documentary evidence, see post §§ 506, 507.

¶ 2486. Any written agreement that constitutes part of the bargain by which title to a vessel has been acquired may properly be put in evidence where the purchase is to be shown.—Mitchell v. Chambers, 43 Mich. 150.

¶ 2487. A party who had sold and delivered wheat to another at the latter's warehouse testified that account was kept of the wheat as delivered, by means of slips of paper tacked on the spout of the hopper and by entries which he made on a page of his memorandum book; that after delivery of the last load the purchaser's warehouse clerk called off the amounts from the slips of paper, and he took them down on the opposite page of his memorandum, and that he and the clerk then compared the two series of entries and found that they agreed, and the clerk receipted for the amount. Held, that such a memorandum could be used in evidence as a contemporaneous record, to the correctness of which both parties assented when made.—Fish v. Adams, 37 Mich. 598.

¶ 2488. A memorandum upon an abstract of title in the words "Examined to date, Nov. 15, 1875," and signed by the register of deeds, whether a certificate or not, is admissible as res gestæ in an action against the register for negligence in carrying out an agreement to furnish a full abstract.—Smith v. Holmes, 54 Mich. 104.

¶ 2489. The assignees of a contract to sell and deliver logs brought suit upon it against the estate of the other party, who had died. They put in evidence a memorandum indicating, as they claimed, that evidence of the fulfillment of the contract existed on decedent's books. It had no tendency in itself to prove this, but they were also allowed to show, in connection with it, a computation by decedent's bookkeeper and certain alleged conversations with him, on which they had relied as inducements in purchasing the claim. Held, that this was not properly admissible as res gestæ to show the good faith of the assignment, nor as bearing on the merits.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 2490. One legatee gave bond to another to pay the latter's share of the debts of the estate, and the latter left moneys in his hands wherewith to do so. Upon a settlement it appeared that the bond was drawn for too high a sum, and by direction of the parties the judge of probate indorsed the balance upon it. Held, that this indorsement was only res gestæ as the memorandum of a disinterested person, and that it need not be signed by either party.—Dennis v. Sharer, 56 Mich. 224.

¶ 2491. In an action for goods sold and delivered where the plaintiff sued to recover for cement blocks furnished in the construction of a dwelling where the plaintiff claimed that the blocks were to be furnished under an agreement to pay the actual cost of the work and material and the defendant claimed they were to be furnished at an agreed price,

a memorandum appearing upon the book of the defendant as to the price claimed to have been made at the time the contract was made by the buyer in the immediate presence of the seller, while not conclusive, is admissible in evidence as part of the res gestæ.—Rogers v. Krumrei, 143 Mich. 15.

¶ 2492. In an action to recover a commission agreed to be paid by the purchaser of logs, papers relating to the situation, amount, character, and quality of the logs, which papers one of the plaintiffs gave to defendant during the negotiations, are admissible as part of the res gestæ.—McKinnon v. Gates, 102 Mich. 618.

¶ 2493. In a suit for trespass to the person based upon the forcible removal of plaintiff from premises which she was occupying with her husband as a homestead, a writ of assistance directed against the husband, under which defendant assumed to act, is admissible in evidence, not as a justification, but as a part of the res gestæ, and as bearing upon the question of damages.—Haviland v. Chase, 116 Mich. 214.

¶ 2494. Where certain apples refused by the buyer were resold by the seller, a written statement used by the seller and the person conducting the resale at the close of such dealing, is admissible in an action to recover the damages for breach of the original contract, in connection with the testimony of the parties, as a part of the res gestæ.—Plowaty v. Sheldon, 167 Mich. 218.

¶ 2495. A report of an engineer to his superior of the circumstances of an accident or injury to a child struck while on the track, including a statement of the reason why the train was not stopped in time, is res gestæ; where the train was backed up and the injured child taken aboard and the run then completed to the point of reporting, during all of which time the engineer was in performance of a duty relating to the child and in control of the train for that purpose, and where the making of such a report is regularly a part of his duties under like circumstances, although a time of 50 minutes intervened between the striking and the completion of the report.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390. (Campbell, C. J., dissenting, and Champlin, J., concurring in the result.)

§ 472. ——Correspondence.

Answering letter as res gestæ, see also ante ¶ 2073.

Admissibility of correspondence with third persons in proving commissions earned on broker's contract, see also Brokers ¶ 179.

¶ 2496. A defendant cannot put in evidence a letter written by him to the agent of defendant after the beginning of the suit, unless the reply contained material admissions; and in that case it could only be introduced to explain the bearing of the letter called out by it.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 2497. The correspondence of a borrower and an insurance company regarding a loan was properly introduced in evidence in an action brought by such borrower against a loan agent to recover money claimed to have been paid such agent under duress as an alleged commission on such loan, where it appeared that such borrower had applied to such loan agent for a loan, at which time, he claimed, he did not know that such agent was loaning money for the company or that such company was in existence; that subsequently the borrower negotiated the loan himself, dealing with the company personally and by letter; that the money was sent by the company to such agent, who insisted on keeping a part of it for his services, and compelled the borrower to give a receipt showing a settlement in full; since such correspondence tended to show that the borrower had his dealings for the money entirely with the company, and that such loan agent was acting for the company in handling the money.—McAllister v. Eagle, 52 Mich. 56.

¶ 2498. In an action upon a contract of employment where the defendant corporation charged insubordination in refusing to make a sketch instanter upon request of the president, promising to let him know, a letter sent the same day informing the president of the inclosure of the sketch, is part of the res gestæ.—Schaub v. Arc Welding Co., 123 Mich. 487.

¶ 2499. In an action for services under a contract of employment a letter from the alleged discharged employee to his employer written on the day of receipt of notice of discharge is admissible as part of the res gestæ.—Schaub v. Welded-Barrel Co., 125 Mich. 591.

¶ 2500. Letters which passed between the broker and a third person not the eventual buyer or bargainer are not res gestæ of his services under his employment.—West v. Demme, 128 Mich. 11.

¶ 2501. Plaintiff's evidence offered in an action to recover money paid to defendant on a condition showed that he sent the money to a third person to be paid to defendant, and the third person testified that he received the money inclosed in a letter, and that the letter had been lost and the money paid over. Held, that the letter was admissible.—Nowlen v. Lyon, 73 Mich. 434.

§ 473. ——Orders and receipts.

¶ 2502. Under a declaration in assumpsit, alleging a promise by defendant to pay plaintiffs a debt owing them by T. in considera-

tion of T.'s release, an order on N. for the amount of T.'s debt given by defendant to plaintiffs when the alleged promise was made is admissible as a part of the res gestæ.—Bond v. McMahon, 94 Mich. 557.

¶ 2503. Receipts or the stubs thereof may be admissible in connection with proof of the delivery of wheat as part of the res gestæ.—Freese v. Arnold, 99 Mich. 13.

§ 474. ——Writings involved in alleged fraud.

¶ 2504. A mortgage in connection with a fraud is part of the res gestæ, and proof concerning it, and to show its purpose, is admissible in an action for damages arising from the fraud itself.—Daniels v. Dayton, 49 Mich. 137.

¶ 2505. On the issue whether a replevin plaintiff's mortgage was fraudulent as to creditors, another mortgage executed at the same time and as a part of the general scheme of the debtor by which other mortgage security was given to a creditor who was a relative of the mortgagor, and who was seeking to secure plaintiff as well as himself, is admissible as bearing upon the fraudulent intent.—Krolik v. Graham, 64 Mich. 226.

¶ 2506. The notes given upon a purchase of goods and the chattel mortgage on such goods to secure the notes are properly put in evidence in an action of replevin brought by the vendor for the property.—Cass v. Gunnison, 58 Mich. 108.

§ 475. Acts of coconspirators and persons in concert.

Admissions by coconspirators, see ante § 419.
Declarations by third persons in favor of party, see post § 489.

¶ 2507. Where, in an action for fraud and deceit, the evidence showed that defendants engaged in the common enterprise of inducing plaintiff to purchase a tax title for their mutual benefit, the acts of each are admissible against the other as part of the res gestæ.—Sudworth v. Morton, 137 Mich. 575.

¶ 2508. What was said by one who bought merchandise at the time he got it is part of the res gestæ, and is admissible where there is evidence tending to show that the purchase was part of a conspiracy to defraud the seller in which the adverse party was implicated.—Jansen v. McQueen, 112 Mich. 254.

§ 476. Acts or statements by husband or wife.

Admissions against each other, see ante §§ 424, 425.

¶ 2509. In an action by lessees for forcible eviction from premises jointly owned by defendant and his wife, testimony of the wife's violent acts in the presence of and acting with her husband is admissible as part of the transaction, but not such acts done in his absence, unless it is shown that she was then acting under his counsel or direction.—Baumier v. Antiau, 65 Mich. 31.

§ 477. Acts and statements of copartners.

Admissions against each other, see ante §§ 420-422.

¶ 2510. In an action against a firm on notes executed by one partner in the firm name, but used in his private business, his statements to his banker explaining why he kept the account at the bank in his own name though it was in fact the firm's account is admissible as showing what the transaction was.—Towle v. Dunham, 84 Mich. 268.

¶ 2511. The statements of a partner at the time he purchased a team that he was buying it for the firm and that plaintiff sold it to the firm, in an action against the copartnership for the price of such team, is admissible as part of the res gestæ, and to show the nature of the contract actually agreed upon; although it was not competent to prove such partner's authority to bind the firm as its agent, or to show that such purchase was within the scope of his authority.—Beckwith v. Mace, 140 Mich. 157.

§ 478. Acts and declarations by agents.

See also ante ¶ 2378.
Pertinency and relation of the declaration to the authority or duty of the declarant, see post § 482.
By corporate officers and agents, see post § 479.
By railroad clerks, agents and trainmen, see post § 483.
Inadmissibility of agent's declarations to establish agency, see ante § 439.
Res gestæ to show authority, see post § 480.
Res gestæ declaration as to fact of agency, see ante ¶ 2340.
Res gestæ of agent's possession, reception or refusal of property, see post § 481.
Agent's statements after the fact, see post § 484.
Declaration by person referred to as res gestæ, see ante ¶ 2308.
Declarations in interest of principal, see post § 490.
Admissions by agents affecting principals, see ante §§ 427-435.
Res gestæ doctrine as basis for admission of agent's admissions, see also ante ¶ 2256.
Direct testimony of agent and of principal in rebuttal, see ante ¶ 447.

¶ 2512. The declaration of an agent, made at the time of doing an act within the scope of his authority, and relating to the subject-matter of the act, is evidence, as a part of the res gestæ; but statements subsequently made by him stand on the same footing with the declarations of other persons.—

Benedict v. Denton, W. 336; Horner v. Fellows, 1 D. 51; Converse v. Blumrich, 14 Mich. 109.

¶ 2513. Declarations of an agent or servant do not, in general, bind the principal. To be admissible they must be in the nature of original and not hearsay evidence. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time.—Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607.

¶ 2514. Where an agent's acts will bind his principal, his representations, declarations and admissions respecting the subject-matter will also bind him if made at the same time and constituting a part of the res gestæ.—Ayres v. Hubbard, 71 Mich. 594; Andrews v. Tamarack Min. Co., 114 Mich. 375.

¶ 2515. The declarations of an agent, and declarations made in the presence of an agent, at the time of doing an act within the scope of his authority and relating to the subject-matter of the act, are evidence, as part of the res gestæ.—Zart v. Singer Sew. Mach. Co., 162 Mich. 387.

¶ 2516. An agent's declarations can be shown in connection with evidence of acts done by him in carrying on negotiations that are within his power.—Bacon v. Johnson, 56 Mich. 182.

¶ 2517. An agent's talk with strangers concerning past transactions of his employer is not res gestæ either in point of time or in relation to parties, and, being of no account as proof, cannot affect his principal's right under a contract on which the transactions were based.—Benner v. Feige, 51 Mich. 568.

¶ 2518. In an action for an injury from the negligent driving of defendant's servant, the driver's admissions of his negligence in conversations with third persons are not admissible as res gestæ unless contemporaneous with the main fact.—Mabley v. Kittleberger, 37 Mich. 360.

§ 479. ——By corporate agents or officers.

Admissions binding corporation, see ante § 432.

¶ 2519. In an action for the price of a machine sold to a corporation, statements made by a director who had given some directions regarding the work and who might have had authority to make a settlement with plaintiff, to the effect that the machine had been tried and successfully run, were not part of the res gestæ; as such statements were not made in connection with any act relating to the business of the corporation, within the scope of such director's authority.—Allington & Curtis Mfg. Co. v. Detroit Reduction Co., 133 Mich. 427.

§ 480. ——As showing nature of authority.

Agent's declarations out of court that he is agent, see ante § 439.

Admissibility of deceased agent's memoranda of transactions as showing relationship and extent of it, see Agency ¶ 42.

¶ 2520. Declarations of an alleged agent are inadmissible to prove agency, but where there is testimony to show ratification or original authority, or a holding out as having authority, such declarations accompanying the act are admissible to show in what capacity he acted.—Hirschmann v. Iron Range & H. B. R. Co., 97 Mich. 384; see Michigan Slate Co. v. Iron Range & H. B. R. Co., 101 Mich. 14.

¶ 2521. Declarations by a person claiming to be an agent, and constituting a part of his transactions as such, may be shown as res gestæ on the question of his authority.—Haughton v. Maurer, 55 Mich. 323.

§ 481. ——Declarations incident to possession, reception or refusal of property.

¶ 2522. Any creditor has a right to know whether a person in possession of property has any claim hostile to his right to levy on it, and the declarations of employees in charge in their employer's absence, made in reply to inquiries by his creditors, are admissible, as in the nature of res gestæ, to explain a possession of chattels claimed to be held under an unrecorded bill of sale to one whose rights are kept secret.—Haynes v. Leppig, 40 Mich. 602.

¶ 2523. An agent's possession of chattels cannot empower him to admit away his principal's title, notwithstanding the rule that his declarations within the scope of his agency and in connection with some transaction as agent, are receivable as res gestæ.—Michigan Paneling Machine & Manufacturing Co. v. Parsell, 38 Mich. 475.

¶ 2524. The conversation between the person bringing grain to a mill to be ground and an agent of the owner, who, under the owner's direction, refuses to receive the grain, is competent evidence, as part of the res gestæ, in a suit against the owner, under the statute, for such refusal.—Merrill v. Cahill, 8 Mich. 55.

¶ 2525. Declarations by the agents of a manufacturing company concerning the quality and condition of an engine may be received as res gestæ, if made during negotiations for the sale, and during experiments to amend defects.—Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310.

¶ 2526. Conversation between lessor and lessee's agent in which he disclaimed authority to turn over the property, leaving it for another to arrange, is competent, as part of the res gestæ, to show that lease had not been surrendered at the time it took place.—Stevens v. Pantlind, 95 Mich. 145.

§ 482. ——Relation of act or statement to duty or authority.

See also ante ¶ 2513.

Admissions beyond scope of agency, see also ante § 429-431.

As to railroad clerks and trainmen, see post § 483.

Necessity that declaration accompany and pertain to authorized act, see also ante §§ 478, 479.

¶ 2527. An agent's declarations may be shown in connection with acts done by him in carrying on negotiations within his power. —Bacon v. Johnson, 56 Mich. 182.

¶ 2528. An answer of a bank's bookkeeper to an inquiry at the bank by one who had intrusted a draft to it for collection is admissible to show payment of the draft to an agent of the bank, being an admission made in the course of his duties and his agency, and constituting part of the res gestæ.—Simpson v. Waldby, 63 Mich. 439.

¶ 2529. It is relevant to an alleged promise of defendant plank road company to repay tolls paid, if a judgment of ouster of its franchise should be affirmed, the promise being evidenced by a receipt so stating, to show what the toll gatekeeper said at the time of collecting the tolls. VerDuyn v. Detroit & Saline Plank-Road Co., 141 Mich. 450.

¶ 2530. In an action on an insurance policy, defended on the ground that the insured was in poor health at the time of making the contract, the statements of the company's examining physician made at the time of the application are admissible, not as conclusive evidence but as bearing on the insured's condition at that time.—Rhode v. Metropolitan Life Ins. Co., 129 Mich. 112.

¶ 2531. In an action for an injury caused by a chip flying from a hammer which plaintiff was using, testimony of what a fellow-servant, to whom the hammer belonged, said immediately after the injury about the hammer or about the work, is not admissible as part of the res gestæ.—Dompier v. Lewis, 131 Mich. 144.

§ 483. ——Railroad clerks and agents and trainmen.

See also ante ¶ 2289.

¶ 2532. In an action against a railroad company for a breach of a contract to transport goods, statements made by a conductor as to the capacity of the engine to draw the train with proper speed, he being at the time in the business of the defendants, in respect to the contract in question, and in control of the train, which statements relate to the delay complained of, are part of the res gestæ of the case.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 2533. A brakeman's admission that he caused a railway accident is inadmissible as res gestæ in an action arising therefrom against the company by which he is employed, if his statement was not made in the execution of his duty or while the act to which it referred was in progress; nor can it bind the company as the admission of an agent, if it does not appear that the act done was in the line of his duty.—Patterson v. Wabash, St. L. & P. R. Co., 54 Mich. 91.

¶ 2534. In an action against an electric railway company, for killing stock, a statement of the motorman that it resulted from running without a headlight, if made as he alighted from the car at the time of the accident is admissible as part of the res gestæ. —Ensley v. Detroit United Ry., 134 Mich. 195.

¶ 2535. Upon the issue whether or not the flooring of a street car was so defective as to render the company liable for an accident caused by it, it is competent for plaintiff to show what the conductor did with the section of flooring at the time of the accident, it being a part of the res gestæ.—Plefka v. Detroit United Ry., 155 Mich. 53.

¶ 2536. Plaintiff, a passenger on defendant's street car, sued for personal injuries due to a fall received when the conductor started up the car. The conductor testified to a conversation had with plaintiff in which he said "I supposed you were off" when he gave the bell to start. Held, the evidence was admissible as part of the res gestæ.—Reese v. Detroit United Ry., 159 Mich. 600.

§ 484. ——Subsequent statements; time and connection.

See also ante ¶¶ 2275, 2512.

Admissions by agents after termination of agency or authority, see ante § 430.

Explanations of accidents and injuries as admissions, see also ante § 431.

Utterances evoked by questions or fear, see ante § 445.

¶ 2537. Where an accident in a mine indicated danger and was followed three days later by another which did fatal injury, the acts and statements of the mine officers meanwhile in relation thereto were continuous parts of the res gestæ.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 2538. A statement by an engineer on reaching the point by backing his train to where the engine had struck a child, the child being then picked up and put on the train, that he saw an object on the track for half a mile but thought it was a pig until it raised up, when he was too close to stop, is res gestæ of the occurrence.—Keyser v. Chicago & G. T. R. Co., 66 Mich. 390. (Campbell, C. J., dissenting, and Champlin, J., concurring in the result.)

¶ 2539. In a suit for railway injury it was held inadmissible, as hearsay, to allow evi-

dence of a conversation held with a brakeman soon after the accident, in which the brakeman said that the train should have stopped longer. This is matter for the jury, and the rule concerning res gestæ does not apply.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 2540. In an action to recover the value of a horse which had been hired to go on a journey and died before his return, evidence of the driver's statement to a third person that he supposed the horse had been driven too hard the day before its death, but that he had driven according to instructions, is mere hearsay and inadmissible; this was a narrative of a past transaction and not made while in the performance of any duty calling for it, and therefore was not part of the res gestæ.—Ruggles v. Fay, 31 Mich. 141.

¶ 2541. In an action to recover damages for personal injuries sustained in a collision between an interurban car and a moving van, conversations as to the cause of the accident with the driver of the van more than a half hour after the accident, held not admissible as part of the res gestæ.—Hyatt v. Leonard Storage Co., 196 Mich. 337.

E. SELF-SERVING DECLARATIONS.

§ 485. In general.

See also ante ¶ 1772.

By persons since deceased, see post § 488.

By third persons and agents of party, see post §§ 489, 490.

Utterances and complaints of pain and sickness in presence of prospective witness, see ante § 455.

Party's own declarations as res gestæ showing assent or dissent at time, see ante ¶ 2377.

Book of account for self-serving purpose, see also post § 522.

Admissibility of self-serving declarations for other purposes, see ante § 93, ¶ 500.

Statement of plaintiff as to existence of contract to marry, see Breach of Promise to Marry § 4.

Rule as to self-serving declarations in trials for crime, see Indictment, VIII, B.

¶ 2542. A party's declaration in his own interest and not in the other party's presence is inadmissible.—Tolbert v. Burke, 89 Mich. 132.

¶ 2543. A self-serving statement is not admissible on behalf of the party making it and the corroboration of the party in a material part of the case by his own statement is not admissible, since any declaration made by a party in his own favor to a third party, in the absence of the other party to the suit, is in general mere hearsay.—Drake Coal Co. v. Croze, 165 Mich. 120.

¶ 2544. Exculpatory remarks made by a defendant to third persons, but not in the nature of res gestæ, are properly excluded.—Kehrig v. Peters, 41 Mich. 475.

¶ 2545. A party cannot escape the force of adverse evidence by introducing his own statements made before the trial to his attorney.—Vanneter v. Crossman, 42 Mich. 465.

¶ 2546. In an action to recover for the purchase price of goods where the defense was that the order had been canceled by mail during the time limited, held that evidence as to what defendant said when he wrote a letter to the seller about the goods within such time limited, and whether or not he said it was a letter canceling his order, was properly excluded as being self-serving statements.—Farmers' Handy Wagon Co. v. Newcomb, 192 Mich. 634.

¶ 2546a. What a party sued for a false imprisonment said to his attorney when about to cause the arrest is not admissible in his favor.—Josselyn v. McAllister, 22 Mich. 300.

§ 486. Claims and declarations of title.

¶ 2547. Evidence that one in possession of lands when notice to quit was served upon him set up claim to the lands as owner is not competent on his behalf to disprove a tenancy.—Hogsett v. Ellis, 17 Mich. 351.

¶ 2548. The declarations of a third party from whom defendant bought the property in suit, made in plaintiff's absence, to the effect that he owned the property, are inadmissible in defendant's favor although such third party has since died.—Carr v. McCarthy, 70 Mich. 258.

¶ 2549. One who holds an assigned security as collateral cannot, by his statements concerning the transaction, make evidence in favor of a subsequent holder against his assignor, and his declarations can only be received so far as they operate as admissions against his own title.—Paige v. Stephens, 23 Mich. 357.

¶ 2550. In garnishment where plaintiffs claimed that the stock in question was purchased from their debtor, and the garnishees claimed that they purchased from another creditor of such debtor, it was reversible error to admit testimony of a statement made by the principal debtor that his firm had sold out to defendant garnishees, such being a self-serving statement.—Seitz v. Starks, 136 Mich. 90.

§ 487. Writings and memoranda by party.

¶ 2551. In an action against an attaching officer the appraisal under his writ is not evidence in the officer's favor.—Dyer v. Rosenthal, 45 Mich. 588.

¶ 2552. It is error to admit in evidence an entry made in a book by one of the parties, of his version of the parol contract in question.—Collins v. Shaw, 124 Mich. 474.

¶ 2553. In trover for the conversion of property of the plaintiff which the latter claimed was leased by her and that it was wrongfully taken while in the possession of her tenant, an objection to the admission of the lease on the ground of permitting the plaintiff to make testimony in her own interest will not lie, as the lease is competent as one link in the plaintiff's chain of testimony.—Grenier v. Hild, 124 Mich. 222.

¶ 2554. Entries made by a part owner in the discount register of a private bank are not admissible in order to show a purchase of the note sued on by the bank, since such entries were of a self-serving character.—Conroy v. Haffner, 182 Mich. 289.

¶ 2555. Where the question was whether the consideration for certain notes was the services of the payee's stallion with the privilege of returning the mares for service the next year if they did not foal, or was the begetting of a colt for each note, a circular offered in evidence by plaintiff advertising the stallion, and stating that he would make the season of the year in which the notes were given at a certain price the season, and that mares which did not foal might be returned free for service the next year, was properly excluded, copies of it not having been shown to have been published, posted, distributed, or brought to defendant's attention.—Van Tuyle v. Pratt, 101 Mich. 38.

¶ 2555a. In an action for personal injuries sustained in a collision between two automobiles, repair tickets and letters tending to show that the parts which would have been damaged in the collision had not been repaired, held incompetent and immaterial and in the nature of self-serving statements made after the fact.—Granger v. Farrant, 179 Mich. 19.

§ 488. Statements and declarations by decedents.

¶ 2556. The declarations of a person since deceased cannot be made evidence on behalf of his representatives or of his estate any more than on his own behalf while living.—Wilson v. Wilson, 6 Mich. 9; Jones v. Tyler, 6 Mich. 364; Ward v. Ward, 37 Mich. 253; Van Fleet v. Van Fleet, 50 Mich. 1.

¶ 2557. Self-serving declarations made by a person in his lifetime, are not admissible in behalf of his estate.—Walsh v. Backus, 183 Mich. 527.

¶ 2558. Self-serving declarations of a decedent tending to disprove a claim against his estate, not made in the presence of the claimant, are not admissible in favor of the estate.—Bolthouse v. DeSpelder, 181 Mich. 153.

¶ 2559. Declarations tending to disprove a claim, not made by deceased in the claimant's presence, are not admissible in evidence on the trial of an action to recover for the support of such deceased person.—Coleman v. McGowan's Estate, 149 Mich. 624.

¶ 2560. In an action for services rendered by a son to his mother since deceased, evidence of ex parte statements of the mother as to trouble between herself and son, is inadmissible.—Bettinghouse v. Bettinghouse, 156 Mich. 169.

¶ 2561. Statements made by a deceased mortgagor as to payments claimed to have been made by him upon the mortgage, are self-serving, and not admissible to prove such payments, though all the parties who knew the facts are dead.—Rose v. Lockerby, 116 Mich. 277.

§ 489. By others in party's interest.

¶ 2562. An endeavor on the part of defendant, sued for assault and battery, to have an interview afterwards with the injured person in regard to the affair and a voluntary payment by him of the attending physician are irrelevant to disprove malice.—Johnson v. McKee, 27 Mich. 471.

¶ 2563. On the question whether a sale by a failing merchant was fictitious and fraudulent or was in good faith and as against the purchaser suing an attaching sheriff for conversion, testimony in defendant's behalf that after the attachment had been levied and the suit in trover begun, the seller selected his exemptions and that they were set aside to him by defendant, is inadmissible, when it was all done at the sheriff's direction.—Bendetson v. Moody, 100 Mich. 553.

§ 490. By party's agents.

By third persons by procurement, see ante § 489.

¶ 2564. In an action to recover for plastering a house, which work, defendant claims, was done for his contractor, evidence of what was said in a talk between defendant and his architect is inadmissible in defendant's behalf.—Evans v. Montgomery, 95 Mich. 497.

¶ 2565. In an action on account against a corporation a letter by the defendant's bookkeeper to its president was not admissible in its behalf.—Snyder v. Patton & Gibson, 143 Mich. 350.

¶ 2566. Plaintiff sued defendant for the price of coal delivered under an oral contract of sale. Defendant sought to escape liability on the ground that plaintiff had agreed to deliver four or five thousand tons of coal, whereas in fact he had refused to deliver more than 1,427 tons. Plaintiff was permitted to introduce a letter written by its agent to plaintiff after said agent had made the agreement in question with defendant and returned to his hotel, the pur-

pose of introducing the letter being to show that the agent had written plaintiff that the order was for seven hundred tons. Held, the admission of the letter in evidence constituted reversible error.—Drake Coal Co. v. Croze, 165 Mich. 120.

¶ 2567. In an action by a fraternal benefit society to recover the amount of a draft drawn by its finance keeper who was also the assistant cashier of defendant bank, the proceeds of which were received by the bank, it being alleged that it was used to pay his individual indebtedness to the bank, statements of the finance keeper that the draft was for the payment of warrants and other proper charges against plaintiff, made at the time of the transaction to defendant's officers, while admissible as part of the res gestæ, are not binding upon plaintiff since such statements may have been actuated by self-interest.—Supreme Tent K. O. T. M. v. Port Huron Sav. Bank, 137 Mich. 627.

VIII. DOCUMENTARY EVIDENCE.

[Note. In this division the competency of documents and writings as a means of evidence is treated, leaving to other specific topics and to other divisions in this topic the relevancy of the facts appearing by the document to prove the facts in issue. For example, the relevancy of properly executed deeds to prove title in ejectment is treated in Ejectment, IV, while the sufficiency of the deed or the proof of its authenticity or of the record of it or of a certified transcript of the record to be received in evidence is treated here. See cross-references for further outworkings of this classification.]

A. IN GENERAL; PRIVATE WRITINGS.

§ 491. Admissibility in general.

Admissibility of particular kinds of documents and writings, see post §§ 492-511.
Self-proving documents, see post §§ 512-514.
Foundation proofs of execution and authenticity, see post §§ 515-521.
Admissibility of documents where offer is made to concede their effect, see ante ¶ 393.
Exclusion of letters because facts are admitted, see ante ¶ 387.
Offer of document to cut off explanation of transaction evidenced by it, see also ante ¶ 434.
Later letter to rebut earlier, see ante ¶ 446.
Admissibility of intercepted letter for adverse party, see ante § 83.
Admissibility of complementary portions of documents, see ante § 91.
Admissibility of writings referred to in testimony to complete or explain it, see ante § 92.
Canceled check in payment as evidence of title to transferred note, see ante ¶ 548.
Documents as best evidence, see ante, IV, A.
Copies as secondary evidence, see ante, IV.
Existence, identity or custody of writings as matter provable by parol, see ante § 117.
Writings themselves as best evidence of their own contents, see ante § 120.
Voluntary destruction of instrument as precluding proof by secondary evidence, see ante § 143.
Inadmissibility of parol evidence to vary or contradict the writing, see ante, V.
Prior or contemporaneous letters, contracts or writings to explain written agreements, see ante §§ 170, 171.
Admissibility of parol evidence to contradict letters not amounting to a contract, see ante § 189.
Letters making up contract as writing within parol evidence rule, see ante § 187.
Opinions and conclusions as to existence, effect and terms of agreements, see ante § 213.
Comparison of writings by experts as basis for opinions, see ante § 297.
Private writings and entries as hearsay, see ante §§ 315, 316.
Testimony based on others' writings as hearsay, see ante § 317.
Statement made up from books as admission when proved correct by oath of competent witness, see ante ¶ 2034.
Omission to reply to letters as admission implied therefrom, see ante § 387.
Writings and papers as res gestæ, see ante §§ 471-474.
Res gestæ of making and terms of contracts, see ante § 457.
Self-serving writings by party, see ante § 487.
Models and real objects as evidence, see post, IX.
Conclusiveness and unimpeachability of documentary evidence, see post § 601.
Conflict between written and oral evidence, see post § 607.
Admissibility of writing used to refresh recollection in connection with recollection of witness, see Examination of Witnesses, I.
Mode of introducing and receiving papers and documents in evidence, see Trial, V.
Admission of parts or restrictions on use or purposes of proof, see Trial, V.
Right of other party to read complementary portions of admitted writing, see Trial, V, A.
Proper offer, whole writing or relevant portion, see Trial, V, A.
Introduction of documents in equity cases, see Equity § 177.
Manner of incorporating documents and exhibits in bill or case for appeal, see Appeal § 104.
Pleadings and answers in equity as evidence, see Equity, VII, F.
Depositions and affidavits, see Depositions; Affidavits.
Admissible evidence of title in conversion, see Conversion §§ 31, 36.

Affidavits or other evidence receivable by county board in auditing claims, see Counties § 46.
Admissibility of mortality tables on damage questions, see Damages §§ 329, 330; Death by Wrongful Act § 26.
Admissibility of mill scales as evidence, see also Contracts § 318.
Private records and writings admissible in trials for crime, see Indictment, VIII, B.

¶ 2568. An irrelevant instrument between third parties is properly excluded.—Wright v. Irwin, 33 Mich. 32.

¶ 2569. Private books and records are not evidence of the nonoccurrence of a fact, because they do not contain any mention of it. —Winnett v. Detroit United Ry., 171 Mich. 629.

¶ 2570. It is no objection to admission of a proper document that the party offering it has been guilty of laches in asserting the right which it is to prove.—Murphy v. Cady, 145 Mich. 33.

¶ 2571. The supposed rule, if such existed, that a party declining to produce a document when called for under a proper notice is estopped from producing it afterwards does not authorize such exclusion when the document relates to the case of the party holding it. Such a rule would be better calculated for the punishing of parties than for the eliciting of truth; and, if it were ever proper there can be no reason for it now when parties are competent witnesses, and can be compelled to bring into court any paper in their hands which their adversaries have any right to prove.—Moulton v. Mason, 21 Mich. 364.

¶ 2572. In replevin against a city treasurer for property levied upon to satisfy a tax assessed against plaintiff's husband, it was proper for plaintiff, after proving its execution, to introduce the bill of sale by which her husband previously had transferred the property to her to show title in her.—Hall v. Moriarty, 57 Mich. 345.

§ 492. Deeds and mortgages.

Relation of deed to chain of title, see post § 493.
Invalid and unstamped instruments, see post § 494.
Altered and interlined instruments, see post § 495.
Unrecorded deeds and plats and those illegally recorded, see post § 496.
Drafts not executed, see post § 497.
Official deeds and transfers, see post § 539.
Deed record as evidence, see post § 542.
Deeds as evidence as to true location of boundary, see Boundaries, § 26.
Recital of consideration in deed as evidence between the parties, see also Contracts ¶ 625.

¶ 2573. It is no objection to the admission of a deed in evidence that the description of the premises is not in the same words as laid in the declaration. The identity of the premises may be shown by other evidence.—Hovey v. Smith, 22 Mich. 170.

¶ 2574. Ejectment was brought for land in town 2 south, range 10 west, in Kalamazoo county, being in the township of Comstock, and the plaintiff in support of his title introduced a deed purporting to convey the same description of land in the township of that name, but describing it as in range 9. Held, that the discrepancy was not sufficient ground for excluding the deed, but that extrinsic evidence was admissible to identify the land conveyed with the premises in suit. —Crooks v. Whitford, 47 Mich. 283.

¶ 2575. A deed cannot be objected to because it purports to convey more land than the grantor is shown to have owned at the time of its execution; it is admissible to show the conveyance of what he did own.—Atwood v. Canrike, 86 Mich. 99.

¶ 2576. The mere recital of a valuable consideration in a deed is not evidence of payment thereof as against a party holding under a prior but unrecorded deed.—Shotwell v. Harrison, 22 Mich. 410.

¶ 2576a. The absence of a seal from a deed, though not affecting its validity may be a circumstance tending to show the instrument never was such a one as it is claimed to be, but was in fact a simple written contract.—Spicer v. Bonker, 45 Mich. 630.

§ 493. ——Connection with or relation to party's claim or title.

¶ 2577. A deed is no evidence of title in the grantor, where he is not otherwise connected with the title, or shown to have ever had possession.—Smith v. Lawrence, 12 Mich. 431; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

¶ 2578. Where the title to land is involved, a deed that has been executed to a party after he has closed his case is inadmissible to remedy a defect therein.—Houghton Village Common Council v. Huron Copper Min. Co., 57 Mich. 547.

¶ 2579. A quitclaim deed is no evidence of title if at the time of its execution the grantee was in possession and the grantor not.—Anderson v. Thunder Bay River Boom Co., 57 Mich. 216.

¶ 2580. Recitals in a deed describing the grantors as heirs of the deceased owner of the land conveyed are insufficient proof of such heirship, and the grantee, in order to entitle the deed to be received in evidence in an action of ejectment brought by him for said land, must prove the identity of

the grantors as heirs of said deceased owner. —Wolf v. Holton, 104 Mich. 107.

¶ 2581. In an action to recover damages for breach of a contract to cut and manufacture certain timber, in which the breach is alleged to consist in a failure of title, deeds and bills of sale are inadmissible in evidence as establishing title where they are not shown to have been to defendant, and are not connected with his title.—Mott v. Penoyar, 153 Mich. 273.

¶ 2582. The registry of a quitclaim deed purporting to be from the heirs of a former owner is inadmissible to show title on proof only that they were his children, without showing that they were born in wedlock or that their mother became his wife.—Van Auken v. Monroe, 38 Mich. 725.

¶ 2583. A deed purporting to be made by an executor at the request of certain other persons who signed it with him is not properly admissible as evidence of title without proof that the grantor had authority to act as executor and that he or the estate had an interest in the premises conveyed.—Chapman v. Crooks, 41 Mich. 595.

¶ 2584. In trover for the conversion of timber, the question of title to the lands on which the timber was cut being involved, a swamp-land patent issued by the governor, under the great seal of the state, and covering the premises in dispute, is admissible to prove title in the patentee, without proof of the title of the state or the authority of the governor to issue the patent.—Grant v. Smith, 26 Mich. 201.

¶ 2585. A deed from a sole heir to supply a defect in the ancestor's deed is admissible in evidence of the title transferred without showing that the earlier deed could not be found; and a recital in the second deed that its purpose is to supply the defect in the first does not hurt it.—Boyce v. Stambaugh, 34 Mich. 348.

¶ 2586. In an action of trover to recover the value of timber, a deed to Harriet N. Andrews was received in evidence, after which the conveyance of the title to the land by her was attempted to be shown by the introduction of a deed from Cyrus Andrews and Harriet Andrews, his wife, who was described in the body of the deed as "Harriet N. Andrews," and in both of which deeds her place of residence was the same; which facts are held sufficient proof of identity to warrant the court in receiving the latter deed as a link in the chain of title.—Clow v. Plummer, 85 Mich. 550.

§ 494. Invalid or unstamped deeds, contracts or instruments.

Invalid or inoperative instrument as admission of facts, see ante § 384.

Secondary proof of invalidly recorded deeds, see ante § 140.

Stamps as circumstance showing value passed, see ante ¶ 398a.

Invalidity of federal law requiring stamps on documents to be admitted in evidence, see Constitutional Law § 125.

¶ 2586a. In state courts the want of a stamp does not affect the force of a document as evidence.—Sammons v. Halloway, 21 Mich. 162.

¶ 2586b. The provisions of the acts of congress which precluded unstamped instruments being received in evidence had no application to state courts.—Clemens v. Conrad, 19 Mich. 170.

¶ 2587. A contract void on its face as against public policy, will not be rejected as evidence, on the grounds of incompetency. —Benson v. Bawden, 149 Mich. 584.

¶ 2588. Leases made by plaintiff, a tenant, for a portion of the premises and tending to show the rental value of the subleased portion were admitted over an objection that the subleases were void because no sufficient consent to subletting was shown, where there was some evidence that the condition against subletting was waived by plaintiff's lessor.—Vincent v. Defield, 105 Mich. 315.

¶ 2589. In an action of ejectment in which the defendant, although conceding record title in plaintiff, claimed under a life lease from a prior grantor after he had acquired title by adverse possession to the property which he had conveyed by deed prior thereto, held that a deed from the grantee of such prior grantor to another person, although it had been declared invalid by the courts, was admissible in evidence to show the mental attitude of such prior grantor inconsistent with a claim of adverse possession.—Tyler v. Wright, 188 Mich. 561.

§ 495. Instruments showing alteration.

Mutilated and incomplete books of account, see post § 522.

Presumption against suppresser or despoiler of documents, see ante § 64.

Propriety of submitting genuinely signed note to jury when alteration is in question, see Negotiable Instruments, XIV; Trial, V.

Effect of alteration to invalidate the instrument, see Alteration of Instruments.

¶ 2590. Unless an alteration or interlineation in an instrument is suspicious in appearance the presumption is that it was made before the paper was executed; if so, it will not prevent the admission of the paper in evidence.—Munroe v. Eastman, 31 Mich. 283; Sirrine v. Briggs, 31 Mich. 443; Brand v. Johnrowe, 60 Mich. 210.

¶ 2591. The note may be read in evidence when the genuineness of the signature is ad-

mitted, although defendant claims it has been altered.—Hunter v. Parsons, 22 Mich. 96; Willett v. Shepard, 34 Mich. 106.

¶ 2592. A deed cannot be excluded as evidence on the ground that part of it seems to have been written over an erasure; but the burden of proving its genuineness is upon him who claims under the suspected clause.—Comstock v. Smith, 26 Mich. 306.

§ 496. Unrecorded or illegally recorded plats and deeds.

Competency of record of deed or plat improperly placed on the record, see post § 530.

Necessity and sufficiency of proof of execution as foundation, see post § 515 et seq.

¶ 2593. A plat actually, though not legally, recorded may be used to identify the land described in the deeds referring to it.—Johnstone v. Scott, 11 Mich. 232.

¶ 2594. A plat referred to in deeds under which both parties to an ejectment suit claim title, is admissible in evidence although its execution is so defective that it is not entitled to record, especially where it appears that lots have been conveyed with reference to it, and that streets marked out on it have been used as public highways for more than twenty years.—Pere Marquette R. Co. v. Graham, 150 Mich. 219.

§ 497. Preparatory drafts and unexecuted writings.

As admissions against interest, see ante § 397.

Admissibility of written draft or contract as evidence of terms of oral agreement, see Contracts § 315.

¶ 2595. Where one of the parties to an oral agreement puts it in writing, and the other party refuses to sign it and denies its accuracy, the former cannot use it as evidence of the actual agreement in an action thereon.—Holland v. Rea, 48 Mich. 218.

¶ 2596. If the previous memorandum of sale is defective under the statute of frauds, the deed thereupon, though delivered only for purposes of examination, is competent to show the precise locality of the land which such memorandum was intended to embrace.—Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

¶ 2596a. The record of a deed apparently prepared for execution by two parties exchanging lands but executed by one only is admissible as tending to show the agreement to exchange but has little tendency to prove the execution of a corresponding deed by the other party to effect the exchange.—Goodell v. Labadie, 19 Mich. 87.

§ 498. Papers connected by reference or otherwise.

¶ 2597. Where a marine protest is made part of the proofs of loss by being referred to therein, it is admissible in evidence with such proofs as an explanatory writing.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

§ 499. Papers bearing diverse instruments.

Indorsements and bank stamps on paper, see post § 502.

¶ 2598. It is not error to admit a paper bearing a deed and also a memorandum where the paper was offered because of the memorandum which was admissible in evidence, though it referred to the land described in the deed.—Russell v. Phelps, 42 Mich. 377.

¶ 2599. Where upon a letter written by defendant to plaintiff, relating to the subject-matter of the suit, and offered in evidence by plaintiff, there appears an unsigned memorandum not so relating, and not written by defendant, and the author or purpose of which does not appear, the memorandum is no part of the letter and is immaterial as evidence.—Julius King Optical Co. v. Treat, 72 Mich. 599.

§ 500. Private record books or diaries.

Memoranda or minutes, see post § 501.

Corporate books and records, see post § 503.

Complex records, like scales, tallies and train records involving numerous persons and details, see post §§ 506, 507.

¶ 2600. A leaf sworn to as taken, after his death, from a soldier's private record book, required to be kept by soldiers in the British service, containing the names of the father and his wife, and the names, ages and birthplaces of all his children, is admissible in proof of the age of a child of such soldier.—Hunt v. Supreme Council of the Order of Chosen Friends, 64 Mich. 671.

¶ 2601. Entries in a diary, which is not a book of accounts kept in the usual course of business, made by a wife, not from her own knowledge, but from what her husband told her, are inadmissible in evidence unless used merely to aid the recollection of a witness.—Stabler v. Clark, 155 Mich. 26.

§ 501. Memoranda or minutes.

Memoranda on paper bearing other writings, see also ante § 499.

Entries and memoranda as res gestæ, see ante § 471.

Computation figures as res gestæ of accounting and settlement, see ante ¶ 2452.

Memoranda used to refresh memory of witness, see Examination of Witnesses, I.

¶ 2602. The minutes of the testimony of witnesses at a former trial, taken at the time

by one who was attorney for one of the parties on that trial, may be read as evidence of what those witnesses then testified to, after the attorney has sworn that his minutes are correct.—Fisher v. Kyle, 27 Mich. 454.

¶ 2603. A settlement of partnership accounts was claimed to have been made from a memorandum drawn from the books of a firm instead of from the books themselves. Held, that the fact of such settlement being for the jury to determine, the memorandum was admissible in evidence.—Miner v. Lorman, 66 Mich. 530.

§ 502. Indorsements and stamped impressions on papers.

Official indorsements and filing marks, see post § 535.

¶ 2604. A bank stamp upon a promissory note, indicating that it was paid upon a certain date, is admissible in evidence to show the time of such payment, in connection with testimony that the note was so stamped by the bank officer when paid, in accordance with the custom of the bank, and that such stamp was used upon no other occasions.—Hanish v. Kennedy, 106 Mich. 455.

§ 503. Corporate books.

Foundation proofs of authenticity, see post § 515 et seq.

Best and secondary evidence of corporate acts, see ante § 125.

Opinion evidence as to existence and contents of records, see ante § 218.

Entries on corporate stock book as evidence of title to stock, see Corporations § 284.

¶ 2605. The transactions and acts of a corporation may be proved by entries in its books.—People ex rel. Platt v. Oakland County Bank, 1 D. 282.

¶ 2606. Where a private corporation has power to employ a superintendent, the entry in its proper record book of a resolution of appointment passed by its directors is admissible to help establish a claim for salary.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

¶ 2607. The subscription books of a railroad corporation, opened and kept by commissioners according to statute, are in the nature of official registers, and are competent evidence, in an action against a subscriber, to prove how much per mile had been subscribed to the capital stock.—Monroe v. Fort Wayne, J. & S. R. Co., 28 Mich. 272.

¶ 2608. Official statements and business correspondence as to the dealings of a corporation with the party to whom they run are corporate and not private acts, and admissible in proof of such dealings in an action between the parties, if material thereto; and this though signed only by the name or initial of the secretary of the corporation.—Harrison Wire Co. v. Moore, 55 Mich. 610.

§ 504. Maps and diagrams.

As ancient documents, see post § 508.

Certified copies of land office plats and surveys, see post § 552.

Foundation proof of correctness, see post § 517.

Foundation proofs of accuracy or resemblance for photographs, see post § 572.

Survey and field notes as evidence of boundaries, see Boundaries § 30.

¶ 2609. Error being assigned because a witness was allowed to use a map whereon he pointed out the locality of an alleged trespass, held, that it was not necessary that a map correct in every respect should be produced; a map could only be used in connection with the testimony to enable the jury to understand the facts testified to.—Hoffman v. Harrington, 44 Mich. 183.

¶ 2610. A map of a government subdivision is inadmissible in evidence without the surveyor's field notes and has no evidential significance.—Wilson v. Hoffman, 54 Mich. 246.

¶ 2611. A map made by a deputy surveyor of the United States, whereon certain lands are shaded green, and which bears a memorandum that "the tracts embraced in the green shade are reserved for light-house purposes, see commissioner's letter, June 14, 1852," and a map of the same survey from the office of the register of deeds, concerning which a witness testifies that the green shade indicates lands resurveyed for light-house purposes, do not show that such lands were so reserved from the operation of Act, Cong. Sept. 28, 1850, granting swamp lands to the state.—Sterling v. Jackson, 69 Mich. 488.

¶ 2612. A surveyor who testifies to running out lines in order to settle a disputed boundary may present a plat of his survey, which is admissible in evidence, and, if incorrect, such fact may be shown by the opposite party; and the question of its correctness is for the jury.—Atwood v. Canrike, 86 Mich. 99.

§ 505. Photographs.

Admissibility to show appearances to jury, see post § 572.

Enlarged photographs of things for better illustration, see post ¶ 2853.

Photographs as secondary evidence of original, see ante § 109.

¶ 2613. In an action for negligence in leaving an elevator shaft unguarded, photographs of the premises where the injury occurred should not have been excluded.—Bedell v. Berkey, 76 Mich. 435.

¶ 2614. In a personal injury suit photographic views of the scene of the accident are admissible in evidence, where there is sufficient evidence to authenticate them.—Pruner v. Detroit United Ry., 173 Mich. 146.

¶ 2615. Where supported by proof of their accuracy, photographs of the locus in quo are admissible in an action for personal injuries caused by defective highway.—Sterling v. City of Detroit, 134 Mich. 22.

¶ 2616. In an action for obstructing a right of drainage, photographic views taken of the premises more than a year after the cause of action arose, which would not have assisted the jury, and which are not shown to be accurate, are properly excluded.—Leidlein v. Meyer, 95 Mich. 586.

¶ 2617. In an action for personal injuries, a photograph of the place where the injury occurred, showing the parties and witnesses in their respective positions, is not rendered inadmissible by the fact that it corroborated the evidence of the defendant as to the position in which he was standing, and thus emphasized his version of the occurrence.—Harrison v. Green, 157 Mich. 690.

¶ 2618. A picture of the place where an injury was received is properly considered as corroborating testimony of an eyewitness.—Measel v. Detroit United Ry., 166 Mich. 688.

§ 506. Records of data, work or operations involving complexity.

Foundation for tally books, see post ¶ 2650.

¶ 2619. A log scale can be proved by the testimony of a witness to a scale book of a boom company, where the book was made up in the office from figures there received from a tallyboy, who took them down as given by the log scaler, neither the tally boy nor his original entries being produced.—Smith v. Kelly, 43 Mich. 390; Seligman v. Ten Eyck's Estate, 60 Mich. 267.

¶ 2620. In an action for the price of logs where a scaler relying upon measurements made by an assistant of the opposite ends of logs on a skidway which he called off, also calling any apparent defects, measured the ends of the logs next to him, such scale was held to be incompetent because not of the witness' personal knowledge in the absence of proof that the measurements were accurately made by the assistant and defects accurately reported which testimony only the assistant himself could give.—Sovereign v. Mosher, 86 Mich. 36.

¶ 2621. Entries copied upon freight books from the waybills by a railroad agent, purporting to show the receipt by the company of cases of goods which the agent swears he delivered to the consignee's authorized draymen, are competent evidence in a suit against the consignee for the price of the goods.—Robinson v. Mulder, 81 Mich. 75.

¶ 2622. A railroad yardmaster and weighmaster may testify as to the weight of a carload of wood from the records of the railroad wherein are entered in the regular course of business the weights of cars as taken from the cards whereon originally entered, though such weighmaster did not himself weigh the car nor were the entries in the book in his handwriting, and especially where he testified that he compared the entry made in the book with the entry on the original card.—Meyer v. Brown, 130 Mich. 449.

¶ 2623. Weight cards kept by a carrier showing the weight of the contents of a car are admissible in an action between joint shippers to show the amount of grain in the car, notwithstanding that the employee who made the entries on the card was not available as a witness.—Remer v. Goul, 185 Mich. 371.

§ 507. ——Train and car records.

Freight records, see also ante § 506.
Train reports as res gestæ, see ante § 471.
Foundation for admission, see post § 515 et seq.

¶ 2624. A register of the arrival and departure of trains, said to have been kept by the train dispatcher and made by him from telegrams received, is inadmissible, as not sufficiently authenticated, to show when a particular train arrived at a certain station unless proved to be an official register required to be kept by the company, and an original document, and unless it is shown who made the entries, who the dispatcher was, and that the witness was familiar with his handwriting.—Bronson v. Leach, 74 Mich. 713.

¶ 2625. The records of railroad agents showing the shipment of a car in good condition were admissible in evidence, when made in regular course of business, in an action against such carrier for damages to goods in transit caused by rough handling of such car.—Modern Match Co. v. Baltimore & O. R. Co., 140 Mich. 570.

¶ 2626. Books kept by an electric railway company showing the records of conductors and motormen, and containing entries as to the alleged incompetent motorman, were admissible in evidence, in an action against such company by a servant for injuries received by being struck by a car operated by such incompetent motorman, not only for the purpose of showing notice to the company of his record, but also as prima facie evidence of any facts stated therein, and plaintiff is not limited in his use of such books to specific acts of incompetency otherwise shown, except as he may have limited himself by his declaration.—Trend v. Detroit United Ry., 149 Mich. 338.

§ 508. Ancient documents and records.

Recitals in ancient documents as exception to hearsay rule, see ante § 322.

¶ 2627. Parish record of church thirty years old showing date of baptism of de-

ceased person admitted on question of age. —Hunt v. Supreme Council of Chosen Friends, 64 Mich. 671.

¶ 2628. A husband leased a part of a homestead to a township, and the township officers occupied the premises for thirty-six years. The lease was found in the clerk's office among the township papers. Held, the lease should be treated as an ancient document and no proof of the husband's signature was necessary.—Township of Jasper v. Martin, 161 Mich. 336.

¶ 2629. Records of surveys and other papers that have been subject of statutory regulation are not admissible as ancient records.—Wilcox v. Jenison, 198 Mich. 182.

§ 509. Baptismal records and parish registers.

Ancient records, see ante § 508.
Marriage records and certificates, see post § 510.
Certified copies and transcripts from official registers, see post § 554.

¶ 2630. A record of baptism, when admissible in evidence, is evidence of the date of baptism but not of birth, although stated therein.—Durfee v. Abbott, 61 Mich. 471.

¶ 2631. When a record of baptism is introduced in evidence to establish a person's age, it is necessary to prove the identity of the person baptized with the person concerning whom the issue is raised.—Durfee v. Abbott, 61 Mich. 471.

¶ 2632. A sworn and examined extract from the parish record of a church, showing the baptism of a deceased party, and reciting the names of her parents, with their description, and a statement of her age, supported by the affidavit of the priest that such a record was required to be kept by the rules of the church, and which is thirty years old, is admissible as evidence of age.—Hunt v. Supreme Council of the Order of Chosen Friends, 64 Mich. 671.

§ 510. Marriage certificates and registers.

Certified copies and transcripts, see post § 552.
In criminal cases, see Indictment, VIII, B.

¶ 2633. A statement in a marriage certificate is not evidence of the age of the parties.—Passmore v. Passmore's Estate, 60 Mich. 463.

§ 511. Books on science, art or special subjects.

Allusions to scientific books in hypothetical question to expert, see ante § 303.
Use in examining or cross-examining expert witnesses, see ante § 303; Examination of Witnesses, I, II; Witnesses, VI, D.
Reading books to jury to contradict or impeach expert, see Witnesses, VI, D.

¶ 2634. Medical books are not admissible as evidence on medical questions.—People v. Hall, 48 Mich. 482; Marshall v. Brown, 50 Mich. 148; People v. Millard, 53 Mich. 63.

¶ 2635. To permit plaintiff's counsel, in an action for personal injuries, to read to the jury extracts from medical works in connection with the cross-examination of experts called by defendant to refute plaintiff's theory of the cause of his physical condition, is prejudicial error.—Hall v. Murdock, 114 Mich. 233.

¶ 2636. The only circumstances under which medical works can properly be read in evidence are where the witness has based his opinions upon them, and has referred to them as authority.—Hall v. Murdock, 114 Mich. 233.

§ 512. Self-proving documents.

Acknowledged and recorded deeds and mortgages, see post § 513.
Deeds executed abroad or for lands in other states, see post § 514.
Instruments connected by reference with admissible instruments, see also ante ¶ 2597.
Ancient documents and records, see ante § 508.
Admissibility of record without foundation proofs, see post § 549.
Sufficiency of device used as seal to be admitted as such, see Jud. Act, chap. XVII, § 28; Comp. L. 1915, § 12516.

¶ 2637. A bill of sale of an account though signed and witnessed does not prove itself.—Bush v. Meacham, 53 Mich. 574.

§ 513. ——Acknowledged or recorded deeds and mortgages.

Admissibility of the record or of transcript thereof, see post §§ 530, 542, 557.
Admissibility of certified copy of records, see post §§ 551, 557.
General requisites of acknowledgments, see Acknowledgments.
Sufficiency of certificate of acknowledgment to admit deed in evidence, see also Acknowledgments § 9 et seq.
Admissibility of deed whose date varies from that of acknowledgment, see also Acknowledgments ¶¶ 25, 26.
Admissibility of deed not acknowledged when made but acknowledged before offer in evidence, see Acknowledgments § 21.
Instruments made self-proving by acknowledgment, see Jud. Act, chap. XVII, § 41; Comp. L. 1915, § 12529.
Statutory rules for admissibility of record or transcript of it or copy of instrument, see Jud. Act, chap. XVII, § 20; Comp. L. 1915, § 12508.

¶ 2638. A deed the record of which is admissible in evidence is also itself admissible without preliminary proof.—Lacey v. Davis, 4 Mich. 140.

¶ 2639. Under How. St., § 5685, making a certified transcript of the record of a deed sufficient proof of its execution and delivery, the original deed, with the certificate of record indorsed thereon, is also admissible without preliminary proof.—Webb v. Holt, 113 Mich. 338.

¶ 2640. An unacknowledged deed does not prove itself, and cannot be proved by the registry though actually recorded.—People v. Marion, 29 Mich. 31 (criminal case).

¶ 2641. An objection to the introduction of an instrument, because at the close of the attestation clause it purports to be executed in duplicate, is of no force where it does not appear that any duplicate was ever intended to be made, and the party objecting never required it.—Dykes v. Wyman, 67 Mich. 236.

§ 514. ——Executed abroad or for foreign lands.

Requisites and sufficiency of certification of record of foreign executed deed, see post § 557.

¶ 2642. Where proof of a foreign deed is to be made, it is competent to establish the official position of the certifying officer by proof of the foreign law. The statutory certificate of authentication is not the only way. —Crooks v. Whitford, 47 Mich. 283.

¶ 2643. A deed of New York lands does not prove itself in Michigan under our statutes.—Gault v. Van Zile, 37 Mich. 22.

§ 515. Foundation proof of authenticity.

For writings offered for comparison, see post § 516.
For maps and diagrams to show accuracy, see post § 517.
Necessity of proof by attesting witnesses, see post § 519.
Sufficiency of proof of execution, see post § 520.
Right to inspect and cross-examine, see post § 521.
Of agent's authority to execute, see post § 518.
Proof of writing and mailing of letter by stenographer, see ante ¶ 1830.
Presumption of receipt of letters duly mailed, see ante § 35.
Other facts to connect deeds with fact to be proved, see also ante § 493.
Identification of person as foundation for birth records, see ante § 509.
Of unacknowledged but recorded deed, see ante ¶ 2640.
Signature of corporate records, see ante ¶ 2608.
Altered or interlined writings, see ante § 495.
Proof of identity and origin of the paper used for writing, see ante ¶¶ 551, 552.
Necessity of accounting for duplicate original, see ante ¶ 2641.
Self-proving documents, see ante §§ 512-514.
For photographs, see also ante ¶¶ 2615, 2616.
Comparison of writings by jury, see post § 569.
Comparison by experts, see ante § 297.
Comparison by lay witnesses, see ante § 252.
Foundation for admission of records and official writings, see post §§ 549, 550.
Foundation for secondary proofs, see ante §§ 148-151.
Admissibility and sufficiency of evidence of signature, genuineness, delivery, and acceptance of instrument, see Execution of Instruments, I, III.
Issue and proof of fact of alteration, and province of jury thereon, see Alteration of Instruments, §§ 13-15.
Discretion to withhold admission of offered document until suspicious appearance is explained, see Trial, V, B.

¶ 2644. In an action for delaying freight in transit, bills of lading are incompetent to prove the date on which the freight was delivered to defendant railroad for transportation until the genuineness of such bills has been proved.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

¶ 2645. In an action on a note executed in the name of a corporation, a paper purporting to be a resolution authorizing the execution of the note and signed by the president and secretary, is not admissible where its adoption is not established by competent evidence.—Northville State Bank v. Detroit Silver Refining Co., 181 Mich. 515.

¶ 2646. All the testimony of a witness should be taken together in determining whether it fairly tends to establish facts entitling documentary evidence to be admitted. —Ortmann v. Merchants' Bank of Canada, 41 Mich. 482.

¶ 2647. The plaintiff, having testified to the admissions and explanations of defendant on the former trial, as to the circumstances attending the signing of the instrument sued upon, if in fact it was signed by defendant at all, and these circumstances having some tendency to prove the signature to be that of defendant, it was not error to admit the instrument to be read in evidence.—Gibbs v. Linabury, 22 Mich. 479.

¶ 2648. The court should admit a document sued on, the signing of which is disputed but of which there is some evidence, since it is ultimately for the jury to determine on the issues whether the instrument was signed or not.—Gibbs v. Linabury, 22 Mich. 479.

¶ 2649. In an action upon a warranty of title free from incumbrances, of a span of horses sold by defendant to plaintiff, it is error to receive in evidence, against objection, a note and mortgage purporting to be executed by defendant without any proof of their execution.—McHugh v. Brown, 33 Mich. 2.

¶ 2650. Plaintiff, preparatory to suing defendant for cutting timber from his land, employed two experienced men, Brown and Blair, to examine the timber and determine the amount unlawfully cut by defendants. Brown and Blair proceeded to examine, count, make measurements, and ascertain the kind of logs taken according to the measurements of lumbermen in estimating trespass. A record of their work was made as it progressed, in small tally books carried with them for that purpose. Brown called off the figures and Blair made the entries. At the trial, Brown, Blair being dead, testified as to the manner of making the measurements and the entries in the tally books. Held, the tally books were admissible.—Sullivan v. Godkin, 172 Mich. 257.

¶ 2651. The reports of the business condition of a corporation cannot be admitted in evidence in the absence of the testimony of the secretary who made them.—Diel v. Kellogg, 163 Mich. 162.

¶ 2652. In a suit on a promissory note signed by a corporation and indorsed personally by defendant secretary thereof, who was payee, the correspondence between plaintiff and said corporation was admitted in evidence relative to the said note, letters from said corporation dictated, though not signed by defendant, were properly admitted on the stenographer's testimony to those facts.—Gelder v. Welsh, 169 Mich. 490.

¶ 2653. In an action against a street car company for injuries to the plaintiff caused by the starting of the car while she was alighting, the only evidence of the accident was plaintiff's testimony, neither the conductor or motorman having any recollection of the incident. There was evidence that it was the custom to report all accidents at the office, and the witness for defendant testified that she had charge of the record of accidents. There was no proof as to how or when the record was made, nor by whom it was made, and no showing was offered as to its accuracy. Said witness was permitted to testify that her files contained no report of the accident from the conductor or motorman. Held, the admission of the evidence constituted reversible error because if the private books of the company were competent, no proper foundation for same had been laid.—Winnett v. Detroit United Ry., 171 Mich. 629.

¶ 2654. In an action of trover by the purchaser of an engine, which had been detached from a boat owned by the seller and substituted for the engine in another boat bought by the seller of the engine from defendant, and later detached by the owner of the boat but not removed, and taken possession of by defendant, upon rescission of his contract, held in fixing the measure of damages that a receipt for certain bonds delivered to defendant's servant as part payment of the purchase price, and signed by her, was admissible in evidence to fix a material date without proof of her signature when the defendant admitted that he received the bonds.—Parnell v. Pungs, 190 Mich. 638.

¶ 2655. In an action for the alienation of a wife's affections, post-marked letters and envelopes in defendant's handwriting, addressed to plaintiff's wife at her street and number, and showing on their face that they belong to a connected correspondence, are admissible in evidence upon proof that defendant, in the presence of a witness, admitted having written them, producing letters from the wife, in support of his claim that they constituted simply a friendly correspondence, although receipt of his letters by the wife is not otherwise shown.—Mead v. Randall, 111 Mich. 268.

§ 516. ——Writings for purpose of comparing handwriting.

See also post ¶ 2842.

Admissibility of writings for comparison, see post § 569.

Admissibility of writing used by expert to compare with questioned writing, see ante ¶ 1685.

Comparison of questioned with genuine writing as basis for opinion, see ante § 297.

¶ 2656. In an action on promissory notes the defendant will not be permitted to introduce other documents in evidence on the question of genuineness of defendant's signature unless properly identified.—Taylor v. Taylor's Estate, 138 Mich. 658.

§ 517. ——Of correctness of map or diagram.

¶ 2657. A map of the premises where an alleged assault occurred, and of the surrounding property, cannot be used before the jury by counsel without proof that it is correct, and testimony that it has been adopted by the city council is not such proof.—Zube v. Weber, 67 Mich. 52.

¶ 2658. In an action for a personal injury it was not error to admit in evidence a map of the place of the accident, there being testimony that such map was approximately correct, and one witness testifying that it was accurate.—Le Beau v. Telephone & T. Const. Co., 109 Mich. 302.

§ 518. ——Of authority of agent to execute.

As to letter dictated but not signed, see also ante ¶ 2652.

¶ 2659. In a suit between firms relating to certain sales, a letter written in the name of one of the firms by a boy in the office, in answer to a dispatch referring to the sales, was offered in evidence but objected to for want of proof of authority to write it. A member of the firm testified to the handwriting, also that the letter was written on paper having the printed heading of

the firm and such as was used in the office at the time; also that the boy was in the firm's employ and sometimes wrote letters for it; though he said he did not know whether this particular letter was written by the firm's authority, or how or by whom it was sent. Held, that the evidence was sufficient to go to the jury on the question whether written by the firm's authority, and that the letter was properly admitted.—Botsford v. Kleinhans, 29 Mich. 332.

¶ 2660. An attorney's letter in reply to one addressed to his client seems to be admissible, if relevant, when it has been shown that he is attorney and has been put in possession of the letter to which his is an answer.—Ward v. Beecher, 56 Mich. 616.

§ 519. ——Necessity of proof by attesting witnesses.

In proving existence of lost instrument as foundation for secondary, see ante § 153.
Statutory rule for necessity of calling subscribing witnesses, see Jud. Act, chap. XVII, § 50; Comp. L. 1915, § 12538.

¶ 2661. The statutory right of a party to testify on his own behalf does not dispense with the necessity for calling the subscribing witness to prove a contract to which he was a party.—Hess v. Griggs, 43 Mich. 397.

¶ 2662. Where replevin rests on plaintiff's possession through another person, who holds under a contract with him which the other contracting party had signed only by his mark, the contract must be proved by the subscribing witness.—Hess v. Griggs, 43 Mich. 397.

¶ 2663. Where a paper requiring no witness was admitted in evidence on prima facie proof of the signature, by one not an attesting witness and the witness thereto admitted on subsequent cross-examination that he was not familiar with the signer's handwriting and did not see it signed, but there was abundant other evidence of the signature, there was no error in refusing to direct a verdict on the ground that the signature was not proved.—Bulen v. Granger, 63 Mich. 311.

¶ 2664. A subscribing witness need not be called to prove an official bond that is proved by certified copy under U. S. Rev. Stat. § 886.—Lee v. Wisner, 38 Mich. 82.

¶ 2665. Where a party calls his adversary or permits him to be called to prove an instrument referred to, it need not also be proved by the subscribing witness.—Rayburn v. Mason Lumber Co., 57 Mich. 273.

¶ 2666. The "reasonable time" before trial within which an effort should be made to serve a subpoena for a subscribing witness depends largely on the latter's abiding place at the time.—McMillan v. Larned, 41 Mich. 521.

¶ 2667. Where a party brings suit before a justice of the peace, and in order to make out his case it becomes necessary to prove the execution of a written instrument, to which the justice is the only subscribing witness, the disability of the justice to be sworn is not a sufficient reason for admitting other proof of the execution of the instrument. Whether it would be different if the witness was the only person before whom the suit could have been brought, quære.—Jones v. Phelps, 5 Mich. 218.

§ 520. ——Sufficiency of proof of execution.

When proof by attesting witnesses is required, see ante § 519.

¶ 2668. The testimony of a subscribing witness that he did not see the instrument executed, but signed as such witness because he knew the handwriting of the party executing it, destroys his character as such witness.—Cooper v. Smith, 75 Mich. 247.

¶ 2669. Proof by a witness of the execution and seal on a bill of sale by an association suffices to make it admissible.—Lingle v. Dalzell, 141 Mich. 399.

§ 521. ——Right to inspect and cross-examine.

Practice on offer of instrument in general, see Trial, V.

¶ 2670. Documents cannot be treated as proved by the testimony of a witness to their identity unless the adverse party has had an opportunity to inspect them and cross-examine the witness.—De Witt v. Prescott, 51 Mich. 298.

B. BOOKS OF ACCOUNT.

§ 522. In general; admissibility.

Firm and individual books, see post § 523.
Corporate books, see post § 524.
What are books of original entry, see post § 525.
Foundation proof for books, see post §§ 526, 527.
Carefulness and accuracy in keeping, and method of keeping as foundation for admission, see post § 526.
Memoranda made from books and used as basis of dealings, see ante ¶ 2603.
Presumable knowledge of contents of one's own books, see ante § 46.
Presumption against party suppressing or against despoliator of books, see ante §§ 63-65.
Books themselves as best evidence as to person charged therein, see ante § 120, ¶ 607.
Oral evidence of amount due on mortgage, objection as secondary, see ante ¶ 583.
Oral testimony without production as to whether books contain given entry, see ante ¶ 594.

Bill made up from original entries by witness since deceased as competent secondary proof of contents of lost book of originals, see ante § 152.
Private books and entries as hearsay, see ante § 315.
Book entries as admissions, see ante § 378.
Entries in decedent's books as admissions to bind his estate, see ante § 411.
Self-serving entries, see also ante § 487.
Conclusiveness and unimpeachability of one's own books, see post § 601.
Instructions as to use and weight in evidence, see Instructions, V, VI.
Statutory requisites of admissibility of books of account, see Jud. Act, chap. XVII, § 53; Comp L. 1915, § 12541.

¶ 2671. Where account books are received in evidence it is only where the entries are apparently made of items as they arise, and as contemporaneous res gestæ.—McClintock's Appeal, 58 Mich. 152.

¶ 2672. How. St., § 7526, as amended by Laws 1885, Act No. 105, defining for what purpose the books of a commission merchant may be used as evidence, does not allow the defendant, in an action for the price of goods, to introduce his books of account to show by the heading of his account that he only held the goods to sell on commission.—Richards v. Burroughs, 62 Mich. 117.

¶ 2673. Books of account containing charges for money paid, laid out, furnished or lent are admissible under How. St., § 7526, and the rights of the opposite party are properly guarded by instructing the jury that they are memoranda from which the party offering them may refresh his recollection, and testify in regard to the transactions themselves.—Lester v. Thompson, 91 Mich. 245.

¶ 2674. Whether books carelessly kept by assistants who are not agents are admissible in evidence upon a bill for an accounting against their superior, quære.—University of Michigan v. Rose, 45 Mich. 284.

¶ 2675. Where payments alleged to have been made by a deceased mortgage debtor are denied by the creditor they are not sufficiently proved by entries in the debtor's handwriting in an unusual place in his day-book from which the immediately preceding leaves have been torn, while the regular entries are followed by a number of blank pages.—Robinson v. Hout, 39 Mich. 405.

¶ 2676. In an action to recover the price of goods sold, plaintiff's books, testimony having been given as to their correctness, were properly admitted to show to whom goods were charged and to whom credit is given.—Montague v. Dougan, 68 Mich. 98.

¶ 2677. In an action for materials and labor, an account book kept by the plaintiff and by him shown to contain a correct statement of the transactions in dispute is properly admissible in evidence.—Smaltz v. Newhof, 178 Mich. 500.

¶ 2678. In an action by a materialman against a contractor and surety on a bond, held that books of accounts were admissible to prove the receipt by the contractor of the material for the price of which the suit was brought.—People v. Traves, 188 Mich. 345.

¶ 2679. Books of account regularly kept by a party in which entries are promptly made after each transaction, and which contain the only record thereof, are admissible in his favor.—Mally v. Excelsior Wrapper Co., 181 Mich. 568.

¶ 2680. Book entries, when receivable, are not allowed beyond the purpose for which the exception in their favor is allowed in the usual course of business.—In re Ward's Estate, 73 Mich. 220.

¶ 2681. A recital in a decedent's books of account that certain stock was turned over to a named person in full of her share in a certain estate does not prove anything more than a charge of the amount, and has no weight in establishing a settlement.—In re Ward's Estate, 73 Mich. 220.

¶ 2682. Book entries by a guardian's clerks are not admissible to prove a settlement in favor of the guardian making them.—In re Ward's Estate, 73 Mich. 220.

¶ 2683. An entry in the handwriting of a deceased payee of a note, made in his day-book in his lifetime, is competent evidence to show the transfer of the note to plaintiff's testator.—Macomb v. Wilkinson, 83 Mich. 486.

¶ 2684. In an action on a claim against an estate on a promissory note, the books of account of the claimant are admissible to show that the note was for the same amount as the books showed to be due, if limited to that purpose.—Baker v. Halleck's Estate, 128 Mich. 180.

¶ 2685. In an action against a married woman to recover for work and labor, plaintiff may show that he made the original charge upon his books against defendant rather than her husband as she claimed.—Lempke v. Felcher, 115 Mich. 37.

§ 523. Firm and individual books.

Books of partnership associations, see post § 524.

¶ 2686. Where an administrator of one estate brought a claim against another estate, and the defense gave evidence tending to show that the decedents were in partnership, and that defendant's intestate kept the accounts, a book of accounts in the latter's

handwriting, and containing entries purporting to have been made in the presence of the other partner, was held admissible for defendant as tending to prove the copartnership and the condition of the accounts.—Howard v. Patrick, 38 Mich. 795.

¶ 2687. A partner's private books are not evidence against other partners as to partnership matters.—Kinney v. Robinson, 66 Mich. 113.

¶ 2688. A man sued a firm for the price of some produce he had furnished, and the firm defended on the ground that it had only been left for sale with an individual partner as a personal transaction, and that the partner had afterwards sold out his interest and this transaction had not entered into the account. Held, that defendant could be asked whether plaintiff's account on the firm books showed a credit to him of the amount claimed; and the plaintiff was also entitled to call for the partnership books for evidence as to the account.—Grant v. Masterton, 55 Mich. 161.

§ 524. Corporate books.

Township or county treasurer's books, see also post ¶¶ 2727, 2728.

¶ 2689. The books of a corporation, when properly kept by its officers or agents, are competent testimony to prove the entries of payments entered therein as paid to an employee.—Ganther v. James Jenks & Co., 76 Mich. 510.

¶ 2690. The books of a limited partnership association are not admissible in evidence in an action by the receiver against the stockholder in trover to recover for the conversion of assets to show that defendant paid money on an alleged special obligation to take treasury stock at a fixed price, where the defendant denies the obligation, and it is not otherwise proved.—Jacobs v. Morgenthaler, 149 Mich. 1.

¶ 2691. In a suit on a promissory note signed by a corporation and indorsed personally by defendant secretary thereof, plaintiff was permitted to use a page of the ledger of said corporation to refresh defendant's recollection when examining him as a hostile witness, and said ledger after being identified by defendant, was introduced for the purpose of showing his knowledge of the financial condition of the company and the fact that defendant knew it had no money to meet said note when presented for payment. The purpose of said evidence was to show a waiver of protest by defendant. Held, the admission of said ledger was proper.—Gelder v. Welsh, 169 Mich. 490.

§ 525. Books of original entry.

¶ 2692. The servant of a man dealing in brick, who keeps a tally book or slate upon which he keeps memoranda of sales during the day, reporting them to his employer at night, who enters them upon his regular account books, is not a clerk within the meaning of the rule; and such regular account books are to be considered the books of original entries.—Jackson v. Evans, 8 Mich. 476.

¶ 2693. A bank depositor's pass book is as much a book of original entry as the deposit slip and the bank books.—Kux v. Central Michigan Sav. Bank, 93 Mich. 511.

§ 526. Foundation proofs.

Necessary and proper witnesses under statutes, see post § 527.

Proof of open account or account stated by affidavit to copy attached to declaration to recover amount due on such account, see Jud. Act, chap. XVII, § 52; Comp. L. 1915, § 12540.

¶ 2694. A party's own entries in his books of account cannot be admitted as evidence in his behalf unless a foundation be first laid by proving that he had no clerk; that some of the account books were those of the party containing original entries; and by further proof of those who have dealt and settled accounts with him, that he keeps fair and honest accounts.—Jackson v. Evans, 8 Mich. 476.

¶ 2695. In an action to recover the price of goods sold, plaintiff's books, testimony having been given as to their correctness, were properly admitted to show to whom goods were charged and to whom credit is given.—Montague v. Dougan, 68 Mich. 98.

¶ 2696. In an action on an implied assumpsit for services in breaking a rollway, the entries made in the plaintiff's time book by his foreman as to the number of days' work done are admissible in connection with the plaintiff's testimony that he knows the entries to be correct.—Peters v. Gallagher, 37 Mich. 407.

¶ 2697. Entries in the bill book of a bank are admissible to fix the original dates of an altered bill of exchange only in connection with testimony tending to show that they were accurately made from the original or from a correct memorandum of it.—Ortmann v. Merchants' Bank of Canada, 41 Mich. 482.

¶ 2698. In order to entitle books of account to be received as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and that they are designed at least to embrace all the items of the account which are proper subjects of entry.—Countryman v. Bunker, 101 Mich. 218.

¶ 2699. The testimony of a witness that he made entries in an account book as original entries taken from the job or order

book, and that he knew they were correct, is sufficient foundation to admit the book.—Baxter v. Reynolds, 112 Mich. 471.

¶ 2700. A merchant's books of account are inadmissible in an action for goods sold and delivered, where the only testimony to support them is that of the bookkeeper, who merely transcribed the entries from slips handed him by salesmen, and who had no personal knowledge of the sale and delivery of the articles charged.—Swan v. Thurman, 112 Mich. 416.

¶ 2701. Original books of entry are admissible in an action for goods sold and delivered where shown to have been properly kept and that settlements had been made on these books, that several clerks who made sales were called, the entries of others were proven to be in the handwriting of clerks who were then without the jurisdiction, and the defendant testified to no objection against the items allowed in the verdict.—Cameron Lumber Co. v. Somerville, 129 Mich. 552.

¶ 2702. In an action for the price of goods sold on credit the introduction of the ledger account with the explanation that the items were copied from slips sent to the bookkeeper by clerks and the original slips destroyed, renders it necessary to show that no entries were made except from slips, that no slips were sent to the bookkeeper except when goods were sent to the bundle counter, and that all goods sent to the bundle counter were delivered to the customer.—Taylor-Woolfenden Co. v. Atkinson, 127 Mich. 633.

¶ 2703. In an action by an insurance company on an agent's bond the books of the company were competent under How. St., § 7526, to show the balance claimed to be due, where the state agent testified to their correctness and that the entries were made at his dictation.—Union Cent. Life Ins. Co. v. Smith, 119 Mich. 171.

¶ 2704. A testator bequeathed to his daughter a certain sum of money, "of which sum shall be deducted the amount she may be owing on my books." Testator's books of account containing entries both on the debit and credit sides of the daughter's account, were admitted in a suit by the daughter to obtain an order of distribution. The books were in testator's handwriting, were books of original entry, and most of the entries were corroborated by producing checks corresponding to them. Petitioner was competent to testify, and she alone knew whether the account was accurate, but she kept silent. Held, that the books were properly admitted as being books kept in the ordinary course of business, and as being the books referred to in the will.—In re Bresler's Estate (Appeal of Faeder), 155 Mich. 567.

§ 527. ——Necessary or proper witnesses to prove books.

¶ 2705. Since the statute allows parties to testify generally, it is no longer necessary, before putting plaintiff's account books in evidence, to require proof by third persons that they had settled accounts with plaintiff upon his books, and that he kept correct books. Parties can testify to the keeping of their accounts, and the correctness of their books.—Montague v. Dougan, 68 Mich. 98.

¶ 2706. Books of account, testified to by those who have kept them as "correctly and accurately kept," are admissible in evidence without calling as witnesses persons who have settled accounts by them.—Montague v. Dougan, 68 Mich. 98; Seventh Day Adventist Pub. Ass'n v. Fisher, 95 Mich. 274.

¶ 2707. Where in charging brick sold there was entered opposite each charge of a load on a tally book or slate the name of the teamster who hauled it, these teamsters should be called to verify the charges, or their absence accounted for, before the books posted from such tallies are received in evidence.—Jackson v. Evans, 8 Mich. 476.

¶ 2708. The witnesses to prove that the party keeps honest books should be able to identify the books, and to testify to settlements made from the entries on such books. It is not sufficient that they testify to having made settlements from bills presented, which they found honest, without being able to testify whether such bills were from the account books or not.—Jackson v. Evans, 8 Mich. 476.

¶ 2709. It is not competent, in order to dispense with the necessity of calling the teamsters, to prove by others that if called it would not be possible for them to testify from recollection to the quantity hauled. The main fact to be established is that the articles have been delivered; and it is only on failure to prove the delivery, or the quantity, by the teamsters when called, that the books are received as the next best evidence. The books are receivable on the presumption that no other proof exists which has not been adduced.—Jackson v. Evans, 8 Mich. 476.

C. OFFICIAL AND PUBLIC RECORDS AND DOCUMENTS.

1. Admissibility in general.

See note at head of this division (VIII).

§ 528. In general.

Improper and irregular records and recorded instruments, see post §§ 529, 530.

Mode of proving absence of matters from records, see post § 531.

Particular records and documents, see post §§ 532-548.

Judgments and judicial records, see post § 543 et seq.

Official subscription books for corporations, see ante ¶ 2607.
Certified copies and transcripts, see post, VIII, C, 2.
Purposes for which transcripts are relevant under statute, see post ¶ 2790.
When writings deemed best evidence, see ante, IV, A.
Secondary proof of public records not producible in court, see ante § 142.
Copies in official files as superior secondary evidence of original, see ante § 154.
Public writings and reports as hearsay of facts stated, see ante § 320.
Official writings and entries as admissions against interest of maker, see ante § 374.
Weight and effect of record and documentary evidence, see post §§ 580, 594, 607.
Conclusiveness or unimpeachability of record evidence, see post § 601.
Admissibility of tax rolls to prove taxes an incumbrance, see Covenants for Title ¶ 72.
Depositions as evidence, see Depositions.
Proper offer, whole record or relevant portions, see Trial, V, A.
Right of adversary to read complementary portions of admitted document, see Trial, V, A.
Restrictions in admitting document as to use or purpose of proof, see Trial, V, C.
Admissibility of public records and writings in trials for crime, see Indictment, VIII, B.

¶ 2710. Record entries in the office of a register of deeds, whether in his own handwriting or not, are competent evidence in an action against him for negligence in failing to give information of the matters of record.—Smith v. Holmes, 54 Mich. 104.

§ 529. Improper and unnecessary recitals and records.

Improper notation in tax record, see also post ¶ 2739.
Unauthorized record of plat as evidence of dedication, see Dedication § 24.

¶ 2711. Where, after default in an action for the price of goods sold, there had been an assessment of damages, which was afterwards set aside to permit the defendant to plead, a memorandum made by the clerk of the court at the time of the assessment was inadmissible to show that the plaintiff had treated as his own a certain order by which the defendant now claims to have paid for the goods. Such a memorandum is not an official document, nor any part of the record, and does not bind the plaintiff.—Danielson v. Dyckman, 26 Mich. 169.

¶ 2712. A recital in a justice's docket on discontinuing an action that the matters in dispute have been settled is not evidence of such settlement, the entry being one not required by statute.—Shank v. Woodworth, 111 Mich. 642.

¶ 2713. In an action for malicious prosecution in causing plaintiff's arrest for knowingly receiving stolen property, the entries in the docket of the justice before whom plaintiff was examined after his arrest are admissible, in so far as they state those things which the law requires to be entered there; but a statement therein that the case was discontinued by complainant, "representing" defendant in the civil suit, a corporation, is inadmissible.—Fletcher v. Chicago & N. W. R. Co., 109 Mich. 363.

§ 530. ——Deeds and plats improperly recorded.

Competency of the deed notwithstanding improper record, see ante § 496.
Proper deed recorded as evidence, see post § 542.

¶ 2714. The record of a deed, void for defective execution, is inadmissible in evidence.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 2715. A book of township plats found in the office of the register of deeds is not evidence where there is no law requiring it to be kept or declaring it to be evidence.—Smith v. Lawrence, 12 Mich. 431.

¶ 2716. An unauthorized record of a plat is not evidence of the plat's validity and execution.—City of Grand Rapids v. Hastings, 36 Mich. 122.

¶ 2717. An unofficial book of entries kept in the office of a register of deeds and purporting to give descriptions of property, with the names of purchasers, date of sales and manner of payment, is not, of itself, or under any statute, evidence of land title from the United States government.—Newell v. McLarney, 49 Mich. 232.

¶ 2718. The record in one county of a certified copy of a record in another county from the register of deeds of that other county is not admissible in evidence.—Shotwell v. Harrison, 22 Mich. 410.

§ 531. Proof of absence of matters from records or documents.

See also ante ¶ 594.
Presumption of nonexistence of record not found in place, see ante § 58.
Opinion evidence as to what records show, see ante § 218.
Oral testimony as to lack of signatures to original record and that a transcript omits nothing relevant or material, see ante ¶ 612.
Testimony as to absence of record opposed to certificate of such record, see post ¶ 2977.
Effect of certificate that no report has been filed as required, see also Corporations ¶ 668.

Certificate of official search and of absence of matter from records and files as evidence of nonexistence of record, see Jud. Act, chap. XVII, § 22; Comp. L. 1915, § 12510.

¶ 2719. The record of the official proceedings of a common council need not be produced in court to show that the council has taken no action with reference to posting notices of the meeting of a board of review; it is enough to prove the official character of the record and to show, by a competent person, that he has examined it and that it shows no action.—Maxwell v. Paine, 53 Mich. 30.

§ 532. Published books of laws and ordinances.

Proof of ordinances by record book of councils, see post § 534.

Necessity of proving foreign laws by copy, see post § 555.

Foundation proofs for oral evidence as to foreign laws, see ante § 149.

Foundation proof of published book of foreign laws, see post § 550.

Statute authorizing reception in evidence, see Jud. Act, chap. XVII, §§ 24-26; Comp. L. 1915, §§ 12512-12514.

¶ 2720. Comp. L. 1871, § 5935, How. St., § 7508, requires that a volume of laws of another state must have been published by the authority of the state government to make it admissible as evidence of the laws it contains. Held, that a volume purporting on the title page to have been "printed by order of the governor" was admissible under the statute, the purpose of which was merely to exclude unauthorized publications.—Wilt v. Cutler, 38 Mich. 189.

¶ 2721. The charter of Detroit having provided that the printed volume of the city ordinances shall be evidence in all courts, they are placed on the same footing, as regards proof, as the statutes.—Napman v. People, 19 Mich. 352.

¶ 2722. The marriage laws of Pennsylvania may be proved by the introduction of Brightly's Purdon's Digest, a nonofficial compilation of the statutes of that state of twenty-five years' standing, and which is admitted in the courts of Pennsylvania as prima facie evidence thereof.—People v. McQuaid, 85 Mich. 123.

¶ 2723. The statutes of another state and the reports of its courts are admissible under How. St., §§ 7508, 7509 (Comp. L. 1871, §§ 10173, 10174), to prove the negotiability of notes executed in such state.—Rice v. Rankans, 101 Mich. 378.

¶ 2724. A decision of the supreme court of another state is proper evidence to prove the law of that state.—Barger v. Farnham, 130 Mich. 487.

§ 533. Public reports and documents.

Admissibility of interstate commerce reports in other cases as evidence in overcharge suit, see ante ¶ 527.

¶ 2725. Under Interstate Commerce Act § 14, as amended March 2, 1889 (25 Stat. 859), providing for the admission of reports and decisions of the Interstate Commerce Commission in evidence, a pamphlet purporting to be a decision of the commission made December 23, 1897, and their report and order signed "By the commission, Edw. A. Moseley, Sec'y" is admissible.—Nichols v. Chicago & W. M. Ry. Co., 125 Mich. 394.

§ 534. Municipal records and books or minutes.

Printed book of ordinances as evidence, see ante § 532.

¶ 2726. The official record of the proceedings of a municipal council, including the ordinances passed by that body, and showing that they were adopted and properly published, is admissible in evidence of an ordinance.—People v. Murray, 57 Mich. 396.

¶ 2727. The books of a township treasurer are competent evidence of his indebtedness to the township in an action on his bond.—Township of Otsego Lake v. Kirsten, 72 Mich. 1.

¶ 2728. A county treasurer's books are admissible in evidence in an action involving the amount turned over to his successor, and alterations in the entries cannot be presumed unless they are manifest, nor presumed to be wrongful.—Van Ness v. Hadsell, 54 Mich. 560.

¶ 2728a. Where plaintiff was injured as a result of the fact that the city light at the place of the accident was not lighted, a record kept by the police department as to lights not burning, is not admissible to show that this light was not reported, where it appears that the record was made up from reports of both citizens and police officers made by telephone and then noted in the book and was in no sense an official report.—Taylor v. City of Jackson, 151 Mich. 639.

§ 535. Official indorsements and file marks.

Private indorsements, see ante § 502.

Memoranda by clerk on filings unnecessary thereto, see ante ¶ 2711.

¶ 2729. The certificate of the registry of a mortgage, required by Comp. L. 1871, § 4229, How. St., § 5681, to be indorsed thereon, is evidence of its record.—Jakway v. Jenison, 46 Mich. 521.

§ 536. Certificates of death or birth or marriage.

Parish registers and baptismal records, see ante § 509.

Verdict of coroner's inquest as document, see post § 537.

Copies and transcripts of filed certificates, see post § 553.
Admissibility by statute of marriage certificates and records or copies of records, see Jud. Act, chap. XVII, § 42; Comp. L. 1915, § 12530.
Proof of marriage license by record or copy of record thereof, see Jud. Act, chap. XVII, § 43; Comp. L. 1915, § 12531.

¶ 2730. In an action on an insurance policy a certificate of death by a physician is admissible in evidence under provisions of Comp. L. 1897, § 4617.—Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369.

¶ 2731. That part of the death certificate of a woman containing the words "contributory abortion," being a proper part of the certificate required under Comp. Laws 1897, § 4616, How. St., 2nd Ed., § 1579, is not objectionable as hearsay.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

¶ 2732. The words "said by deceased to have been performed by Dr. ———," relating to an abortion performed by him, not being a proper part of the certificate of death required under Comp. Laws 1897, § 4616, How. St., 2nd Ed., § 1579, are objectionable as hearsay.—Gilchrist v. Mystic Workers of the World, 188 Mich. 466.

§ 537. Inquest of death and verdict.

¶ 2733. A coroner's verdict that a person came to death by suicide is not admissible to prove the cause of death.—Wasey v. Travelers' Ins. Co., 126 Mich. 119.

§ 538. Weather records.

Admissibility of weather records by reason of other testimony, see ante ¶ 466.
Weather reports of conditions at place remote from one in question, see ante ¶ 523.
Proof by certified copy or certificate, see post § 551.

¶ 2734. The weather record, kept for a number of years at the state insane asylum at Kalamazoo, held competent to prove the temperature in the vicinity on a particular day.—De Armond v. Neasmith, 32 Mich. 231.

§ 539. Official grants, deeds and transfers.

Certified copies of land office records, see post § 552.
Tax deeds and certificates, see post § 540.
Best and secondary evidence, see ante §§ 112, 131.

¶ 2735. A defendant railway in a suit to eject it from occupying certain streets may introduce in evidence the original franchise given by a township, granting it a right of way in such streets, upon parol proof that the paper is genuine and was regularly granted, and this evidence is admissible despite the fact that the record book of the township board does not show the granting of such franchise.—Chase v. Michigan United Rys. Co., 165 Mich. 493.

¶ 2736. Where a deed, dated 1817, purported to be a deed of partition and to have been made in part execution of an order by the register of probate that an administrator make conveyances in partition of an estate, the deed being in the handwriting of the register, subscribed by him as a witness, and acknowledged before him, the recital of this order in the deed was held to be evidence of the granting of the order, the record of the proceedings in partition being defective and part of it lost.—Willetts v. Mandlebaum, 28 Mich. 521.

§ 540. Tax receipts, certificates and deeds.

General requisites of taxation and tax sale proceedings to sustain sale and make deed admissible, see Taxes.

¶ 2737. A collector's receipt for taxes is an official paper which the law requires him to give, and it is therefore evidence of the payment of the taxes in suits between third persons.—Johnstone v. Scott, 11 Mich. 232.

¶ 2738. A book kept by a county treasurer, containing his entries of tax sales, though not distinctly required by any statute to be kept, yet being necessary to the adequate discharge of his duties, is an official book, and admissible in evidence to prove the facts therein stated.—Groesbeck v. Seeley, 13 Mich. 329.

¶ 2739. A certificate of the register of deeds that, in reference to a deed recorded in his office, the words "not sealed" were entered in the record opposite the names of the signers to the deed, is not evidence, as the register has no authority for entering statements of fact not in the original.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 2740. The provisions of the tax laws of 1889 and 1893 providing that tax deeds shall convey absolute title to the land sold, and be conclusive evidence of title in fee, having been declared unconstitutional, the plaintiff in ejectment claiming title under a deed issued under such provisions, was bound to follow the common-law rule and show the proceedings leading up to the giving of the deeds, before he could put them in evidence.—Dawson v. Peter, 119 Mich. 274.

§ 541. Official surveys and certificates.

Certified copies from land office, see post § 552.

¶ 2741. County surveyors' certificates are not admissible in evidence of the facts they contain unless they contain the particulars which the statute (Comp. L. 1871, §§ 587-590, How. St., §§ 616-619) requires to be entered in the surveyor's record.—Smith v. Rich, 37 Mich. 549.

¶ 2742. To constitute the action of a county surveyor evidence, the requirements of Comp. L. 1871, §§ 587-590, How. St., §§ 616-619 must be complied with.—Beeman v. Black, 49 Mich. 598.

¶ 2743. Surveyor's records defective within Comp. L. 1897, § 2622, are not made admissible in evidence by section 2619.—Pugh v. Schindler, 127 Mich. 191.

¶ 2744. Admissibility of record of survey of state road where boundary described in deed as being such road is in dispute.—Atwood v. Canrike, 86 Mich. 99.

¶ 2745. Under Pub. Acts 1915, No. 196, § 102, providing that "records of surveys, field notes, and calculations made by any former county surveyor which have been, or shall be, on file in the office of the county surveyor, register of deeds or county clerk for a period of fifteen years or upward * * * shall be admissible in evidence of the facts they contain in any court of record," surveys of state, and not territorial, surveyors, are admissible.—Wilcox v. Jenison, 198 Mich. 182.

¶ 2746. Under Rev. Stats. 1846, chap. XIV, §§ 96, 97, 102, providing that certain records of surveys made by the county surveyors since the organization of the state government may be received in evidence, records of surveys are not competent evidence unless made by county surveyors.—Wilcox v. Jenison, 198 Mich. 182.

§ 542. Records of deeds, mortgages, etc.

Record as original or secondary evidence, see also ante § 112.
Secondary evidence of invalidly recorded instrument, see ante § 140.
Parol evidence to show that title had not passed at time appearing from deed record, see ante ¶ 1183.
Admissibility of improper record or of record of instrument ineligible to record, see ante § 530.
Admissibility of sworn and compared copies, see post § 565.
Admissibility of recorded deed without further foundation, see ante § 513.
Admissibility of record without foundation, see post § 549.
Mode of certifying transcript of record, see post § 557.

¶ 2747. It is no objection to the admission of a deed record in evidence in ejectment that it was not recorded until after the commencement of the suit.—Russell v. Sweezey, 22 Mich. 235; Eames v. McGregor, 43 Mich. 313.

¶ 2748. Where a deed from several grantors is put upon record, as to only a part of whom it is properly executed and witnessed, the record is evidence of a deed as to those parties only by whom it has been properly executed, and whose execution of it has been duly witnessed so as to entitle it to record had they been the only grantors named.—Hall v. Redson, 10 Mich. 21; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361; Rayner v. Lee, 20 Mich. 384.

§ 543. Record of will or probate.

See also post ¶ 2750.
Certification of foreign probate record, see post §§ 560, 561.

¶ 2749. A record from the registry of deeds of a county in this state containing a certified copy of a will executed and probated in another state is admissible in evidence where it recites that a copy of the will and of the probate thereof duly authenticated was presented to the probate court here: that due notice of hearing was given by publication, and that said copy was duly admitted to record upon full proof.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

§ 544. Judgment and judicial records.

Unnecessary entries and records, see also ante § 529.
Record of probate of will, see ante § 543.
Decision of other state as evidence to prove its laws, see ante § 532.
Best and secondary evidence, see ante § 122.
Foundation proof for admission, see post § 549.
Effect of the judgment as adjudication or as evidence of facts decided, see Former Adjudication.
Condition, time and stage when judgment becomes an estoppel, see Former Adjudication, II.
Mode of proof of judgment on plea of estoppel by it, see also Former Adjudication, VII.
Appeal as suspending evidentiary force of decree, see Appeal ¶ 598.

¶ 2750. A record made in October, 1847, by a probate court, of a decree made by the same court in February, 1837, admitting a will to probate, was held good evidence of the probate of the will.—Ives v. Kimball, 1 Mich. 308.

¶ 2751. In an action of ejectment, although the pleadings are admissible to show bad faith, the plaintiff may not introduce in evidence the record of a judgment in a former ejectment action between the parties to show the bad faith of the defendant in claiming that her grantor had title by adverse possession because such claim was not made on the former trial, especially where no good reason exists why the jury should know the outcome of the former trial.—Tyler v. Wright, 188 Mich. 561.

§ 545. Mode and means of proving judgments.

Certification of transcripts, see post §§ 558-561.
Mode of proving judgments when urged as estoppels, see Former Adjudication, VII.

Admissibility of record of certified copy of judgment or decree rendered elsewhere than in place of record, see Jud. Act, chap. XVII, § 29; Comp. L. 1915, § 12517.

¶ 2752. A judgment of the circuit court is to be proved by the files and journal entries, which, under our practice, are a substitute for a judgment record.—Norvell v. McHenry, 1 Mich. 227; Crane v. Hardy, 1 Mich. 56; Prentiss v. Holbrook, 2 Mich. 372; Whitwell v. Emory, 3 Mich. 84; Emery v. Whitwell, 6 Mich. 474; Kenyon v. Baker, 16 Mich. 373; Hovey v. Smith, 22 Mich. 170.

¶ 2753. The docket entry of a judgment, without proof of such files, entries and proceedings as could alone justify the court in awarding it, is no evidence whatever of a valid judgment.—Kenyon v. Baker, 16 Mich. 373.

¶ 2754. Where, in ejectment, the plaintiff, claiming the premises under execution sale, offered in evidence, to prove the judgment on which execution issued, the journal entry, the execution issued for the debt, with the indorsement thereon, and the files in the case, showing declaration, plea thereto, etc., the writ of error by the defendant in the same case and the return thereto, being a transcript of the judgment record and proceedings in the supreme court where judgment was affirmed, held, that such evidence was sufficient and admissible.—Emery v. Whitwell, 6 Mich. 474.

¶ 2755. In an auxiliary garnishee proceeding the judgment against the principal debtor may be shown by the judgment entry.—Strong v. Hollon, 39 Mich. 411.

¶ 2756. The record of attachment proceedings, upon which a defense in replevin is based, cannot be excluded on the objection that the attachment of logs will not justify the taking of lumber on the execution, there being no dispute that the lumber was made from the logs; and even if this were disputed, it would be the subject of extrinsic evidence, and would not appear on the face of the record, and would, therefore, be no ground for excluding the record.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 2757. A decree in chancery cannot be proved without the rest of the record.—Day v. De Jonge, 66 Mich. 550.

§ 546. ——Of inferior courts and justices.

Admissibility of justice's original entry or transcript to prove his judgment or writs or proceedings before him, see Jud. Act, chap. XVII, § 30; Comp. L. 1915, § 12518.

Proof of proceedings before justice by his oath or by minutes and proof of his handwriting if he be dead or absent, see Jud. Act, chap. XVII, § 31; Comp. L. 1915, § 12519.

¶ 2758. Where in an action for false imprisonment the petty nature of the charge in a justice's court becomes material, such nature may be proved by the docket entries.—Bates v. Kitchel, 166 Mich. 695.

¶ 2759. A justice's judgment may, under Comp. L. 1871, §§ 5488, 5490, be proved by his docket.—Schlatterer v. Nickodemus, 50 Mich. 315.

¶ 2760. A justice's judgment may be proved by showing jurisdiction of the defendant, a trial at the proper time, the rendition of the judgment and its amount.—Henry v. Gates, 118 Mich. 379.

¶ 2761. After judgment is pronounced by a justice of the peace, and before the proceedings are entered on his docket, it is competent to prove the judgment by the oath of the justice, who produces for that purpose his minutes of the trial, which are as full as the docket entries are required to be.—Hickey v. Hinsdale, 8 Mich. 267.

§ 547. Stenographers' notes or transcripts.

¶ 2762. A literal transcript of accurate stenographer's notes of testimony containing admissions may be introduced in proof of such admissions.—Potter's Appeal, 53 Mich. 106.

¶ 2763. The stenographer's transcript, if correct and accurate, may be received where a witness at a former trial has since absented himself from the state and cannot be reached by a subpoena.—Dunbar v. McGill, 69 Mich. 297.

¶ 2764. Laws of 1879, Act No. 8, How. St., § 7613, authorizing the minutes of the official stenographer to be used in settling a bill of exceptions, does not give them the character of depositions or of record evidence generally.—Edwards v. Heuer, 46 Mich. 95.

¶ 2765. A stenographer's minutes of testimony are not original evidence, being neither read over to nor signed by the witness, and have no greater efficacy than those taken by the judge or by any other person.—Johnson v. Johnson, 70 Mich. 65; Barker v. Hebbard, 81 Mich. 267.

¶ 2766. A stenographer's notes of testimony given on a former trial are not admissible in evidence if he has not testified to their accuracy or if they are not in some way authenticated.—Misner v. Darling, 44 Mich. 438.

¶ 2767. Where the supreme court reverses and grants a new trial, the stenographer's notes of testimony taken upon the former trial are not competent when not proven.—Opsomere v. Opsomere, 167 Mich. 636.

¶ 2768. In a suit for personal injuries sustained from being assaulted and forcibly

thrown from defendant railway's car, plaintiff, in order to prove defendant the owner of said car, introduced in evidence the stenographer's minutes of another suit, in which defendant was party defendant and plaintiff was not concerned. There was no proof that defendant's chief officers were at the time of the trial absent from the state. The minutes read related to a trial held some years before. There was no evidence to show that the conditions of ownership remained the same. The stenographer who took and read the testimony did not swear that it was a true and correct reproduction of the evidence given at the trial of the former case. Held, the admission of such evidence constituted reversible error.—Kaiser v. Detroit United Ry., 167 Mich. 288.

§ 548. Pleadings, files and affidavits.

Foundation proof for admission, see post § 549.

Admissibility of entire files, part having been admitted, see ante § 91.

Inadmissibility of judgment where pleadings only are relevant, see also ante ¶ 2751.

Pleadings and files in the cause making up judgment roll, see ante § 545.

Admissibility for impeachment or contradiction or corroboration, see Witnesses, VI, D.

Effect of affidavits, see generally Affidavits.

Pleadings as evidence of ratification by joining in suit on contract, see Agency ¶ 397.

Warrant of attorney from files as evidence of authority, see Appearance § 4, ¶ 10.

Files and records in prior suit as evidence of act done with knowledge, see also Carriers ¶ 400.

Pleadings and judgment as evidence in action on bail bond given in the action, see Civil Arrest § 63.

Bill in prior suit as evidence in divorce on issue of collusion, see Divorce ¶ 210.

Drain proceedings bill of costs as evidence in action by commissioner to recover costs, see Drains § 48, ¶ 149.

Effect of equity pleadings as evidence in the cause, see Equity § 164 et seq.

Affidavits of printer to prove publication of notices, see Jud. Act, chap. XVII, §§ 35-38; Comp. L. 1915, §§ 12523-12526.

¶ 2769. In an action for alienating the affections of plaintiff's wife it is competent for plaintiff to show that he has obtained a divorce from his wife, as this would negative a claim that there has been a reconciliation between the two, but the bill of complaint in the divorce suit, being an ex parte statement by plaintiff, himself not a competent witness, is inadmissible.—Mead v. Randall, 111 Mich. 268.

¶ 2770. In an action upon a bond given by one arrested as a fraudulent debtor, evidence of the proceedings is admissible to show that they were void and the bond lacking in consideration.—Butts v. Davis, 50 Mich. 310.

¶ 2771. Records and files of several attachment suits held admissible in trover against an officer by person claiming under chattel mortgage attacked as fraudulent, although goods had been sold under one of the judgments in such suits which they failed to satisfy; since the others tended to show existence of creditors when the mortgage was made.—Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 489.

¶ 2772. Where a vendor in a contract to sell land which was executed by his covendor without sufficient authority has joined with the latter in a suit against their vendee to recover the unpaid purchase-money, so much of the pleadings in such suit as are necessary to show the joinder are admissible to prove a ratification of the covendor's doings on the contract, and as tending to establish a joint liability.—Wright v. Dickinson, 67 Mich. 590.

¶ 2773. Where an injunction's issue and service are material in a subsequent action at law between the same parties, there is no error in admitting in such action the files of the injunction suit where there is nothing in the other portions of such files harmful to the objecting party.—Wright v. Dickinson, 67 Mich. 590.

¶ 2774. In an action against a bank for neglecting to present a draft promptly to a debtor who was the drawee, it is error to exclude files and records in attachment cases offered by defendant to show that after plaintiffs had brought suit other creditors sued out attachments against the drawee, and that in several cases bonds were given to release the attached property; since giving the bonds had some weight to show that collection was possible by pressing the drawee.—Finch v. Karste, 97 Mich. 20.

¶ 2775. The purchaser of a stock of goods mortgaged the goods, after which they were attached by creditors of his vendor, and he replevied them from the creditors. The mortgagee induced another party to become cosurety with himself in the replevin bond by promising to indemnify him from loss in doing so. Judgment passed for the defendants in the replevin suit, and also in their favor in a suit brought upon the replevin bond. In a suit brought against the mortgagee by his cosurety to recover the money by him paid on the latter judgment, the court admitted in evidence in plaintiff's favor the files and records in the attachment suit as bearing on the question whether the indemnity promise was an original promise or one within the statute. Held, that it was a case in which the broadest latitude of investigation was permissible under plaintiff's claim that the replevin suit was in fact for the benefit of defendant, and that the court did not err in receiving said evidence.—Boyer v. Soules, 105 Mich. 31.

¶ 2776. The files in an attachment suit are admissible in evidence in trover against the attaching officer, although no affidavit is attached to the original writ, where such affidavit is shown to have been attached at the time of the levy.—Jansen v. McQueen, 112 Mich. 254.

¶ 2777. An owner of mortgaged land agreed to accept for a railroad right of way such sum as arbitrators should award. The mortgage having been foreclosed meantime, one M. redeemed under an alleged agreement with the owner, taking title for security which excluded the sum awarded for the right of way. The railroad company filed a bill to restrain M. from prosecuting an ejectment suit and prevailed over his defense that the owner had passed no right to the railroad company. The amount of the award had been paid into court and was taken by M., who afterwards died and the original owner then presented a claim against M.'s estate for that amount. Held that the chancery records in the suit against M. were admissible on the claim to show the origin of the fund which came to him.—Rapley v. McKinney's Estate, 143 Mich. 508.

¶ 2778. A bill of particulars cannot be rendered competent evidence by the introduction of private account books to sustain its charges.—Tioga Mfg. Co. v. Stimson, 48 Mich. 213.

¶ 2779. The affidavit in attachment does not establish the fact of indebtedness as against third parties.—Cook v. Hopper, 23 Mich. 511; Manning v. Bresnahan, 63 Mich. 584.

¶ 2780. In trover for horses taken under a void attachment the attachment proceedings are admissible to show that the taking was in good faith and under belief of right, and as part of the res gestæ; and plaintiff cannot be injured by such admission if the jury is instructed that the attachment, being void, did not justify the taking or holding.—Mears v. Cornwall, 73 Mich. 78.

Admissibility in evidence in personal injury or death action of pleading in another suit, see note 14 N. C. C. A. 499-511.

§ 549. Foundation proof.

For tax deed in absence of constitutional statute prescribing less than common-law foundation, see ante ¶ 2740.

Judicial notice of public records and documents, see ante § 18 et seq.

Certification of foreign affidavit to show authority of notary taking it, see Affidavits ¶ 19.

Mode of authentication of affidavits taken in other state or country to make them admissible in cases where by law receivable, see Jud. Act, chap. XVII, § 14; Comp. L. 1915, § 12502.

Seal of supreme court as conclusive evidence of authenticity of process issued by it, see Jud. Act, chap. I, § 15; Comp. L. 1915, § 12020.

¶ 2781. An alleged copy not attested by any public officer of a certiorari issued to review proceedings resulting in the dissolution of an attachment, is not of itself competent proof of the reinstatement of the attachment lien by the removal of the dissolution proceedings to the supreme court.—Jaycox v. Balch, 98 Mich. 160.

¶ 2782. In a suit by a township to recover personal taxes, the testimony of the supervisor that he made the tax roll, delivered it to the township treasurer, and obtained it from the county treasurer's office for use upon the trial, sufficiently identifies the roll to justify its introduction in evidence.—Township of Deerfield v. Harper, 115 Mich. 678.

¶ 2783. In an action for malicious prosecution, the files in the criminal case may be identified by the testimony of a lawyer that he obtained them from the county clerk, whose signature they bear, as the criminal files of that case.—McLeod v. Crosby, 128 Mich. 641.

¶ 2784. The record of a deed, properly executed and acknowledged, may be read in evidence without further proof of delivery under Comp. Laws 1897, § 8990, How. 2nd Ed., § 10852, and it is immaterial whether the deed was recorded before or after the grantor's death.—Barras v. Barras, 192 Mich. 584.

§ 550. ——Of authenticity of foreign book of statutes or reports.

¶ 2785. A sufficient foundation for the introduction of a volume in proof of the laws of a foreign country is laid by the testimony of a barrister and solicitor of such country that it is a volume of the statutes commonly admitted and used as evidence in the courts of his country.—Dawson v. Peterson, 110 Mich. 431.

2. Transcripts and copies.

§ 551. Certified or authenticated copies of records.

Of land office records and maps, see post § 552.

Of filed certificates of birth, death or marriage, see post § 553.

Of parish registers, see post § 554.

Requisites of the transcript and mode of authenticating it, see post §§ 556-563.

Sworn copies, see post § 565.

Probative force and effect of copies, see post § 566.

Certificate of record indorsed on deed, see ante § 535.

Sworn copies and compared copies, see post § 565.

General rule as to secondary proof by copies, see ante, IV.
Served copy of pleading rather than filed original as original for some purposes, see ante § 111, ¶ 573.
Statutory provision for reception of certified copies of official files and records, see Jud. Act, chap. XVII, § 19; Comp. L. 1915, § 12507.
Proof of Weather Bureau records, by certified copies, see Jud. Act, chap. XVII, § 34; Comp. L. 1915, § 12522.

¶ 2786. Regarding matters which an officer is not bound to record, his certificate, being extra-official, is merely the statement of a private person.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 2787. An indorsement by a city physician upon a ticket of admission to the poorhouse that the bearer has been ill with arsenical poisoning is inadmissible as evidence of such illness in an action for damages from the poisoning, such indorsement not being required by statute.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 2788. The certificate of the secretary of state to a legal conclusion is of no validity as evidence. His duty in certifying to copies of instruments on file in his office is purely ministerial, and he must certify to a copy of the entire document. A mere certificate that a paper required to be acknowledged is accompanied by an acknowledgment in the usual form is of no effect.—Doyle v. Mizner, 42 Mich. 332.

¶ 2789. The certificate of the government inspector is not evidence upon the question whether a steamboat engine is properly constructed in accordance with the terms of the manufacturer's contract.—Clark v. Detroit Locomotive Works, 32 Mich. 348.

¶ 2790. How. St., § 7504, providing that certified transcripts of filed or recorded papers shall be evidence "in like manner as the original would be if produced," makes such transcripts evidence only of what the original would be evidence; and therefore does not make proof of an instrument which is itself not self-proving.—Shelden v. Merrill, 69 Mich. 156.

¶ 2791. In a suit on notes, plaintiff put in evidence a certified statement of the appointment by the probate court of one Purdon as administrator of the estate of the payee, and the deposition of said Purdon taken in Vermont that he was such administrator, and as such indorsed and delivered the notes to plaintiff and that said notes belonged to plaintiff. Held, the proofs of appointment of administrator were insufficient, since the probate register did not set forth a copy of the order of the court certified by him, but certified to what the court did, "as appears by the records and files of said probate court."—General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium & Benevolent Ass'n, 106 Mich. 504.

§ 552. ——Of land office maps and records.

Sufficiency of certificate to copy, see also post §§ 557, 558.
Certified transcript of record of patent as secondary evidence, see ante ¶ 575.
Public abstract of records as statutory evidence, see also post § 580.
Proof of land office records, plats and maps by certified copies, see Jud. Act, chap. XVII, § 32; Comp. L. 1915, § 12520.
Proof of possession of land by land office certificates of purchase or entry, see Jud. Act, chap. XVII, § 44; Comp. L. 1915, § 12532.
Proof of records, plats and maps of St. Mary's Falls Ship Canal Board by certified copy, see Jud. Act, chap. XVII, § 33; Comp. L. 1915, § 12521.

¶ 2792. A patent of land from the United States being lost, a copy of the record thereof from the general land office, properly certified by the commissioner, is evidence.—Lacey v. Davis, 4 Mich. 140.

¶ 2793. A certified copy of a map from the general land office, on which a certain section was designated as the tract of one of the reservees, was held evidence of the due location of such section, according to the conditions of a treaty.—Dewey v. Campau, 4 Mich. 565.

¶ 2794. A surveyor's field notes on file in the United States land office may be proved by a certified copy from the commissioner.—Gilman v. Riopelle, 18 Mich. 145.

¶ 2795. The assignment of a land office certificate for the purchase of lands, when filed in the office of the commissioner of the general land office at Washington, becomes a part of the records, and may be proved by a copy certified by the commissioner. It is not necessary that the assignment should be acknowledged in order to pass the title of the assignor.—Clark v. Hall, 19 Mich. 356.

§ 553. ——Of filed certificates of birth, death and marriage.

¶ 2796. A certified copy of a publicly recorded certificate of death showing the date and cause thereof, is admissible in evidence in an action on a certificate of fraternal insurance, to show the falsity of the insured's statements and warranties in her application, as to her family history.—O'Brien v. Brotherhood of American Yeomen, 183 Mich. 86.

§ 554. ——Of parish registers.

See also ante ¶ 2632.
Sufficiency of sworn copy embodied in deposition, see post § 2831.

¶ 2797. Certificates based upon the parish registry of baptisms and marriages kept in a foreign country, which do not purport to be authenticated copies of such registry, but simply assert that certain facts are shown thereby, are not competent evidence of the facts so stated.—Tessman v. Supreme Commandery of United Friends, 103 Mich. 185.

§ 555. Copies and transcripts of foreign laws.

Manner of certification, see post ¶ 2818.

Sufficiency of evidence to establish foreign laws, see post § 587.

¶ 2798. The statute laws of other states and countries must be proved by copies authenticated in some mode recognized by law.—People v. Lambert, 5 Mich. 349; Kermott v. Ayer, 11 Mich. 181; Ellis v. Maxson, 19 Mich. 186.

§ 556. Requisites of copy or transcript, certification and authentication.

Of various kinds of records, see post §§ 557-561.

Certification of part only of record, see post § 564.

Preservation by statute of common-law modes of proving foreign records, see Jud. Act, chap. XVII, § 17; Comp. L. 1915, § 12505.

Certification of copies of filed affidavits which by law are admissible, see Jud. Act, chap. XVII, §§ 39, 40; Comp. L. 1915, §§ 12527, 12528.

¶ 2799. Under Comp. L. 1871, §§ 8058-9 (see How. St., § 9679), relating to meetings of the board of state prison inspectors, and the adoption by them of rules for the direction and government of the officers, the clerk being made a mere amanuensis whose attendance is not requisite to make the acts of the board valid, copies of the inspectors' rules, verified by the signatures of the inspectors, are held sufficiently signed without the clerk's signature to make them a record, and, as such, admissible in evidence. Printed copies pasted in the board's record book and signed by each member are sufficiently verified as to correctness.—Hulin v. People, 31 Mich. 323.

¶ 2800. A copy of articles of incorporation and of the affidavit of acknowledgment attached thereto are, under How. St., § 3600, presumptive evidence of incorporation, if properly certified by the secretary of state, and the mere fact that in the certification the affidavit is referred to as a "certificate" does not justify the rejection of the certified copies as evidence.—Canal St. Gravel Road Co. v. Paas, 95 Mich. 372.

¶ 2801. A county clerk's certificate that "the annexed and foregoing is a true copy of a statement of lien, and of the whole of said original record as compared by me," is sufficient under How. St., § 7504, to entitle the copy to be received in evidence.—Huntoon v. O'Brien, 79 Mich. 227.

¶ 2802. A certificate by the township clerk, that a copy of a chattel mortgage, to which it is attached, is a true and compared copy of the original on file in his office, and of the whole of such original, is sufficient to entitle the copy so certified to be received in evidence. The form of certificate indicated by Comp. L. 1871, § 5931, How. St., § 7504, viz., that the copy certified is a true transcript compared by the officer with the original in his office, is not designed to require one general form for all cases; the purpose was only to indicate a certificate that should be sufficient, without precluding others which, but for this statute, would have been good. Comp. L. 1871, § 4711, How. St., § 6198, seems to provide for this certification, under which the certificate in question would be sufficient.—Bills v. Keesler, 36 Mich. 69.

¶ 2803. A copy of parts of the record of the proceedings of a board of supervisors, purporting to show the action of the board with reference to the equalization and apportionment of taxes, and certified by the county clerk to be a correct copy, and to contain all entries appearing upon the record in relation to that subject, is admissible in evidence to show the invalidity of the tax levy over an objection that it appears to be a selection of portions of the record, and may be given the same force as a complete record, where no offer is made to supplement it.—Hoffman v. Pack, Woods & Co., 114 Mich. 1.

§ 557. ——Of deed or title record.

Admissibility of deed where transcript is admissible, see also ante § 513.

Record or transcript of it or copy of filed instrument as evidence, see Jud. Act, chap. XVII, § 20; Comp. L. 1915, § 12508.

¶ 2804. The record of a deed purporting to have been executed and acknowledged in another state, and to have had attached thereto the certificate of the clerk of the proper county, under his hand and the seal of said county, certifying to the official character of the acknowledging officer, the genuineness of his signature, and the execution and acknowledgment of the instrument according to the laws of said state, but which record fails to show that any seal was attached to said certificate, is inadmissible in evidence.—Hoban v. Cable, 102 Mich. 206.

¶ 2805. The record of a deed executed in another state and certified so as to entitle the deed to record under the law in force here at the time, is admissible in evidence although the certificate does not show another fact required by a later statute.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 2806. A certificate by the commissioner of the state land office that "the annexed is a true and correct copy of" a specified governmental subdivision "as shown on government plat on file in this office" is insufficient to authorize the admission in evidence of a map of the subdivision referred to (How. St., § 5243).—Wilson v. Hoffman, 54 Mich. 246.

§ 558. ——Of records of federal courts and government offices.

Admissibility of official bond without proof by witnesses, see ante ¶ 2664.

¶ 2807. The mode of authenticating the documents, records and proceedings of any of the departments or courts of the United States is governed by the laws of the United States, and by the practice of such departments and courts, and not by the statutes of the state.—Lacey v. Davis, 4 Mich. 140; Gilman v. Riopelle, 18 Mich. 145.

¶ 2808. A judgment rendered in a United States court, authenticated in the common-law mode and in the manner provided by the laws of Michigan, is admissible in evidence, notwithstanding that the form of authentication is not such as the acts of congress require to make it evidence in all places.—Dean v. Chapin, 22 Mich. 275.

¶ 2809. Papers from one of the departments of the federal government, if authenticated according to the practice of the department, are admissible as prima facie if not as conclusive evidence, even though not certified in accordance with our statutes; so held of an exemplification from the records of the federal land office of a list of lands selected by the state agent under a railroad grant, where, under the department's practice, only the lands involved in the case at issue were certified in such list.—Tillotson v. Webber, 96 Mich. 144.

¶ 2810. Exemplified copies of pension vouchers made pursuant to U. S. Rev. St., § 882, are admissible as self-proving documents.—Murphy v. Cady, 145 Mich. 33.

¶ 2811. An instrument purporting to be a copy of an assignment in bankruptcy from the register to the assignee, purporting to be certified by the register, but not certified by the clerk, and not otherwise identified by acknowledgment or record, is not evidence under the Bankrupt Law without further proof.—Wisner v. Wirth, 48 Mich. 291.

¶ 2812. The certificate of the commissioner of the general land office that a transcript of the record of a patent is "a true and literal exemplification from the record in this office" is sufficient, under U. S. Rev. Stat. §§ 891, 2469-2470, to entitle it to be admitted in evidence.—Boyce v. Stambaugh, 34 Mich. 348.

§ 559. ——Of judgments and judicial records.

See also ante ¶ 2781.

Of judgments and records from inferior courts and justices, see post § 562.

Of federal courts and offices of government, see ante § 558.

Foreign judgments and records, see post §§ 560, 561.

Statutory requisites of copy and authentication of records of courts of record within State of Michigan, see Jud. Act, chap. XVII, § 18; Comp. L. 1915, § 12506.

¶ 2813. A judgment is sufficiently proved by a properly certified copy, under the seal of the court, of the pleadings, which were special, and on personal appearance, and of the record of verdict and judgment.—People v. Mersereau, 74 Mich. 687.

¶ 2814. As a judgment cannot be attacked collaterally for mere irregularities, it is only on proceedings in error and not when offered in evidence by certified copy that all the continuances and other matters of practice need be mentioned in the transcript.—People v. Mersereau, 74 Mich. 687.

¶ 2815. Where the record of proceedings in one court (a federal court), has been put in evidence and made a part of proceedings in another court (a Wisconsin court), which is in evidence in the case at bar, whether the authentication of the record of the latter court, as including the transcript of the proceedings in the former, can so embody such introduced transcript upon the record now in evidence as to make it a component part thereof, quære. Held, safer to introduce authenticated copies of both original records.—Aldrich v. Chubb, 35 Mich. 350.

§ 560. ——Of foreign judgments and records under statute.

Of foreign justices' and inferior court judgments, see post § 563.

Statutory authentication of foreign records and judicial proceedings, see Jud. Act, chap. XVII, § 15; Comp. L. 1915, § 12503.

¶ 2816. The authentication of a judgment of a foreign court of common law, authenticated by the seal of the court and the signature of the clerk, is sufficient both by common law and by the statute.—Capling v. Herman, 17 Mich. 524.

¶ 2817. In a suit on a note, plaintiff put in evidence the deposition of one Ruiter of Canada, which set out the will of the payee of the note and stated that she being universal legatee thereunder was vested with administration; that the indorsement on the note was her own as administratrix; and that the estate was fully settled. Plaintiff further put in evidence a certified copy of probate of the proper court in Canada showing the will of the payee to have been duly proved. Held, that the proofs were sufficient to be admitted in evidence under section

10145, Comp. Laws 1897, as amended by Act 191, Pub. Acts 1909.—General Conference Ass'n of Seventh-Day Adventists v. Michigan Sanitarium and Benevolent Ass'n, 166 Mich. 504.

§ 561. ——Of foreign records and judgments under act of congress.

Mode of certifying federal court judgments, see ante § 558.

Sufficiency of common-law certification instead of certification according to act of congress, see ante § 560.

Federal statute regulating authentication of legislative acts, judicial proceedings, and other records of any state or territory for use in evidence in other states, see Comp. L. 1915, preliminary chap. V.

¶ 2818. A paper purporting to be a certificate of a marriage solemnized in another state, which paper is certified by the clerk of the county court to be a true and perfect copy of such certificate as the same appears from the records in his office, is inadmissible as evidence in this state of the marriage, it not being certified as required by the act of congress, and not conforming to any Michigan rule on the subject.—People v. Perriman, 72 Mich. 184.

¶ 2819. A chancery record from another state, attested by the clerk and presiding judge in the form required by the act of congress, is not open to objection for improper attestation because there is appended an additional clerk's certificate not inconsistent with the proper one, but rather corroborative of it; such additional certificate could not vitiate the transcript.—Weeks v. Downing, 30 Mich. 4.

¶ 2820. A transcript of the record showing the probate of a will in New Jersey was held to be properly authenticated where its correctness was certified to by the surrogate under the seal of his court, and the president judge of the orphans' court had certified under the seal of that court that the authentication was in due form and by the proper officer.—Wilt v. Cutler, 38 Mich. 189.

§ 562. Transcripts and certifications of inferior judgments.

¶ 2821. Where a transcript from a justice's docket is not certified as such it may be proved by the justice's oath; but if neither certified nor proved it is inadmissible to prove a judgment.—Wilber v. Goodrich, 34 Mich. 84.

¶ 2822. It is presumed that a particular justice of the peace is the one who certified a transcript if his name is signed, as justice, to the certificate.—Holcomb v. Tift, 54 Mich. 647.

¶ 2823. A transcript of a justice's judgment is admissible as evidence though certified by another justice, if his certificate shows that he had possession of the docket of the justice who rendered the judgment.—Holcomb v. Tift, 54 Mich. 647.

¶ 2824. Where a justice, in pursuance of Comp. L. 1857, § 3893, How. St., § 7056, certifies a transcript of a judgment from the docket of a former justice, which he certifies is in his control, full credit will be given to such certificate, and it will be presumed that the docket is legally in his possession.—Facey v. Fuller, 13 Mich. 527.

¶ 2825. A transcript of a justice's judgment which complies with Comp. L. 1857, § 3893, How. St., § 7056, and is certified to be a transcript of the judgment, and of all the proceedings so far as they appear on the docket, is sufficient to entitle it to be read in evidence without further statements. This section is complete in itself, and the general chapter on evidence (Comp. L. 1857, chap. 127, How. St., ch. 262), does not qualify it.—Goodsell v. Leonard, 23 Mich. 374.

§ 563. ——Of foreign justices and inferior courts.

Statutory provisions as to authentication, see Jud. Act, chap. XVII, § 23; Comp. L. 1915, § 12511.

¶ 2826. A properly certified transcript of a justice's judgment rendered in another state on personal service and appearance is sufficient evidence of the judgment and of the justice's jurisdiction (Comp. L. 1871, § 5933, How. St., § 7506).—Campbell v. Wallace, 46 Mich. 320.

¶ 2827. A transcript of a judgment rendered by a justice of the peace in California is not admissible in evidence in an action in Michigan on such judgment where it is only certified to by the clerk of the county in which it was rendered without any certification that such clerk was clerk of a court of record (How. St., § 7506).—Howard v. Coon, 93 Mich. 442.

§ 564. Certificate going to part only of record or copy.

¶ 2828. A copy of a record is not to be wholly rejected because the certificate attached is confined to a portion of the document only. The copy will be evidence so far as it is properly certified.—Gilman v. Riopelle, 18 Mich. 145.

¶ 2829. In an action for malicious prosecution a certificate of the records in the criminal case which is in proper form and shows the copy to be the whole of the entries that it purports to certify, is properly admitted although it does not attempt to certify all orders in the case, where it does show a verdict of not guilty but fails to show judgment of not guilty and discharge of the prisoner.—McLeod v. Crosby, 128 Mich. 641.

§ 565. Sworn copies.

Inadmissibility of deposition of register as to contents of record, see ante ¶ 662.

Statutory requisites of copy, comparison and proofs, see Jud. Act, chap. XVII, § 16; Comp. L. 1915, § 12504.

Admissibility of common-law modes of proof of foreign records, see Jud. Act, chap. XVII, § 17; Comp. L. 1915, § 12505.

¶ 2830. A bill of sale intended as a security, and properly filed in the town clerk's office, is a public record, which may be proved by a sworn copy.—Pierce v. Rehfuss, 35 Mich. 53.

¶ 2831. A deposition showed that deponent was a minister at A., and had custody and control of the church records, which contain the records of those christened and confirmed in said church; that the records were kept according to the regulations of the royal consistory, and had been so kept for more than two centuries; that deponent had inspected such records for the purpose of ascertaining the facts; and that it appeared therefrom that one C. was baptized on March 17, 1822, when he was seven days old, and that he was born at G., in East Prussia. The deposition directed: "Q. If witness answers 'Yes' to the last question [as to the inspection of the records], please attach here a copy, made by your own hand, and compared with the original by yourself, of so much of said records as pertains to the christening of said C., of the age of said C. when christened, and of the birthplace of said C." The next answer was: "A. [Copy attached]," and said copy was followed by the statement, "According to the local church record, it is hereby officially testified that to [a certain person] of G., * * * by his lawful wife," a child "was born on the 10th of March, 1822, who was baptized on the 17th of March of the same year, and received the name of 'C.' Evangelical Church at A., East Prussia, December 9, 1895. R., Minister. [Church Seal]." Held, that the record attached to the deposition was a sworn copy of the church record, and hence the deposition was admissible in evidence on the issue of C.'s age.—Drosdowski v. Supreme Council of Order of Chosen Friends, 114 Mich. 178.

§ 566. Probative force and effect of copies and certificates.

Effect of statutes, see also ante ¶ 2790.

Weight and effect of documents, certificates and official evidence, see post § 595.

¶ 2832. How. St., § 7504 provides that certified copies of papers on file in public offices shall be evidence in like manner as the originals would be. Section 6198 provides that a certified copy of a chattel mortgage "shall be received in evidence, but only of the fact that such instrument was received and filed, * * * and of no other fact." Held, that a certified copy of a chattel mortgage does not prove its execution.—Shelden v. Merrill, 69 Mich. 156.

¶ 2833. An aid note that had been drawn to the order of a railroad company which fell into bankruptcy was transferred by the assignee's deed and a subsequent conveyance, and sued on by the final holder. Held, in an action on the note, that, as the deeds had been lost, certified copies thereof were admissible as tending to show that plaintiff, having succeeded to the franchises of the promisee company, was a proper person to perform on the promisee's part the contract embodied in the note; they would not, however, be admissible evidence of the transfer of such contract.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

IX. EVIDENCE ADDRESSED TO THE SENSES; REAL EVIDENCE.

§ 567. Objects, models and things as evidence.

Foundation proofs of sameness and identity, see post § 576.

Correctness of model as jury question, see Trial, VI.

Production and examination of tangible property before trial, see Discovery § 10.

Defective insulator as evidence in action for injuries from escaped electric current, see Electricity ¶ 24.

Use by counsel of diagrams or articles not in evidence as illustrations in argument, see Argument of Counsel §§ 4, 9.

Admissibility in criminal trials of subjects of crime or other things as evidence, see Indictment, VIII, B.

¶ 2834. Where a village is sued for injuries occasioned by a defective sidewalk, plaintiff may produce and identify the defective plank, and show that it was taken from the walk at the place where plaintiff claimed to have been injured.—Lombar v. Village of East Tawas, 86 Mich. 14.

¶ 2835. In an action for injury alleged to have been caused by a defective sidewalk, the theory being that the stringers were rotten, a piece of wood offered upon a claim that it was a part of a stringer of the walk in the immediate proximity of the place of the accident, is admissible.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 2836. Where, in an action to recover for tug service in towing, defendants seek to recoup for the loss, through the parting of the raft-line, of certain booms and chains, and for expense in recovering scattered logs, and where plaintiffs identify 500 feet of the line, and gave testimony tending to show that this part of the line shows the very break itself, they are entitled to exhibit to the jury the entire 500 feet of such line, and to have the jury permitted to view the same.—Stevenson v. Michigan Log-Towing Co., 103 Mich. 412.

¶ 2837. A model may properly be exhibited to the jury in a case involving questions of construction, if there is testimony that it correctly represents distances and dimensions; its correctness, if disputed, is a question for the jury.—Richmond v. Atkinson, 58 Mich. 413.

¶ 2838. In an action for personal injuries alleged to have been caused by a defective brake, the brake beam may be introduced in evidence in order that the jury may understand its working more clearly, without any evidence that it is in the same condition as at the time of the accident.—Bernard v. Pittsburg Coal Co., 137 Mich. 279.

§ 568. Inspection and comparison of goods.

Testimony as to comparisons and tests made by witness or others with other things, see ante § 96.

¶ 2839. In an action for the price of goods sold, but rejected by the vendee on their arrival as not merchantable, it is not error to permit the exhibition of some of the goods to the jury, and to admit testimony as to how they compare with others, and also to allow, in connection with such testimony, the exhibition of a sample of goods taken from the original packages of other merchants to show that the goods were not No. 1, as ordered.—Imbrie v. Wetherbee & Co., 70 Mich. 103.

¶ 2840. Where on the trial of a suit to recover the price of a mirror which, after being delivered to the purchaser, had been taken away by the vendors to be resilvered, the mirror was brought into the court room by plaintiffs, and witnesses testified in relation to it, having their attention directed to it by plaintiffs' counsel, and its workmanship, and whether it was defective or not after being resilvered, was made part of the issue, the jury should have been permitted to inspect the mirror at the request of defendant's counsel.—Hudson v. Roos, 76 Mich. 173.

§ 569. Inspection and comparison of questioned writings by jury.

Comparison of writings as basis for opinions of experts, see ante § 297.

Compelling writing for comparison, see post § 577.

Propriety of microscopical examination of alterations, see Alteration of Instruments ¶ 38.

Statutory rule for admission of instruments for comparison of questioned hand writing, see Jud. Act. chap. XVII, § 51; Comp. L. 1915, § 12539.

¶ 2841. In an action for damages for selling to plaintiff, through a third person, a worthless note and mortgage, it is proper to lay before the jury the documents themselves if their suspicious character and the tokens of their fabrication are primary facts in the controversy.—Adams v. Bowman, 51 Mich. 189.

¶ 2842. Where an accommodation maker sued upon a note testifies that it has been altered without his consent by filling a space which he left blank, it is error to allow him to introduce in evidence for the purpose of comparison by the jury other notes subsequently written by him.—Weidman v. Symes, 116 Mich. 619.

¶ 2843. Where the genuineness of a party's indorsement is in issue, documents foreign to the case, but admitted by him on cross-examination to bear his signature, may go to the jury for purposes of comparison.—Dietz v. Fourth Nat. Bank of Grand Rapids, 69 Mich. 287.

¶ 2844. A sworn inventory by an administrator, mentioning certain certificates of deposit, is admissible as a basis of comparison by the jury to test the genuineness of his signature indorsed on the certificates, which signature he denies.—Dietz v. Fourth Nat. Bank of Grand Rapids, 69 Mich. 287.

¶ 2845. It was error to refuse to submit to the jury a statement alleged to have been made and signed by affiant in a suit commenced by capias, just before he died retracting the charges made in his affidavit, to enable the jury to compare the two signatures, where such affidavit stated facts conclusively showing adultery between defendant and plaintiff's wife, and where defendant claims that affiant was one of several conspirators who were attempting to blackmail him, and where plaintiff claims that such statement was a forgery.—Brown v. Evans, 149 Mich. 429.

§ 570. Demonstrations and operation of machines.

Opinions of lay witnesses based on experiments, see ante § 253.

Demonstrative experiments as evidence in criminal cases, see Indictment, VIII, B.

Irreviewableness of question depending on demonstration made in open court and not reducible to record, see Appeal § 278.

¶ 2846. In an action for an injury caused to plaintiff by the starting, without his knowledge, of a blower in defendant's planing mill, it was proper to refuse to allow defendant to run the blower in the presence of the jury, who, under permission, were examining the mill; it appearing that the construction of the blower had been changed since the injury.—Kinney v. Folkerts, 84 Mich. 616.

¶ 2847. In an action to recover the price of a machine, sold by plaintiff to defendant, defendant claimed that the machine failed to operate correctly. Held, not error to allow a witness to operate the machine before the jury and to explain the principle upon which it worked, there being testimony in the case showing the identity of the machine and its unchanged condition.—National Cash Register Co. v. Blumenthal, 85 Mich. 464.

§ 571. Reproduction of sound by phonograph.

¶ 2848. In condemnation proceedings for a right of way by a railroad company it was proper to permit the operation in the presence of the jury of a phonograph reproducing sounds claimed to have been made by the operation of trains in proximity to the landowner's hotel where the proper foundation had been laid.—Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328.

§ 572. Appearance as shown by photographs.

X-ray picture of injury as best evidence, see ante § 109.

Photographs as documentary evidence, see ante § 505.

Admissibility of pictures or photographs to corroborate or contradict witnesses, see Witnesses, VI.

¶ 2849. In an action upon an insurance policy where the defense is a false statement in the application that the assured was in good health at the time it was made, a photograph of the assured offered to show her healthy appearance is incompetent.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306.

¶ 2850. While it might not be error to permit photographic copies of a disputed will to be given to the jury, with such precautions as to secure their identity and correctness, yet their use can never be compulsory, and their rejection is not error.—In re Foster's Will, 34 Mich. 21.

¶ 2851. Photographic copies of handwriting are inadmissible as evidence of existing documents if the originals can be had.—Maclean v. Scripps, 52 Mich. 214.

¶ 2852. In an action for personal injuries a photograph of an ulcerated sore on the leg as a claimed result of the injury is competent evidence and admissible.—Davis v. City of Adrian, 147 Mich. 300.

¶ 2853. It is not error to admit photographs of sections of tools enlarged so as to explain and illustrate the testimony of an expert witness as to microscopic tests which he had made.—Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201.

§ 573. Inspection of person for resemblance or identity.

Opinion as to person's resemblance to photograph, see ante ¶ 1304.

Resemblance of bastard as evidencing paternity, see Bastards §§ 8, 10.

¶ 2854. It is not clearly error to permit argument in a bastardy case upon the resemblance between the child and the respondent.—People v. White, 53 Mich. 537.

§ 574. Examination of alleged incompetent.

¶ 2855. At the hearing on a bill to set aside and annul a deed on the ground of the mental incompetency of the grantor it is proper to bring him before the court to afford the judge an opportunity of seeing him, and of questioning him if desirable.—Benson v. Raymond, 142 Mich. 357.

§ 575. Exhibition of person or injured part.

For resemblance or competency of the person, see ante §§ 573, 574.

Power of court to compel, see post § 577.

Photograph of injured parts, see ante ¶ 2852.

Physical examination of the person before trial to prepare or to qualify experts, see Discovery § 9.

Exhibition of injury suffered by assault, see Indictment, VIII, B.

¶ 2856. It is not competent to allow a jury to determine for itself the correctness of a physician's treatment of a woman's fractured leg; and the court is justified in refusing to permit the jury to inspect the leg for that purpose, even when such inspection is asked by the woman.—Carstens v. Hanselman, 61 Mich. 426.

¶ 2857. The trial court, when entertaining a motion to compel the plaintiff in a personal injury case to display the injured part to the jury, must be ruled by considerations of delicacy, also by that of whether the effect will be merely cumulative evidence, or evidence unnecessary or not material to aid the jury.—Graves v. City of Battle Creek, 95 Mich. 266.

¶ 2858. Where, in an action for negligent injury, there is testimony and a question that plaintiff's broken leg has shrivelled, he may be allowed to exhibit it to the jury as evidence of its present condition.—Langworthy v. Township of Green, 95 Mich. 93.

¶ 2859. Where plaintiff in an action for negligent injury claimed that such injury resulted in a swelling of the ankle and in a cracking of the skin of the foot, and that such condition was continuous to the time of the trial, she was properly allowed to exhibit the limb that the jury might see its condition though two years had elapsed.—Edwards v. Village of Three Rivers, 96 Mich. 625.

¶ 2860. In an action to recover for the services of physicians who had treated victims of a wreck on the railroad of defendant, it was not error to refuse to compel a witness for defendant, who was one of the wreck victims and had been treated by plaintiff, to exhibit his leg to the jury.—McKnight v. Detroit & M. Ry. Co., 135 Mich. 307.

¶ 2861. In a suit for personal injuries the trial judge does not abuse his discretion in permitting plaintiff to exhibit his injured arm to the jury.—Barfoot v. White Star Line, 170 Mich. 349.

§ 576. Foundation proofs of identity, etc.

See also post ¶ 2928.

Proof that machine is unchanged when operated before jury, see ante ¶ 2847.
Effect of subsequent changes, see also ante ¶ 2846.
Foundation for photographs, see also ante ¶ 2850.
Foundation proofs of genuineness of writings offered for comparison, see ante § 516.
Admissibility of foundation evidence to show that object introduced remains unchanged, see also Electricity ¶ 26.

¶ 2862. Where a stringer claimed to have been removed from a defective sidewalk in making repairs after an injury is not sufficiently identified as coming from the walk—it having been found standing against a building near by—it is not admissible in evidence.—McGrail v. City of Kalamazoo, 94 Mich. 52.

¶ 2863. It is error to permit plaintiff, suing for a dog-bite, three years and four months after the bite and nine months after the time during which the declaration claims he suffered from such bite, to exhibit the condition of the bitten limb without any testimony tending to show that it is not changed for the worse.—French v. Wilkinson, 93 Mich. 322.

§ 577. Power to compel exhibition or demonstration.

To compel examination before trial, see Discovery.

¶ 2864. The court has power to require a plaintiff suing for an injury to her arm to allow a physician to examine the arm in the jury's presence.—Graves v. City of Battle Creek, 95 Mich. 266.

¶ 2865. Where the genuineness of his signature is in issue, a party cannot be required to write his name in court for purposes of comparison.—First National Bank v. Robert, 41 Mich. 709.

X. WEIGHT, PREPONDERANCE AND SUFFICIENCY.

§ 578. In general; preponderance rule.

See note under § 586, post.
Statutory degrees required such as "positive" proof, see post § 579.
Statutory effect of record evidence, see post § 580.
Stipulations controlling evidence, see post § 581.
Sufficiency, weight, effect, and construction of evidence, see post §§ 582-610.
Conflicting or balanced evidences, see post § 604 et seq.
Relative weight of numbers, numerical preponderance in conflict, see post § 604.
Positive testimony overweighing greater number of negative witnesses, see also post § 605.
Issues in civil cases involving criminal acts, see post § 585.
Rule under former practice as to number of witnesses to overcome sworn answer, see Equity § 165c.
Instructions on preponderance rule and on numerical disparity of witnesses, see Instructions, V.
Establishment of facts in litigation by other means than evidence, see Estoppel; Former Adjudication; Stipulations; Trial, V (admissions other than by pleadings made in open court); Pleading, IX (issues admitted); Equity, VII, F (admissions by pleadings).

¶ 2866. A preponderance of the evidence is all that is required in any civil case to sustain a verdict, judgment, or decree.—Fitch v. Vatter, 143 Mich. 568.

¶ 2867. "Preponderance of evidence" means simply evidence that outweighs that which is offered to oppose it.—Strand v. Chicago & W. M. R. Co., 67 Mich. 380.

¶ 2868. Under the rule requiring a preponderance of evidence in civil cases, plaintiff has the burden merely of producing evidence which, when weighed with that opposed to it, has more convincing force, from which it results that the greater probability is in his favor.—Hoffman v. Loud, 111 Mich. 156.

¶ 2869. By a preponderance of evidence is meant evidence which, when weighed with opposing evidence, has more convincing force, resulting in greater probability in favor of the party upon whom the burden rests.—Cline v. Studebaker Corporation, 189 Mich. 514.

¶ 2870. A preponderance of evidence does not mean the number of witnesses on one side or the other. It means rather the quality and kind of evidence produced.—Newman v. Bowman, How. N. P. 46.

¶ 2871. No greater preponderance of proof is required to authorize a verdict in one civil action than in another.—Elliott v. Van Buren, 33 Mich. 49.

¶ 2872. In an action for an assault and battery accompanied by an attempt to ravish, such attempt need not be made out beyond a reasonable doubt.—Elliott v. Van Buren, 33 Mich. 49.

¶ 2873. Proof beyond a reasonable doubt is not required in a civil action charging assault and battery with ravishment.—Schenk v. Dunkelow, 70 Mich. 89.

§ 579. "Positive" or other statutory degrees and kinds of proof.

Conflict between positive and negative, see post §§ 605, 606.

¶ 2874. By "positive proof" required in a statute is meant direct proof, as contradis-

tinguished from that which is circumstantial or merely presumptive; and it excludes a mere admission of a party.—Niles v. Rhodes, 7 Mich. 374.

§ 580. Statutory effect to be given record evidence.

Conclusiveness of record evidence, see post § 601.
Lessened strictness required where records are ancient or destroyed, see post ¶ 2899.
Force and effect of copies of records and documents, see ante § 566.

¶ 2875. Laws 1867, Act No. 20 (How. St., § 5678), providing, in effect, that deeds executed by executors, administrators and sheriffs, or the record thereof, shall be prima facie evidence of the regularity of all proceedings required by law anterior to such deed, applies to records existing at the time the act was passed as well as the records made subsequently.—Sauers v. Giddings, 90 Mich. 50.

¶ 2876. Under Laws 1865, Act No. 315, which declares that the "Scranton Abstract," so called, owned by Kent county shall be "public records" and "shall have the same virtue and effect as by present provisions of law the records of the office of register of deeds do possess," was designed to give it the same evidentiary effect either under present or future law as is given to other public records.—Sauers v. Giddings, 90 Mich. 50.

¶ 2877. Where a patent has been lost and the original record of it has been destroyed by fire, one claiming through such patent shows prima facie its contents by introducing an abstract of it which, by statute, has been made a public record, together with the tract book kept in the office of the register of deeds showing the same description.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246, affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

§ 581. Stipulations for proof.

Sufficiency of abstracts of title admitted under stipulation, see post ¶ 2900.
Validity of stipulations as to requisite kind and weight of evidence, see also Contracts § 332.
Conclusiveness and effect of stipulations of facts, see Stipulations.

¶ 2878. The parties to a contract cannot stipulate therein as to the kind of evidence that shall alone authorize a recovery thereon.—Utter v. Travelers' Ins. Co., 65 Mich. 545.

§ 582. Sufficiency of proofs.

Of negative of an issue, see post § 583.
Of secondary evidence, see post § 584.
To prove particular facts, see post §§ 586-589.
To prove facts involving criminality, see post § 585.
Preponderance rule, see ante § 578.
Weight and effect of evidence, see post §§ 590-595.
Consideration of the evidence as a whole, see post §§ 596-598.
Conclusiveness and impeachment, see post §§ 601-603.
Conflict in the evidence, see post § 604 et seq.
Of opinion evidence, see post §§ 599, 600.
Conclusiveness and unimpeachability of evidence, see post §§ 601-603.
Conclusiveness of presumptions, see ante § 33.
Evidence or presumptions effective to shift burden of proof, see ante § 70.
Sufficiency of foundation proofs to admit documents, see ante § 515 et seq.
Sufficiency of proof of declarations and statements out of court and of former testimony, see ante §§ 345-347.
Admissibility of circumstantial evidence, see ante, III-IX; and see specific topics treating of the thing to be proved.
Sufficiency of circumstantial proof of adultery in divorce, see Divorce § 69.
Sufficiency of testimony of plaintiff to make prima facie case, see also Attorneys ¶ 157.
Sufficiency of testimony of or admissions by party in divorce, see Divorce § 66.
Directing verdict because of insufficiency of evidence to go to jury, see Directing Verdict, § 5 et seq.
Rules for review on appeal or error, see Appeal, XII, E.
Statutory rules for prima facie proof by various evidences, e. g., seals, incorporation, copartnership, see Jud. Act, chap. XVII, §§ 46-49; Comp. L. 1915, §§ 12534-12537.

¶ 2879. The jury are not warranted in finding a fact established by a greater probability unless, also, the evidence satisfies them that the fact exists; the conclusion that it exists may be drawn from a preponderance of probabilities in its favor, but the probabilities must be such that the conclusion may be and is drawn, or it is not proved.—Dunbar v. McGill, 64 Mich. 676.

¶ 2880. In civil cases a jury cannot be required to discard testimony which produces a rational belief because it does not conclusively establish the fact to be proved.—Watkins v. Wallace, 19 Mich. 57.

¶ 2881. Evidence is not merely that which a witness swears to. Evidence is that which satisfies the consciences and convinces the minds of the jurors of the truth of the existence of a fact sought to be established.—Newman v. Bowman, How. N. P. 46.

¶ 2882. An admission by defendant to plaintiff's agent who presents an account to him, of the correctness of the account, is sufficient proof thereof.—Bjorkquest v. Wagar, 83 Mich. 226.

¶ 2883. Every plaintiff must make out his case by affirmative proof or by legal presumptions; and where the jury think the facts shown are as consistent with defendant's honesty as with his dishonesty the presumption of honesty is not overcome, and his dishonesty cannot be established.—Whitfield v. Stiles, 57 Mich. 410.

¶ 2884. The presumption that one is cognizant of the contents of his own books of account may be entirely overcome by his positive, uncontradicted testimony that the accounts were kept, and entries made, by a bookkeeper, and were never examined by the party himself, and that he had no knowledge thereof.—Hurley v. Watson, 68 Mich. 531.

¶ 2885. One cannot ask for a verdict upon the testimony of a witness whom he has himself impeached.—Bell v. Zelmer, 75 Mich. 66.

§ 583. ——Of negative fact.

Conflict of positive with negative testimony, see post §§ 605, 606.

¶ 2886. Where a party is required to prove a negative the same clear proof is not necessary as where proof of an affirmative is required.—Young v. Stephens, 9 Mich. 500.

¶ 2887. Very slight evidence only should be demanded of a party called upon to prove a negative.—Taff v. Hosmer, 14 Mich. 309.

§ 584. ——Secondary evidence.

See also post ¶ 2899.

Sufficiency of proof of loss of originals to admit secondary proofs, see ante §§ 148-151.

Proper witnesses and means of proving contents of writing secondarily, see ante §§ 152, 153.

Equal competency of parol and secondary written proofs, see ante § 154.

Existence of contract proved by secondary evidence as jury question, see Contracts ¶ 1405.

¶ 2888. The refusal, after reasonable notice, to produce a document in the possession of the adverse party, and which the party demanding it is entitled to introduce in evidence, authorizes proof by secondary evidence; but it does not dispense with such proof as is attainable, nor allow the tenor of the instrument to be made out by anything less than satisfactory evidence of all that is essential.—Moulton v. Mason, 21 Mich. 364.

¶ 2889. The contents of a lost instrument secondarily proved should be established by proofs that satisfy the mind as to its contents.—Shouler v. Benander, 80 Mich. 531.

¶ 2890. In proving the contents of lost instruments it is sufficient to give the substance.—Holmes v. Deppert, 122 Mich. 275.

¶ 2891. Secondary evidence of a contract, said to have been lost, is insufficient where one of the witnesses was not believed and the others either did not agree as to its terms or else did not see it, and the person alleged to have made it with defendant denies that there was any writing.—Seymour v. Canfield, 122 Mich. 212.

¶ 2892. The substance of a lost deed is sufficiently proved where a witness who is not disputed testified positively that it was an absolute conveyance of a right of way across lot 41, a right of way being sufficient description after it had been located by the parties and used for 20 years by the grantee.—Thomson v. Flint & P. M. R. Co., 131 Mich. 95.

¶ 2893. Evidence of a complainant attempting to prove the rendition of a judgment by a justice held insufficient, it appearing that the justice was dead, that the plaintiff was unable to find his docket or any paper in the case except the execution and return, and there being no proper oral proof of the lost record, as the witness had not read it and was not able to speak to the substance of its contents.—Henry v. Gates, 118 Mich. 379.

§ 585. ——Issues of criminality in civil suits.

¶ 2894. Proof beyond reasonable doubt can only be required in criminal cases; in all others, including those, even, that involve facts of a criminal nature, the question is one of preponderance.—Elliott v. Van Buren, 33 Mich. 49; Farmers' Mut. Fire Ins. Co. of Gratiot County v. Gargett, 42 Mich. 289; Peoples v. Evening News Ass'n, 51 Mich. 11.

¶ 2895. In a civil case involving an issue of criminal misconduct a preponderance is enough, provided it overcomes the presumption of innocence.—Monaghan v. Agricultural Fire Ins. Co. of Watertown, N. Y., 53 Mich. 238.

¶ 2896. Proof beyond a reasonable doubt is not required in a civil action charging assault and battery with ravishment.—Schenk v. Dunkelow, 70 Mich. 89.

¶ 2897. While in a civil case it is only necessary to establish the commission of a crime by a preponderance of evidence, there should, however, be testimony of sufficient weight and character to satisfy the court or jury that a crime has been committed.—Baird v. Abbey, 73 Mich. 347.

§ 586. ——Of particular facts.

[Note. For cases on the sufficiency of the evidence as presented and considered to prove a given issue consult the specific topic treating of that issue in the portion devoted to "evidence" or to "remedies and procedure." The sufficiency of the evidence to establish an issue or a cause of action presents a question much

more closely related to the law of that issue than to the general law of evidence, and for that reason only such cases as lay down general rules for sufficiency and weight of evidence are retained in this division. See cross-references which follow.]

Sufficiency of proof of incorporation, see Corporations § 15.
To establish foreign law, see post § 587.
To prove title or possession, see post § 588.
To prove authorship or genuineness of writings, see post § 589.
In accounting suits, see Accounting Suits ¶ 30.
In disbarment proceedings, see Attorneys §§ 5, 6.
In bastardy proceedings, see Bastards § 10.
In divorce cases, see Divorce § 65 et seq.
Proof of adverse possession, see Adverse Possession §§ 48-51.
Proof of death, see Death § 4.
To show that absolute sale or transfer of chattels is in fact a mortgage, see Chattel Mortgages § 6.
Degree of proof required in suits to reform, cancel or rescind, or specifically to enforce instruments, see Reformation, III; Rescission, VI; Specific Performance, IV.
Certainty and clarity of proof of fraud, see Fraud, III.
Certainty and clarity of proof of justification in libel or slander, see Libel, VIII.

§ 587. ——To establish foreign law.

¶ 2898. Testimony of a barrister and solicitor engaged in practice in Canada as to the prevailing practice in Canada is sufficient to establish the procedural law there in force in the absence of proof of any contrary precedent (or, though the opinion does not so state, of any statute or regulation to the contrary).—Patterson v. Kennedy, 122 Mich. 343.

§ 588. ——To prove title or possession.

Conflict of oral with written evidence, see post § 607.
Effect of counter testimony by surveyor, see also ante ¶ 2842.
The sufficiency of proof of title or possession usually is decided in such a way as to be referable to one of the specific topics, and this has been done leaving but a few holdings of a general character. See Adverse Possession §§ 48-51; Conversion §§ 37, 38; Ejectment § 42 et seq.; Forcible Entry, II; Replevin, III; Trespass, II; and other specific topics.
Sufficiency of proofs requisite in suits in equity to overcome or supply lack of written evidences, see Rescission, VI; Reformation, III; Specific Performance, IV; Mortgages, II, B, IX.

¶ 2899. Proof of title resting upon ancient probate proceedings is not required to be as strict as if they were recent, especially if had at a time the judicial records of which are so far lost or destroyed as to make it impossible in most cases to make a complete exhibit of all the papers or proceedings.—Willetts v. Mandlebaum, 28 Mich. 521.

¶ 2900. Mere abstracts of title which are unintelligible without the aid of some proof to explain the meaning of abbreviations and initial letters used in them, introduced in evidence under a stipulation which does not determine what effect shall be given to them, are insufficient of themselves to establish title to lands which became material to show the real facts on an issue of fraud in selling property for less than it was worth with a good title.—Weeks v. Downing, 30 Mich. 4.

¶ 2901. A written conveyance of timber does not, as against a stranger to the deed, conclusively show title; but the real owner may show that title was so made for security.—Busch v. Pollock, 41 Mich. 64.

¶ 2902. A commissioner's deed under foreclosure of mortgages executed by one in peaceable possession constitutes prima facie evidence of title in the grantee as against an intruder who shows no better title in himself, and cannot be defeated by defendant's evidence of an outstanding title in third persons.—Cook v. Bertram, 86 Mich. 356.

¶ 2903. Testimony that plaintiff in an action for damages to crops by flooding, was in "possession and occupancy" of the farm which was owned by his father and mother, at the time in question and "had growing crops there," and that a tenant had half a share, constituted evidence that in some way plaintiff acquired his parent's interest in the growing crops before they were damaged by defendant.—Hovey v. Grand Trunk W. Ry. Co., 135 Mich. 147.

¶ 2904. It cannot be said that there is no evidence of the title of plaintiff in ejectment, claiming under foreclosure sale of a certain railroad, where defendant put in a deed to himself with a recital contained in it that a predecessor in title of the plaintiff owned all of the land but a described strip; for although such deed was no estoppel because the parties were not the same yet the recital was some evidence of the facts recited.—Pere Marquette R. Co. v. Graham, 136 Mich. 444.

§ 589. ——Authorship or genuineness of writings.

On uncontradicted testimony respecting alteration of instrument, see also post ¶ 2915.
Sufficiency of evidence of execution and genuineness of instruments between parties, see Execution of Instruments, I.

¶ 2905. A receipt for payment of professional services purported to be signed by

plaintiffs in their firm name. Defendant testified that he wrote the receipt, and that plaintiff signed it in his presence; that, after the receipt had been written, such plaintiff stated that it was not dated, and thereupon dated it and signed it; but that witness thought it was given in July, instead of February, its purported date. Plaintiff testified that he never executed the paper, either on the date it purported to bear or upon any date; that he could not state positively whether or not the signature was his; that the paper bore evidences of having had writing upon it before, which had been erased by a rubber; that it was his impression that he wrote the date and signature; that, it being in pencil, it was difficult for him to say; and that, if it had been done in ink, he could tell a great deal better. Held, that it could not be said that the genuineness of the signature was admitted.—Howell v. Smith, 108 Mich. 350.

¶ 2906. The regents of the University of Michigan filed a bill against the director of the chemical laboratory and his assistant, an officer appointed by their authority, for an accounting for moneys received in that department and in which there was a deficit. The suit involved the question, as between the defendants, of the genuineness of the initial of the director, used in certain stubbooks as a voucher to indicate that the assistant had accounted to him for moneys received. The director claimed that these initials were forged. Held, on appeal that they were forged, upon comparison of the handwriting of both defendants, and especially of the director, which had changed somewhat, with that of the disputed vouchers; and in the light, also, of expert testimony and, particularly, of the conduct of the assistant in admitting delinquencies in his accounts of moneys received, when the deficit was first called to his attention, and in borrowing money and mortgaging his property to make them good, and giving security to meet whatever deficits might be discovered.—University of Michigan v. Rose, 45 Mich. 284.

§ 590. Weight, effect and construction.

See note under § 586, ante.
Of uncontradicted evidence, see post § 591.
Of admissions and extra-judicial declarations, see post § 594.
Of documentary evidence, see post § 595.
Effect of error, falsity or suppression, see post §§ 592, 593.
Sufficiency of the evidence, see ante §§ 582-589.
Consideration of the evidence as a whole, see post §§ 596-598.
Consideration of adverse party's testimony as a whole, see post § 597.
Of opinions of nonexperts and experts, see post §§ 599, 600.
Conflict or balance of evidences, see post § 604 et seq.
Relative weight of numbers where witnesses are in conflict, see post § 604.
Conflict between evidence and natural law or inherent probabilities, see post § 610.
What evidence is regarded as negative in nature, see post § 606.
Construction of abstracts of title admitted under stipulation, see ante ¶ 2900.
Weight of evidence as matter for jury, see Trial, VI.
Instructions on weight and effect, see Instructions, V, VI.
Construction and weight of evidence on motion to direct verdict, see Directing Verdict §§ 18-20.
Presumptions and construction on review by error or appeal, see Appeal, XII, C.
Weight and sufficiency of evidence on review, see Appeal, XII, E.
Credibility of witnesses as distinguished from weight and sufficiency of the evidence, see Witnesses, VI.
Credibility of witnesses as matter for jury, see Witnesses, VI, A.
Allowable argument of counsel on weight or credibility, see Argument of Counsel § 9 et seq.
Disregard in equity of proofs outside the issues, see Equity § 179.

¶ 2907. In considering the testimony of a witness his unfamiliarity with our language and customs, and his capacity for comprehending and answering the questions propounded through the medium of an interpreter, must be borne in mind.—Walker v. Western Underwriters' Ass'n, 142 Mich. 162.

¶ 2908. Testimony may be given the construction which the parties placed upon it, and hence may be held to afford evidence of a particular fact, although a charge of perjury could not be made with relation to such evidence because of its uncertain meaning.—Hillman v. Hulett, 149 Mich. 289. (Blair, Montgomery and Hooker, JJ., dissenting.)

¶ 2909. The testimony of a defendant in an action as to material facts is for the jury to weigh the same as that of any other witness.—People v. Traves, 188 Mich. 345.

¶ 2910. Where part of complainant's testimony was taken before, and part after, the death of her husband, so that there was no opportunity to take his testimony to explain the transactions testified to by her, and concerning which her bill for accounting was filed, her testimony should be carefully scrutinized, and her claim, if allowed, found to rest upon a solid foundation.—Moore v. Smith, 103 Mich. 387.

¶ 2911. Evidence introduced without restriction is available on any issue which it tends to prove, and which is within the pleadings.—Malkowski v. Olfs, 161 Mich. 303.

Sufficiency of evidence, in absence of eyewitness, that death or injury resulted from "accident," within meaning of Workmen's Compensation Acts, see note 10 N. C. C. A. 618-645.

§ 591. ——Uncontradicted evidence.

Inferences against uncontradicted witnesses, see post § 609.

¶ 2912. Where no attempt is made to meet complainant's evidence in a suit to set aside a partition for fraud, its accuracy is substantially admitted.—Adair v. Cummin, 48 Mich. 375.

¶ 2913. Testimony must be taken as true where the adverse party with knowledge of the facts is in court and fails to take the stand to deny it.—Fruit Dispatch Co. v. Russo, 125 Mich. 306.

¶ 2914. A jury is not required to accept as absolute verity every uncontradicted statement of a witness.—Yonkus v. McKay, 186 Mich. 203.

¶ 2915. A case turned upon the question whether an alteration in a written instrument was by consent of defendant. There was testimony that it was made by a subscribing witness, and none that defendant made it. The judge, from inspection, concluded that it was in the handwriting of defendant, and decreed accordingly. Held to be error.—Sheldon v. Hawes, 15 Mich. 519.

§ 592. ——Error or falsity affecting weight.

Falsity of testimony discrediting witnesses, see Witnesses, VI, A.

Discrediting testimony entire because shown false in part, see Witnesses, VI, A.

Evidence by discredited witness, see also Conversion ¶ 198.

¶ 2916. Where a bank entry is incorrect on its face in one particular, the fact is entitled to be considered as bearing on its accuracy in other respects.—Ortmann v. Merchants' Bank of Canada, 41 Mich. 482.

§ 593. ——Withholding or suppression affecting weight.

Presumptions against party failing to adduce available evidence, see ante §§ 62-65.

¶ 2917. It is a maxim that all evidence must be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.—Wallace v. Harris, 32 Mich. 380.

¶ 2918. The fact, that the testator's papers, including the will if there was one, fell under the control of the contestants who had a powerful motive for suppressing it, is to be considered in weighing the evidence in support of the case for the existence of a lost will.—Ewing v. McIntyre, 141 Mich. 506.

§ 594. ——Admissions and declarations out of court.

Construction and effect of admissions, see ante §§ 440, 441.

Conclusiveness of party's admissions, see post § 602.

Of served copy of complaint in other action put in as admission, see ante ¶ 573.

Admissions of matter of law, see ante § 360.

¶ 2919. The weight to be given to admissions depends upon the circumstances under which they are made, and the mode in which they are proved.—Niles v. Rhodes, 7 Mich. 374.

¶ 2920. Defendant's admission of liability for negligence will not create such liability if defendant is not legally liable; but the jury may consider it as an admission of defendant's carelessness, and his subsequent denial of liability does not lessen the force of such admission as evidence of how he then considered the question of fact in issue.—Swift Electric Light Co. v. Grant, 90 Mich. 469.

¶ 2921. Testimony of oral admissions has always been regarded as the least satisfactory evidence for the establishment of disputed facts, because it depends upon the intelligence and accuracy of the memory of the transmitter, his freedom from bias and his opportunity to understand and interpret the language and meaning of the person whose admission is the subject of the testimony. It is even less satisfactory when the only person who could correct the testimony is dead or absent.—Boam v. Greenman, 147 Mich. 106.

¶ 2921a. Receipted bills for goods may be used with the testimony of the parties to show a debt and payment of it; but of themselves will not show it or the value of the goods.—Dyer v. Rosenthal, 45 Mich. 588.

§ 595. ——Documentary or official evidence.

Deed recitals as proof of heirship, see also ante ¶¶ 2580, 2582.

Recital as evidence rather than as estoppel, see Estoppel ¶ 26.

Statutory effect to be given record evidence, see ante § 580.

Probative force and tendency of copies and certificates, see ante § 566.

Tax receipt as evidence between third persons, see also ante ¶ 2737.

Error affecting weight, see ante § 592.

Conflict between oral and written evidence, see post § 607.

¶ 2922. A bank depositor's pass book is the book of original entry of deposits, and is entitled to as much credence as the deposit slip and the books of the bank; hence it is proper to refuse an instruction that

such slip and books are as against the pass book prima facie evidence of the amount of the deposits.—Kux v. Central Michigan Sav. Bank, 93 Mich. 511.

¶ 2923. In replevin by the debtor against an attaching officer for articles which plaintiff had selected from the property seized as exempt from attachment, being equal in value to $250 according to the officer's appraisal, such appraisal is conclusive as to value, if the articles were in fact exempt as belonging to the class specified in the statute; but if the property is not exempt the value is open to proof.—Wood v. Bresnahan, 63 Mich. 614.

¶ 2924. Under Comp. Laws 1897, § 10170. How. 2nd Ed., § 12815, the certificate of the secretary of state relative to the filing of the annual report of a corporation is presumptive evidence of the facts so certified in the same manner and with like effect as if such officer had personally so testified in court at the time of trial.—Macbeth-Evans Glass Co. v. Gumbinsky, 201 Mich. 18.

¶ 2925. Testimony of one who took an acknowledgment, that the grantor was in full possession of his faculties at the time, is lessened in weight; where it also appears that at the time he did not carefully investigate the condition of things in the beneficiary's absence, though the circumstances were suspicious.—Duncombe v. Richards, 46 Mich. 166.

§ 596. Consideration as a whole.

Of adverse party's testimony, favorable and unfavorable portions, see post § 597.
Of cross-examination with direct, see post § 598.
Construction and effect of admissions, see ante §§ 440, 441.
Conflicting or balanced evidence, see post § 604 et seq.

¶ 2926. One cannot repudiate part of the evidence given in his behalf and claim benefit from the rest.—Humphrey v. Hurd, 31 Mich. 436.

¶ 2927. Where the question before a jury is whether a person is a party to a transaction, and it has to be determined by his acts and conduct, such acts should be considered all together and not separately.—Ward v. Beecher, 56 Mich. 616.

¶ 2928. Where in an action against a municipality and a telephone company for a death caused by coming into contact with an electric wire, the separate testimony of several witnesses may not be sufficient to identify a piece of wire offered in evidence but is sufficient when the testimony is considered as an entirety, held, the wire was identified.—Sykes v. Village of Portland, 177 Mich. 290.

¶ 2929. The general rule is that the whole of an admission must be taken together, although a jury is not bound to give equal weight to that which operates in favor of the party making it.—Case v. Dean, 16 Mich. 12.

§ 597. ——Testimony of adverse party.

Weight of party's testimony, see ante § 590.
Right to rest on admission made in testifying without being bound by the testimony, see post ¶ 2953.
Right to impeach or contradict one's own witness, including adversary called as witness, see Witnesses, VI.

¶ 2930. Complainants must accept as a whole the statements of the defendants when they make them their witnesses and rest the case on their evidence.—Darling v. Hurst, 39 Mich. 765; Brigham v. Fawcett, 42 Mich. 542.

¶ 2931. Where complainant, seeking to have a deed from husband to wife set aside as in fraud of creditors, relies solely upon defendant's testimony, he cannot discriminate between favorable testimony and that which is unfavorable where all is equally probable, merely on suspicion that the former is false.—Hicks v. McLachlan, 94 Mich. 278.

¶ 2932. All of the testimony of the defendant in a bill in aid of execution who is made complainant's witness must be considered and not that only which tends to support the charge of fraud made by complainant.—Hendrickson v. Voss, 115 Mich. 57.

§ 598. ——Of cross-examination with direct.

¶ 2933. The testimony given by a witness on legitimate cross-examination constitutes a part of his evidence in chief, and is, like that, to be treated as evidence on the part of the party calling the witness.—Campau v. Dewey, 9 Mich. 381; Wilson v. Wagar, 26 Mich. 452; Campau v. Traub, 27 Mich. 215; Schratz v. Schratz, 35 Mich. 485; Turnbull v. Richardson, 69 Mich. 400.

¶ 2934. A witness' testimony as given on direct and cross-examination must be taken together.—Maxwell v. Bay City Bridge Co., 46 Mich. 278; Gordon v. Cook, 47 Mich. 248.

§ 599. Conclusions by nonexperts.

Of expert opinions, see post § 600.

¶ 2935. The weight of the opinion of a nonexpert witness as to the mental capacity of a testator depends upon the opportunity he has had to form an opinion.—In re Merriman's Appeal, 108 Mich. 454.

¶ 2936. A promoter's testimony that corporation ratified "his acts" in securing subscribers to stock is not evidence that corporation ever ratified his representations to, or engagements with, subscribers.—Rapid

Hook & Eye Co. v. De Ruyter, 117 Mich. 547.

§ 600. Opinions of experts.

To prove foreign laws, see ante § 587.
Of nonexpert opinions, see ante § 599.
Weight of surveyor's opinion as to boundary location, see Boundaries § 35.
In criminal cases, see Indictment, VIII, C.

¶ 2937. Expert testimony is not held in the highest esteem and should be limited to its proper uses.—McNally v. Colwell, 91 Mich. 527.

¶ 2938. Testimony of one who has sufficient knowledge to qualify as an expert, but who has no personal experience with the subject-matter (spavin in horses), is of little relative weight, though competent.—Rogers v. Ferris, 107 Mich. 126.

¶ 2939. In a conflict between scientific and other testimony the judge cannot decide for the jury that one witness is more to be regarded than another.—Watson v. Watson, 58 Mich. 507.

¶ 2940. Expert testimony as to the character of the sparks which, under certain circumstances, would come out of a smokestack, offered for the purpose of showing that the fire might have been set by another vessel than defendant's, is insufficient to justify a submission of that question to the jury, where the undisputed testimony is to the effect that at the time no sparks were coming from such other vessel.—Burrows v. Delta Transp. Co., 106 Mich. 582.

¶ 2941. The opinion of a physician as to mental competency, aside from the question of insanity, is entitled to no greater consideration than that of a layman having equal facilities for observation.—Maynard v. Vinton, 59 Mich. 139.

¶ 2942. Evidence of plaintiff's possession of what he has occupied as his lot cannot be overthrown, in a case where title is not in question, by a surveyor's testimony as to where the line ought to have been.—Fisher v. Dowling, 66 Mich. 370.

¶ 2943. When the testimony of experts, based on subsequent examination or proofs, is met by positive testimony of facts, the jury must determine what the facts are, and cannot be required to give such testimony as is theoretical in its deductions any weight they think it does not deserve.—Watson v. Watson, 58 Mich. 507.

¶ 2944. Distinct and reliable evidence of facts outweighs the theories of experts as to their scientific possibility.—Treat v. Bates, 27 Mich. 390; Stone v. Chicago & W. M. R. Co., 66 Mich. 76.

¶ 2945. Expert opinions are of no force as against direct testimony for showing the speed of a locomotive, especially if many facts necessary for forming an opinion were not placed before the witness.—Viets v. Toledo, A. A. & G. T. R. Co., 55 Mich. 120.

¶ 2946. In an action against the receivers of a street railway company for the death of a yardmaster in a crossing collision between a street car and a backing steam railroad train, where the yardmaster was at the rear end and in charge of the train, and where there was opinion evidence, not objected to, that it was negligent and unsafe to back the train across the street without flagging in the absence of a watchman, such opinions were not conclusive on the jury and were properly left to the jury with the testimony tending to show an exceptionally dangerous crossing.—Philip v. Heraty, 135 Mich. 446.

§ 601. Conclusiveness or unimpeachability of evidence.

Of admissions and receipts, see post §§ 602, 603.
Inconclusiveness of muniments of title as against third persons, see also ante ¶ 2901.
Inconclusiveness of entries of charge on account books, see ante ¶¶ 2036, 2037.
Estoppel in pais as equivalent to binding admission of fact, see Estoppel ¶ 220.
Conclusiveness and effect of recorded survey of boundary, see Boundaries § 34.
Inconclusiveness of recital of consideration in instrument, see Contracts § 143.
Conclusiveness of scale pursuant to agreement of parties, see Contracts § 185.
Conclusiveness of written evidence, see also Contracts ¶ 1253.
Conclusiveness and effect of certificate or statement of result of election, right to go behind to the returns or to the ballots, see Elections § 72.
Conclusiveness of return to execution in creditors' bill based thereon, see Creditors' Suits § 29.
Conclusiveness of judgments and records and deeds as estoppels, see Estoppel, II; Former Adjudication; Judgments, VII.
Rule against impeachment of one's own witness, see Witnesses, VI, D; and see also Examination of Witnesses, II.
Directing verdict because evidence on material point is indisputable, see Directing Verdict §§ 2, 3.

¶ 2947. Documentary evidence, comprising books of account, cannot be impeached by the party requiring its production and relying upon it.—Hulbert v. Hammond, 41 Mich. 343.

¶ 2948. A charge upon a vendor's books is not conclusive as to whom the sale was made and credit given, but may be explained and shown to be a mistake, and it may be shown that the sale was actually made and credit given to a third party.—Loranger v. Foley, 79 Mich. 244.

¶ 2949. A person against whom criminal proceedings were instituted for perjury, alleged to have been committed by him in a case to which he was a party in justice's court, sued for malicious prosecution. In this suit the justice was produced as a witness for plaintiff and testified that he could not recollect all that was sworn to before him, but had some portion of it minuted down. Held, that he could produce his memoranda, after testifying that they were made at the time the testimony was given and were correct. But such memoranda are not conclusive as to the facts sworn to, and are entitled to no more weight than the testimony of the witness would have if he were testifying from recollection; the weight of the evidence is for the jury, who must also decide whether the memoranda were correctly made and what they tend to prove. —Spalding v. Lowe, 56 Mich. 366.

¶ 2950. While school records are not conclusive in themselves as against all other evidence, yet, if they are shown to have been made in the ordinary course of duty, they are entitled to very great weight in the absence of testimony that they have been tampered with. So held in a case where such were produced to show plaintiff's attendance at school at times he claimed to have been absent by reason of injuries alleged as received by him through the defendant's wrongful act.—Thurstin v. Luce, 61 Mich. 292.

§ 602. ——Admissions by party.

Effect of pleadings in equity as conclusive evidence and of admissions by the pleadings, see Equity, VII, F.

Binding force of admissions in open court by party or counsel on trial, see Trial, V, A.

¶ 2951. Evidence that defendant, who was sought to be held liable to his daughter, upon a bill in chancery, as trustee of bonds and mortgages transferred to him by his deceased wife, testified, in an action against him by a creditor, that he had received from his wife bonds and mortgages to a specified amount, while competent against him, is not conclusive, and a finding, based upon other competent evidence in the subsequent proceeding, that the amount received was less than that testified to by him, is permissible. —Hebard v. Reeves, 112 Mich. 175.

¶ 2952. Admissions stand upon a different footing from that held by mere testimony; the jury hears the testimony, weighs it, and believes it or not, as the case may be, but a judicial admission made intelligently and with deliberation establishes the fact with reference to which it is made, and the jury must accept it as so established.—Connor v. Lake Shore & M. S. Ry. Co., 168 Mich. 29.

¶ 2953. One of the parties to an action may avail himself of an admission made by the other party when sworn as a witness in his own behalf, without being bound by other parts of his testimony.—Liesemer v. Burg, 106 Mich. 124.

§ 603. ——Receipts and acknowledgments in writing.

See also ante ¶ 2921a.

Admissibility of parol evidence to contradict or vary mere receipts, see ante § 190.

Conclusiveness of receipt evidencing accord and satisfaction, see Accord and Satisfaction §§ 13, 14.

Effect of evidence that receipt in full was signed without reading, see also Accord and Satisfaction ¶ 85.

Conclusiveness of acknowledgments to deeds, see Acknowledgments § 20.

Instructions on effect of receipt, see also Payment, V.

¶ 2954. Since a receipt may be explained, one signed in ignorance of the debtor's accountability for certain moneys concerned does not prevent the signer from recovering them.—Hart v. Gould, 62 Mich. 262.

¶ 2955. A receipt given by the register of deeds is not conclusive evidence of the payment of redemption money to him as against a purchaser.—Woodbury v. Lewis, W. 256.

¶ 2956. A recital in a deed of the amount of the consideration paid for the land conveyed is not conclusive upon the grantor, who, in an action for breach of covenant, may show that he received a less sum.—Cook v. Curtis, 68 Mich. 611.

¶ 2957. The recital of a consideration in a deed is not conclusive, and it may be shown to be greater or less than the amount stated.—Dodder v. Snyder, 110 Mich. 69.

¶ 2958. A receipt purporting to discharge a trustee under a will of liability as such trustee, the claimants under the will having attained their majority, is overcome by evidence showing an investigation of the books and accounts of the trustee by the claimants and an expert bookkeeper, which investigation showed substantial inaccuracies, and a retention of more than $25,000, not accounted for.—Jones v. Home Sav. Bank, 118 Mich. 155.

¶ 2959. In an action to recover an unpaid balance upon an account for labor the fact that plaintiff submitted two bills of particulars differing in their items, and he has signed a statement and receipt when payments were made inconsistent therewith are not conclusive against him, but there is a plain issue of fact for the jury to determine. —Snyder v. Patton & Gibson Co., 143 Mich. 350.

¶ 2959a. One who obtains a payment from his employer on the representation that it is a settlement in full is presumptively bound

by the representation, though not conclusively.—Judd v. Burton, 51 Mich. 74.

§ 604. Conflict or balance of evidence.

See also ante ¶ 2883.
See note under § 586, ante.
Particular kinds of evidence and elements of conflict, see post §§ 605-610.
Between bank deposit slips and pass books, see ante ¶ 2922.
Conflicting statements and receipt, see ante ¶ 2959.
Direct evidence opposed to opinions, see ante § 600.
Numerical weight and preponderance, see also Carriers ¶ 643; Contracts ¶ 1385.
Weight of testimony to verified facts as against more numerous witnesses to estimates, see also Bridges ¶ 55.
Numerical preponderance testifying to duress as overcoming deposition of grantor to the contrary, which was inherently improbable, see also Duress ¶ 49.
Conflicting or doubtful evidence, rule as to direction of verdict, see Directing Verdict § 14.
Province of jury to choose between diverse inferences, see also Directing Verdict § 16.

¶ 2960. In cases of conflict in oral testimony, that will be entitled to a preponderance which is most reasonable in view of all the surrounding circumstances, and is most consistent with conceded facts.—Kimball v. Myers, 21 Mich. 276.

¶ 2961. The court, in passing on conflicting proofs, will follow the probabilities though they are contrary to the impressions of witnesses of undoubted integrity of purpose.—Salisbury v. Salisbury, 49 Mich. 306.

¶ 2962. Where there is a sharp conflict in the testimony of witnesses upon many material points, the jury are not bound as a matter of law to accept as true any particular part of the testimony of a witness.—Reed v. McCready, 170 Mich. 532.

¶ 2963. Complainant's case is not made out where the evidence is as consistent with defendant's theory as with complainant's.—Dragoo v. Dragoo, 50 Mich. 573.

¶ 2964. Where witnesses are equally credible, and one asserts and the other denies a fact, and there is nothing else to turn the scales, the affirmative is not established.—Peters v. Canfield, 74 Mich. 498.

§ 605. Positive and negative evidence.

What regarded as negative, see post § 606.
Sufficiency of evidence to establish negative, see ante § 583.
Presumptions opposed to positive evidence, see post § 609.

¶ 2965. Positive testimony as to the giving of stationary railway signals near a highway crossing cannot, as matter of law, control negative testimony on the same subject. If such proofs conflict their weight is for the jury.—Rhoades v. Chicago & G. T. Ry. Co., 58 Mich. 263.

¶ 2966. The testimony of bystanders that they did not hear the statutory signals which a railroad company claims to have given before making a crossing is negative evidence, and without weight, unless there is something in the surrounding circumstances tending to show a probability that the witnesses would have heard the signals if given.—McCullough v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 234.

¶ 2967. The testimony of six witnesses that they did not hear the bell or whistle of an engine, is negative and without weight to go to the jury as against that of sixteen witnesses, six paying attention, that they heard them, including that of the enginemen that the bell was automatically operated and had been set in operation some time before. Shufelt v. Flint & P. M. R. Co., 96 Mich. 327, per Grant, J., Long and Hooker, JJ., concurring in the result without considering this point, and Montgomery and McGrath, JJ., dissenting on the ground that though perhaps not strong enough to support a jury finding that the signals were not sounded, yet the evidence was not so negative as to be withheld from the jury.

¶ 2968. In an action for personal injuries sustained at a railroad crossing by the plaintiff while riding in a covered buggy, a verdict and judgment for the plaintiff based on the defendant's negligence should be set aside as against the weight of the evidence where seven witnesses testified that the defendant gave the necessary signals and the plaintiff alone testified that the whistle was not blown but could not say whether the bell was ringing, she being partly deaf and her testimony conflicting with that given by her on a former trial.—Bond v. Lake Shore & M. S. R. Co., 128 Mich. 577.

¶ 2969. In an action for personal injuries caused by the upsetting of a sleigh on account of an alleged rise in an electric railway track above the level of the street planking, a verdict for the plaintiff is against the clear weight of the evidence where eight of the defendant's witnesses testify to a careful examination of the track and that the planking was flush with the rails while none of the plaintiff's witnesses testify to such examination of the situs as would entitle their testimony to much weight.—Gregory v. Detroit United Ry., 138 Mich. 368.

¶ 2970. In a suit to set aside a sewer assessment, testimony by the complainant, that he did not remember receiving notice of ordering construction of the sewer but that he would not say he did not receive such notice, is not sufficient to establish the lack

of notice as against an affidavit by the service clerk of the service on the complainant three days after the council ordered the sewer and fixed the district.—Walker v. City of Detroit, 138 Mich. 639.

¶ 2970a. On a suit by a patron against the owner of a moving picture theater, the plaintiff testified that she fell on a curved step in the exit that was unlighted and without a hand rail, and her testimony was supported by four witnesses. Seven witnesses for the defense testified that hand rails had been provided and that the exit was amply equipped with electric light. There were interested and apparently disinterested witnesses on both sides and the jury viewed the premises. Held, a verdict for the defendant was not against the weight of the evidence. —Branch v. Klatt, 173 Mich. 31.

Weight of positive and negative testimony as to locomotive and street car signals, see note, 10 N. C. C. A. 571-617.

§ 606. ——What regarded as negative.

Negative testimony as to sale by association, see Associations ¶ 43.

¶ 2971. Testimony of witnesses who were watching an approaching engine under circumstances which made it improbable that signals could have been given without being heard by them, that no signals were given, is not "negative," so as to entitle the company to an instruction, in an action by one who was struck by the train, that "the positive testimony of witnesses who had opportunity to know that the signals were given should outweigh the testimony of witnesses who did not hear them, unless in some manner their attention had been called to it."—Lonis v. Lake Shore & M. S. R. Co., 111 Mich. 458.

¶ 2972. Testimony that the witnesses gave particular attention to the approach of an engine, and listened for the whistle, but that no whistle was sounded or bell rung, is not negative in its character.—McDuffie v. Lake Shore & M. S. R. Co., 98 Mich. 356.

¶ 2973. Testimony that the witness did not hear a train whistle at a certain crossing on the day when an accident occurred, although on that day he was working where he had been in the daily habit of hearing the whistle, and although the wind was blowing towards him from the crossing, was properly submitted to the jury which might regard it as more than merely negative.—Sanborn v. Detroit, B. C. & A. R. Co., 99 Mich. 1.

¶ 2974. Testimony that witnesses never heard of a sale by an association or that the buyer owned the property is negative on the question whether the sale was made.—Lingle v. Dalzell, 141 Mich. 399.

§ 607. Written and oral evidence.

¶ 2975. To establish an equitable right in lands, in opposition to the muniments of title, the parol evidence of the understanding of the parties ought to be very clear and distinct, and should leave no doubt regarding the precise terms of the agreement.—Van Wert v. Chidester, 31 Mich. 207.

¶ 2976. Where dealings between partners, who are connected by family ties, have been carried on for a long series of years without keeping any strict account of them, but in the confidence which springs from such relations, and litigation thereon arises between them and their successors, a court will be disposed to be governed by such indications as appear in the written evidence of their transactions, rather than by the recollections of the parties.—Wiswall v. Ayres, 51 Mich. 324.

¶ 2977. A solicitor's testimony that he has examined the record of a township board and is unable to find a certain resolution cannot prevail against a paper certified according to law as a true copy of part of the record and which contains the resolution in question.—Boyce v. Auditor-General, 90 Mich. 314.

¶ 2978. Where one in possession of real estate claims a right to title contrary to the record title, he must establish the contract to convey and its alleged performance by a clear and satisfactory preponderance of evidence, or the record title must control.—Delosh v. Delosh, 171 Mich. 175.

§ 608. Acts and declarations in conflict.

Implied admission against positive evidence of contract right, see also post ¶ 2982.

¶ 2979. Where there is conflicting testimony as to the admissions of parties, it is safer to trust to the inferences to be drawn from their conduct than to attempt to reconcile such a conflict without regard to their conduct. Their acts, clearly shown, are more reliable than any recollection of their words. —Russell v. Miller, 26 Mich. 1.

§ 609. Presumptions or inferences against positive evidence.

¶ 2980. The suspicion, where a party does not call an apparently important witness, that he dares not call him, cannot have the force of evidence to establish fraud or to overturn the evidence of other facts showing good faith.—Woodhull v. Whittle, 63 Mich. 575.

¶ 2981. When the jury permits inferences to outweigh the positive testimony of witnesses not impeached generally the proved or admitted facts and the reasonable inferences therefrom should be inconsistent with such testimony.—Bowsher v. Grand Rapids & I. Ry. Co., 174 Mich. 339.

¶ 2982. The acceptance of certain amounts monthly for services does not establish conclusively that such amounts were full com-

pensation where there is evidence of a contract for additional compensation.—Shane v. Shearsmith's Estate, 137 Mich. 82.

¶ 2983. Testimony that a letter was duly mailed, permitted the inference that it was received, notwithstanding defendant's denial. —Lee v. Huron Indemnity Union, 135 Mich. 291.

Physical facts as overcoming presumption of due care in case of fatal accident in absence of eyewitness, see note, 12 N. C. C. A. 535-549.

§ 610. Evidence opposed to natural probability.

Judicial notice of natural laws or physical forces contradictory of testimony, see also ante ¶ 4.

Testimony contradictory of known operation of natural forces, see also ante ¶ 4.

Credibility of witnesses affected by intrinsic qualities of testimony, see Witnesses, VI, A.

¶ 2984. Testimony of the lessor as to a lease necessary to defeat a claim of adverse possession, though not directly contradicted, may be discredited by circumstances where it was wholly uncorroborated and intrinsically improbable.—Howatt v. Green, 139 Mich. 289.

¶ 2985. A plaintiff testified that he was injured by breaking through the deck of a threshing machine manufactured by the defendant. His testimony was not contradicted by oral testimony. Held, the court would not hold the verdict to be against the evidence on the ground that the structure of the machine made the plaintiff's contention impossible.—Pierce v. C. H. Bidwell Thresher Co., 158 Mich. 356.

XI. WITNESSES AND MEANS OF PRODUCTION.

§ 611. In general; cross-references.

Competency of witnesses as distinguished from the competency of their testimony, see Witnesses, II, V.

Incompetency of witness to testify of matters equally known to another now dead or incompetent, see Witnesses, IV.

Privileged communications to witness of which he is incompetent to testify, see Witnesses, V.

Privilege of witness to decline to make criminating answers, see Examination of Witnesses, IV.

Immunity of witness from prosecution on his own testimony, see Witnesses, I; Constitutional Law § 201; Indictment, VIII, B.

Separation of witnesses from each other and exclusion from court during testimony of others, see Trial, V.

Subpoenas, subpoenas duces tecum, and privileges of attending witnesses against process or arrest, see Witnesses, I; and see Process, II; Arrest § 5; Civil Arrest § 2.

Deposition as means of producing evidence, see Depositions.

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XII. INTRODUCTION, OFFER AND STRIKING OR WITHDRAWING.

§ 612. In general; cross-references.

Time for offers and order in which proofs should go in, see Trial, V, B.

Trial practice in offering, ruling upon, and receiving evidence, see Trial, V.

Striking out or withdrawing evidence received or offered, see Trial, V.

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Use of photographs on appeal, necessity of introduction on trial, see Appeal ¶ 1116.

XIII. EXAMINATION AND OBJECTIONS.

§ 613. In general; cross-references.

Compulsory physical examination, see also ante § 577.

Examination, cross-examination and redirect examination of witnesses, form of questions, responsiveness of answers, range and latitude, see Examination of Witnesses.

Objections and exceptions, the necessity for them and their form and sufficiency, see Trial, V, C; Saving Questions for Review.

Objections to depositions and motions to suppress, see Depositions, VI.

Review of rulings on admission or exclusion of evidence, and effect of erroneous rulings as ground for reversal or new trial, see generally Appeal; Harmless Error; Saving Questions for Review (taking objections and exceptions); New Trial.

EVIDENCES OF DEBT to EXAMINATION.

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Evidences of Debt—
- See Negotiable Instruments; Nonnegotiable Paper; Mortgages; Chattel Mortgages.
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Right to inspect and examine public records, see Records.
Right to inspect and examine corporate books and papers, see Corporations, XVIII.

EXAMINATION OF WITNESSES.

TREATS of the mode of interrogating witnesses in civil and criminal trials and of the manner of their answering and their duties and privileges in answering. It excludes competency of the evidence offered or elicited (see Evidence; Indictment, VIII, B), the competency of the witnesses (see Witnesses, II-V), trial practice in offering, objecting, ruling upon offers, and receiving evidence (see Trial, V; Indictment, IX, B), the order in which proofs shall be introduced (see Trial, V, B; Indictment, IX, B), the duty of attendance as witness (see Witnesses, I), and the immunity from prosecution on testimony given (see Witnesses, I). Examination on taking depositions is treated in Depositions, III.

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I. IN GENERAL.

§ 1. In general, interrogation or narrative method.

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Permitting counsel to consult with witness during examination, see Trial, II, V, A; Indictment, IX, A, B.

Rebuke or intimidation of witness by court's rulings and remarks as error, see Trial, II; Indictment, IX, C.

Mode of taking testimony and examining in chancery and probate courts, see Equity, VIII, § 176; Probate Courts, II.

Examination on taking of depositions, see Depositions § 11.
Preliminary examination on arrest for crime, see generally Arrest, VII.
Cautionary instructions to cure impropriety in examination or in responses of witnesses, see Instructions, VI; Indictment, IX, E.
Necessity for signing testimony on disbarment proceeding, see Attorneys § 6.
Review of rulings regulating examination and mode of questioning, see Appeal § 406; Indictment, XVI.
Showing in record for review of rulings, see Appeal §§ 182, 183; Indictment, XVI, C.
Mode of making and saving objections for review, see Saving Questions; Indictment, XIV.

¶ 1. It is discretionary for a judge to refuse to allow a witness to give his testimony without questioning.—Clark v. Field, 42 Mich. 342.

¶ 2. The trial court does not go beyond its discretion in allowing a witness, examined by deposition, to testify both directly and in rebuttal.—Thurston v. Luce, 61 Mich. 292.

§ 2. Volunteered testimony.

Argumentative answers, see post § 32.
Voluntary statement by accused without oath, see Indictment, IX, A.

¶ 3. It is error, requiring reversal, to permit a party to prejudice the jury by improper and immaterial statements volunteered on his cross-examination.—Williams v. Clink, 90 Mich. 297.

§ 3. Calling, swearing and qualifying witnesses.

Calling adverse party or his witnesses for cross-examination, see post § 81.
Regulation of calling, custody and sequence of witnesses, see Trial, V; Indictment, IX, B.
Recalling witness for further testimony or examination, see Trial, V; Indictment, IX, B.
Receiving unsworn statement of accused, see Indictment, IX, A.
Keeping witnesses separated and out of court room until they have testified, see Trial, V, D; Indictment, IX, B.
Summoning witnesses and calling witnesses to testify on motion of court or of adverse party, see Witnesses, I.
Duty of state to call witnesses on trial for crime, see Indictment, IX, B.
Presumption from failure to call witness, see Evidence § 65; Indictment, VIII, A.
Examination of parties in divorce suits in open court, see Divorce § 88.
Applicability of statute for examination of party as to payments made to foreclosure suits, see Equity ¶ 733.
Power of court to call parties or witnesses to testify "for furtherance of justice," see 1916 C. C. Rule 36; and see Jud. Act, chap. I, § 29; Comp. L. 1915, § 12034.
Swearing by uplifted hand or by affirmation instead, see Jud. Act, chap. XVII, §§ 80, 81; Comp. L. 1915, §§ 12568, 12569.

§ 4. Counsel allowed to examine; number and changes.

Rules for examination, number of counsel allowed to participate, see 1916 C. C. Rule 42, § 2.

¶ 4. Under circuit court rule 63, which provides that "one counsel only on each side shall examine and cross-examine witnesses," it is held no abuse of discretion to allow one of plaintiff's attorneys to continue and complete the examination of a witness whom the other attorney had commenced to examine.—Malone v. Gates, 87 Mich. 332.

¶ 5. Where a witness who has been cross-examined by one of the attorneys for the opposing party is recalled and examined on a matter not brought out on his first examination, the court under circuit court rule 63 may refuse to permit the other attorney to cross-examine him upon such new matter.—Cook v. Standard Life & Accident Ins. Co., 86 Mich. 554.

§ 5. Questions by court.

Leading question by court, see post § 13, ¶ 46.

¶ 6. It is prejudicial error for the court, without consent of counsel, to take partial control of the examination of a witness, and to dismiss him abruptly.—Darrow v. Pierce, 91 Mich. 63.

¶ 7. A judge may question witnesses to see that the facts are properly brought before the jury, but in so doing it is his duty to so frame the questions as not to indicate his own opinion, and not to lay undue stress upon particular features of a witness' testimony tending to impeach him. In re Stockdale's Estate (Appeal of City of Flint), 157 Mich. 593.

§ 6. Scope and latitude.

Form and manner of questions, see post §§ 8-10.
Assuming, leading and suggesting facts or answers, see post §§ 12-17.
Refreshing memory and reminding witness, see post §§ 20-26.
Repetitions and requestioning, see post § 29.
Explanations and corrections of testimony, see post § 34.
As to repetitions and requestioning, see post § 29.
Of cross-examination and redirect examination, see post § 37 et seq., § 90 et seq.

Limiting further examinations after cross-examination, see post §§ 89, 90.
Relevancy of evidence in general, see Evidence, III, and references there collected; Indictment, VIII, B.
Competency of particular kinds of evidence, see Evidence, IV-IX; Indictment, VIII, B.
Scope of issues made by pleadings, see Pleading, IX, X, and specific civil topics; also Indictment, VIII, B (criminal evidence).
Scope and latitude on impeachment of witness, see Witnesses, VI, D.
Latitude of examination allowable on hearing of claims against decedent's estates, see Estates of Decedents ¶ 610a.
[Note. Where the evidence is circumstantial, indirect, remote, or rebuttal, the question how far the questioning may range without becoming immaterial and irrelevant is a question of admissibility. See Evidence, III; Indictment, VIII, B; and references there collected. See also the various specific topics, e. g., Fraud; Negligence, V; Contracts, X, B; and the like.]

¶ 8. Exact rules cannot be prescribed to limit examinations in criminal prosecutions; circumstances must determine how far back the prosecution may carry them.—People v. Niles, 44 Mich. 606.

¶ 9. Considerable latitude should be allowed in the examination of an illiterate and ignorant witness.—People v. Wheeler, 186 Mich. 489.

¶ 10. A wide range of examination is allowable where questions of fraud are involved.—Comstock v. Smith, 20 Mich. 338; Cook v. Perry, 43 Mich. 623; Dibble v. Nash, 47 Mich. 589; Gutsch v. Pittsley, 51 Mich. 566; Burrill v. Kimball, 65 Mich. 217; Hyde v. Shank, 77 Mich. 517; Loud v. Solomon, 188 Mich. 7.

¶ 11. Where the issue involves a charge of fraud a wide range of inquiry into transactions between the parties is allowed.—Gumberg v. Treusch, 103 Mich. 543; French v. Ryan, 104 Mich. 625.

§ 7. Province of direct, cross and redirect examinations.

Direct as limiting scope of cross-examination, see post §§ 37, 45 et seq.
Scope of redirect and relation to direct and cross-examinations, see post § 90 et seq.
Calling on cross-examination for repetition of matter brought out on direct, see post §§ 39, 40.
Admissibility of redirect as to matter that might have been shown in chief, see post § 95.
Order and sequence of proofs as distinguished from examinations of same witness, see Trial, V, B; Indictment, IX, B.
Order in which direct and rebutting and redirect matter shall be introduced, see Trial, V, B; Indictment, IX, B.

¶ 12. Although a witness called as an expert on the subject of insanity may base his opinion upon his observation and experience in cases similar to the one at bar, he cannot, on his direct examination, be questioned concerning the particular cases.—People v. Holmes, 111 Mich. 364.

¶ 13. After a physician has stated the condition in which he found plaintiff he may be asked whether plaintiff's symptoms, actions and complaints were simulated, and such question need not be withheld until rebuttal.—Miller v. Michigan Cent. R. Co., 167 Mich. 21.

¶ 14. It is proper, on direct examination, as well as on cross-examination, to ask an impeaching witness if he would believe the impeached witness under oath.—Keator v. People, 32 Mich. 484.

§ 8. Form and manner of questions.

[Note. Relatively few objections to the question go to its form. Nearly all are aimed at the evidence which it calls for. Hence the decisions assume that the answer would have been given as objected to and pass on the admissibility of that evidence. Such decisions belong in topics, Evidence; Indictment, VIII, B; and in the specific topics as "evidence."]
Propriety of testifying in narrative manner, see ante § 1.
Calling for particularity and details, see post § 9.
Calling for conclusions, see post § 10.
Preliminary questions, see also post § 25.
Construction and intendment of questions, see post § 11.
Assuming facts in question, see post § 12.
Leading witness or suggesting answer, see post §§ 13-17.
Form and phrasing as translated by interpreter, see post § 19.
Manner of reminding or refreshing memory, reading memoranda or paper to be used, see post §§ 25, 26.
Repeating questions and requestioning witness, see post § 29.
Right to inspect paper before answering respecting it, see post § 107.
Form and sufficiency of hypothetical and other questions to experts, see Evidence § 298 et seq.; Indictment, VIII, B.
Form of interrogatories in depositions, see Depositions § 9.
Making and sufficiency of objections to questions, see Trial, V, C; Indictment, IX, B.
Making frivolous and unnecessary objections as error, see Trial, V, C; Indictment, IX, B.

Admission of question and answer for limited purpose and sufficiency of rulings and instructions to limit consideration by jury to proper purposes, see Trial, V, C; Instructions, VI; Indictment, IX, B, E.

Asking or putting questions in hearing of jury to create prejudice or cast innuendo as misconduct, see Trial, II, V; Indictment, IX, B.

¶ 15. A question calculated to bring out the improbability of a thing imputed to the party asking it is proper.—Julius King Optical Co. v. Treat, 72 Mich. 599.

¶ 16. It is not reversible error to sustain an objection to the double question, "Did he say anything what was to be done with the property? Did he say anything about his family?" since it contained two questions and it would have been easy for counsel to obtain from the witness any information which was material and competent by other questions.—Wilcox v. Wilcox, 139 Mich. 365.

¶ 17. A witness testifying as to the damage which cattle, loaded upon a train of cars at different places, had suffered in consequence of detention on the road, was asked what, in his opinion, was "the extra shrinkage of the stock at Osseo, Hillsdale, Coldwater and Detroit, above what it would have been had it gone on the regular train." Held, that as the cattle had been on the train for different lengths of time, they must have been differently affected, and the question for this reason ought to have been overruled.—Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

¶ 18. The practice of handing to witnesses who had testified in some other proceeding, a copy of the testimony given by them and asking them to read it and then directing their attention to the subject-matter covered by the copies, is disapproved.—Lorimer v. Lorimer, 124 Mich. 631.

§ 9. ——Particularity and details.

Details and generality in answers, see post § 34.

Question not confining witness to his own knowledge, see also post ¶ 51.

Admissibility of complementary details and particulars of matter in evidence, see Evidence, III; Indictment, VIII, B.

Admissibility of substance rather than exact words of writing as secondary evidence, see Evidence §§ 152, 584; Indictment, VIII, B.

Admissibility of substance of former testimony of witness or of admissions, confessions and statements made out of court, see Evidence §§ 152, 584; Indictment, VIII, B.

Particularity in identifying time, place, details, and matter of impeachment, see Witnesses, VI, D.

¶ 19. In an action for money had and received plaintiff was asked as a witness how much defendant owed him. Held, that the question was not necessarily improper for being too general, especially where it appeared that details were gone into and evidence of items was submitted that was not given in the record.—Donkersley v. Levy, 38 Mich. 54.

¶ 20. In a suit to recover salary under a contract of employment "if satisfactory," a question whether the employee gave satisfaction to his employer while employed is considered too general, unless asked by way of introduction.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

¶ 21. Where the ownership of chattels is disputed, and one of the parties testifies to having had a bill of sale of them which was lost, it is within the discretion of the trial judge to permit the witness to be asked what property it conveyed, though it would be better to ask for its contents; the other party could cross-examine into all particulars.—Stewart v. Brown, 48 Mich. 383.

¶ 22. Where on issue of a breach of warranty of an engine warranted to effect a saving in fuel "equal to that claimed for the Corliss," the evidence of both parties shows that the saving so claimed is fifty per cent, the inquiry should be confined to a fifty per cent saving, and the question: "How much less is this machine worth than it would be if it would effect the saving of the Corliss engine?" should be excluded.—Wickes Bros. v. Swift Electric Light Co., 70 Mich. 322.

¶ 23. A litigant's statements adverse to his own claim are always admissible, and it is immaterial that the examination with reference thereto is not conducted with the particularity required when impeachment is attempted.—Reiser v. Portere, 106 Mich. 102.

§ 10. ——Calling for indirect answers and conclusions.

Answers amounting to conclusions in form, see also post ¶¶ 152, 154.

Cross-question calling for conclusion, see also post § 83.

Propriety of cross-questions, see post § 42.

Questions objectionable as calling for improper conclusions, see also Evidence, VI, A; Indictment, VIII, B.

Striking out answers as conclusions, see Trial, V, C; Indictment, IX, B.

Form of question to expert witness, see Evidence §§ 298-303; Indictment, VIII, B.

Reduction of hypothetical questions to writing, see Evidence § 304; Indictment, VIII, B.

Exclusion of opinion answers on ultimate questions, see also Evidence § 207; Indictment, VIII, B.

Form of question calling for contents of writings, see also Evidence ¶¶ 605, 606.

¶ 24. The question how many persons are ordinarily required upon a completed railroad to keep a specified length of the line in repair is properly excluded as incapable of a direct answer.—Tower v. Detroit, L. & L. M. R. Co., 34 Mich. 328.

¶ 25. A question that is obviously preliminary in its nature, asked with the purpose of following it up with details, may be answered by the witness, although it calls for a conclusion rather than for a fact. The proper course to be pursued by opposing counsel is to cross-examine as to the details. —Lockard v. Van Alstyne, 155 Mich. 507.

¶ 26. If questions put to prove a contract call for the witness' inferences rather than the actual terms of the contract, they are improper.—Ward's Cent. & P. Lake Co. v. Elkins, 34 Mich. 439.

¶ 27. In an action for the breach of a contract to assort logs, a question as to whether the defendant drove and sorted all of plaintiff's logs specified in the contracts, was not subject to the objection that it called for an opinion and not a statement of facts, and that it tended to confuse because it combined the driving and sorting contracts; as the question did call for a statement of facts, and was not confusing where the direct and cross-examinations elicited all the facts in regard to the transaction.—Bellows v. Crane Lumber Co., 119 Mich. 424.

¶ 28. In proving the contents of a lost deed a witness should not be asked what was its "sense," but what was its language or the substance of the language.—Holmes v. Deppert, 122 Mich. 275.

¶ 29. The question in a will case whether or not the testator was an eccentric man is not objectionable as calling for a conclusion instead of a fact.—Fraser v. Jennison, 42 Mich. 206.

¶ 30. A question, "Under whose control was [testator] during the last six years of his life, that you saw," calls for a conclusion.—O'Connor v. Madison, 98 Mich. 183.

¶ 31. In an action against a railroad for killing cattle, the question as to what if any other defect the witness noticed in the cattle guard in question, asked of a witness who had given an incomplete description of the guard, was improperly excluded on the ground of calling for a conclusion.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 32. Where the branches of a tree, near the line where a line fence was being rebuilt by defendant, were cut under the claim that it was necessary in order to establish the line for the fence, questions to a witness whether it was necessary in lining out the fence, to cut these branches, is not objectionable where it is manifest that the inquiry was whether a person could sight along the line without cutting out these branches.—Newberry v. Bunda, 137 Mich. 69.

¶ 33. In an action for personal injuries a question asked a doctor testifying for the defendant, as to whether he had not testified that the plaintiff had told him that he had been drunk on the day before the accident, held properly excluded on objection to form where the defendant was not prevented from showing the extent to which the plaintiff's condition might have been due to indulgence in intoxicating liquor.—Foley v. Detroit & M. Ry. Co., 193 Mich. 233.

¶ 34. A question put to a motorman, who ran the car which injured plaintiff, and is called for cross-examination under Pub. Acts 1909, No. 307, as to what distance he could stop the car in under the conditions in question with the load on and the car going at the rate of 35 miles per hour, calls for a fact of knowledge and is not a hypothetical question so as to render his answer inadmissible. —Walter v. Detroit, J. & C. Ry. Co., 191 Mich. 667.

§ 11. Construction and intendment of questions.

Construction and effect of answers, see post § 31.

Rules as to generality and particularity of questions, see ante § 9.

What regarded as leading or suggestive, see post §§ 13-17.

As calling for conclusions, see also ante § 10.

¶ 35. Questions put to witnesses must be understood to be framed so as to conform to the common understanding.—Parker v. Luce, 14 Mich. 9.

¶ 36. A proper question to a witness cannot be made improper by the statement of irresponsive and objectionable matter in reply. —Wilcox v. Ney, 47 Mich. 421.

¶ 36a. Misnomer of an object in the question cannot be regarded as an error where the name used and the correct name were similar in sound and the jury could not have been misled.—Osten v. Jerome, 93 Mich. 196.

¶ 37. In an action for breach of contract to furnish free telephone service, a question as to what is the "damage" to the plaintiff on account of the failure to furnish the service is not erroneous as including both law and fact where the connection in which the question was put shows that the "value" of the service was the specific item called for by the question.—Zabel v. New State Tel. Co., 127 Mich. 402.

¶ 38. A question in an action for damages for personal injuries as to how many times the witness heard plaintiff during the summer, after the injury, "speak of his back

troubling him" is not improper as calling for a narration of past suffering, as it simply calls for complaints, if any, made by plaintiff of his then condition.—Loose v. Township of Deerfield, 187 Mich. 206.

§ 12. Questions assuming facts.

Redirect questions hypothesizing matters touched in prior examinations, see post ¶ 660.

Hypothetical questions to experts, see Evidence § 298 et seq.; Indictment, VIII, B.

¶ 39. A question which assumes the existence of a fact not proved is objectionable.—People v. Lange, 90 Mich. 454.

¶ 40. On a suit by a patron against the owner of a moving picture theater for injuries sustained on stumbling on an unlighted curved step, although evidence of prior similar accidents is admissible, a question as to how many times a day while the witness was standing near the step did he find people stumbling, is objectionable as assuming facts not proved and as including accidents subsequent to the one in issue.—Branch v. Klatt, 173 Mich. 31.

§ 13. Leading and suggestive questions.

When allowable and discretion to allow, see post §§ 14-17.

Leading questions through interpreters, see post § 19.

Leading question in refreshing memory, see post ¶ 90.

Impropriety of cross-examining one's own witness, see post § 35.

Striking out answers led from or suggested to witness, see Trial, V, C; Indictment, IX, B.

Allowance or exclusion as harmless error, see Harmless Error; Indictment, XV.

¶ 41. The supreme court severely censures the practice of putting the statements of counsel into the mouths of witnesses.—Hart v. Brockway, 57 Mich. 189.

¶ 42. A leading question points out the desired answer, and does not merely call for an affirmative or negative.—McKeown v. Harvey, 40 Mich. 226.

¶ 43. A question to be answered by yes or no, asking whether certain work conformed to the contract specifications, is not necessarily objectionable as leading, especially if it could not well have been asked in any other way that would not have been open to the same criticism.—McKeown v. Harvey, 40 Mich. 226.

¶ 44. No question is leading that does not suggest an answer (so held by two justices, two others concurring in result of case).—Stoudt v. Shepherd, 73 Mich. 588.

¶ 45. The contestants of a will put the following questions: "Did you notice during the spring any weakening of [testator's] mind?" and "In your opinion, during the spring of 1877, had [testator's] mind weakened?" Held, that these questions were not leading.—Fraser v. Jennison, 42 Mich. 206.

¶ 46. It is allowable for a trial judge to ask a witness whether a conversation testified to as having taken place in his presence could have gone on without his hearing it. The question is somewhat leading, but no more so than is sometimes allowed in impeaching questions, to save time; and, if directed merely to the substance of the alleged conversation, is less objectionable for its leading character than if it set out the precise language sworn to.—Driscoll v. People, 47 Mich. 413.

¶ 47. Where the good faith of a transfer from a son to his father is in question in an action of replevin brought by the father to recover the property after it had been seized in an attachment against the son, it is not leading, and it is proper to ask a witness who aided in the transfer whether there was any suggestion by the parties that they were seeking to avoid creditors, or anything of that kind; it is also proper to ask the attachment debtor whether any portion of his object in making the transfer was to delay, hinder or defraud creditors.—Hart v. Newton, 48 Mich. 401.

¶ 48. It seems that the question, "Will you state whether or not, in your judgment, the samples now shown you are off the pieces that were stolen," is not objectionable as leading.—Morrissey v. People, 11 Mich. 327.

¶ 49. In prosecuting a claim against the estate of a son for articles converted by him while living on the estate of his father, a daughter of the plaintiff's intestate, after stating that the mother "stayed right there at her own home," was asked "and [the son] took the whole thing and ran it and carried it on?" Held, that this question called for the deductions of an interested witness upon a subordinate issue which belonged to the jury, and that it led too far and its allowance was erroneous.—Patrick v. Howard, 47 Mich. 40.

¶ 50. A question whether an officer was instructed to go to a given place several days before a levy, and whether he did go, is properly excluded as leading, where the desired answer was to show that the visible presence of the officer was pursuant to a threat of attachment.—Goeschel v. Fisher, 108 Mich. 212.

¶ 51. Defendant in an action for selling liquor to plaintiff's husband admitted that he himself had furnished the liquor on certain specified occasions. Held, that a question by his own counsel as to whether those were the only times the husband got liquor at his place was objectionable as leading, and as

not confining defendant to sales within his own knowledge.—Kehrig v. Peters, 41 Mich. 475.

¶ 52. In a manslaughter case growing out of an abortion it is not leading to ask the man responsible for the pregnancy of deceased what a physician consulted about it said "about marrying" the girl, or what accused said when he was consulted "in reference to the tools, if anything," or whether accused said he had to have a statement of some kind, or whether he paid any money to accused. Such questions merely called attention to subjects of inquiry.—People v. Hodge, 141 Mich. 312.

¶ 53. In a personal injury suit plaintiff's expert witness exhibited certain X-ray pictures of plaintiff's body. On cross-examination he was asked whether or not the pictures demonstrated anything abnormal and stated that he would not be positive about that. On redirect examination he was asked whether the plates indicated a deposit of any foreign substance in the muscles. Held, the ruling of the trial court permitting an answer to said question did not constitute error on the ground that the question was leading.—Wilkens v. Detroit United Ry., 169 Mich. 437.

§ 14. ——Propriety and occasions, discretion to allow.

To adverse, reluctant or hostile witness, see post § 15.
To participant, accomplice or subject of crime, see post § 16.
To accused testifying as witness, see post § 17.
To adverse party or his witness called to stand for cross-examination, see post § 82.
Refreshing memory of witness, see post § 20 et seq.
Propriety on redirect, see post § 105.
Review of rulings on leading questions, see Appeal § 406; Indictment, XVI.
Propriety of striking out answers given to leading or suggestive questions, see Trial, V, C; Indictment, IX, B.

¶ 54. Questions in leading form are not improper when rendered necessary by the nature of the inquiry.—Bullard v. Hascall, 25 Mich. 132.

¶ 55. The asking of questions upon direct examination of an extremely leading and suggesting character should be avoided, even though it may not be reversible error to allow them to be answered.—Cone v. American Elec. Fuse Co., 145 Mich. 536.

¶ 56. The allowance of leading questions is a matter entirely within the discretion of the trial court.—Fowler v. Fowler, 111 Mich. 676; People v. Roat, 117 Mich. 578; Lungerhausen v. Crittenden, 103 Mich. 173; Webb v. Feather's Estate, 119 Mich. 473; Burnham v. Home Ins. Co., 119 Mich. 588; Cairbre v. McQuillen, 162 Mich. 679.

¶ 57. It is within the discretion of the trial court to permit counsel to ask a leading question upon a wholly immaterial matter.—Mason v. Partrick, 100 Mich. 577.

¶ 58. To allow leading questions by the prosecutor is a matter for discretion of the trial judge.—People v. Farrell, 146 Mich. 264.

¶ 59. Admitting questions objected to as leading was not an abuse of discretion where they were merely calculated to reach facts concerning which it was easy to sift the witness by cross-examination, she being unable to speak English and testifying by interpreter.—People v. Jensen, 66 Mich. 711.

¶ 60. In a prosecution for seduction under promise of marriage where the woman testified through an interpreter it was not objectionable as leading to allow the prosecutrix to be asked on her examination in chief whether she had intercourse with respondent after the promise, and whether, without such promise, she would have allowed intercourse.—People v. Jensen, 66 Mich. 711.

¶ 61. A leading question asked, on the theory that the witness was unwilling, as to what he had said on a previous occasion, is not assignable for error because no unwillingness appears, where on the record the question seems a proper one to refresh the witness' memory and the answer was such as to show that no prejudice resulted.—Stone v. Standard Life & Acc. Ins. Co., 71 Mich. 81.

¶ 62. In an action by a traveling salesman to recover a monthly salary and his expenses under an agreement with his employer, denied by the latter, to pay such expenses while plaintiff was at headquarters, it is not an abuse of discretion to permit plaintiff to answer the question whether any arrangement was ever made about the home expenses other than the first agreement that they should be paid by defendant.—Church v. John Davis & Co., 93 Mich. 477.

¶ 63. Upon a trial for breaking and entering a store with intent to commit larceny, the prosecution may put leading questions to the store's manager who made and withdrew the first complaint, concerning money received by him as pay for the articles stolen, and concerning his withdrawing the complaint and returning the money, and also as to statements made by him about the identity of the stolen goods when they were discovered.—People v. Roat, 117 Mich. 578.

¶ 64. In a suit for injuries against a township arising from the sliding of plaintiff's sled off an embankment constructed on a public road across a ravine, plaintiff

is properly refused permission to ask a witness riding in the sleigh why she was afraid of the road at the point in question, where the court offers to permit counsel to discover all that the witness knows about the condition of the road.—Stanton v. Tp. of Webster, 170 Mich. 428.

¶ 65. In a prosecution against a druggist for the illegal sale of intoxicating liquors, leading questions as to the registration of sales were held properly excluded where it did not appear that the witness was hostile, confused or unable to understand the English language.—People v. Frost, 179 Mich. 180.

§ 15. ——To adverse, reluctant or hostile witness.

See also ante ¶ 61.

¶ 66. When a witness unexpectedly shows by his testimony that he is adverse the party calling him may be permitted to ask leading questions.—McBride v. Wallace, 62 Mich. 451.

§ 16. ——To participant, accomplice or subject of crime.

¶ 67. One cannot be examined on the assumption that he is an unfriendly witness before there is any showing to that effect or any evidence from him to warrant it.—People v. Lyons, 51 Mich. 215.

¶ 68. Where the counsel of respondent in a criminal case states that he is advised the prosecuting witnesses are reluctant to testify, the court may in its discretion permit leading questions.—People v. Hennard, 162 Mich. 225.

¶ 69. Plaintiff's counsel, in a personal injury case, should have been permitted to put leading questions to defendant's engineer and to introduce his contradictory statements, where it was necessary to call such witness in order to make out plaintiff's case.—Kaess v. Tivoli Brewing Co., 149 Mich. 371.

¶ 70. The court may in its discretion permit leading questions to be put to a hostile and evasive witness.—Bales v. Evans, 182 Mich. 383.

¶ 71. The prosecuting attorney may be permitted to put leading questions to one of his own witnesses, or even to call her attention to an affidavit previously made by her and inconsistent with her testimony on the trial, where it is evident she is an unwilling witness and is seeking to screen respondent.—People v. Gillespie, 111 Mich. 241.

¶ 72. The trial court may, in its discretion, permit the prosecution to put leading questions to a witness for the people whose answers are evasive, and who evinces a disposition to favor respondent.—People v. Caldwell, 107 Mich. 374.

¶ 73. Whether the prosecuting attorney may examine an unwilling witness for the people by leading questions in discretionary with the trial court.—People v. Johnson, 186 Mich. 516.

¶ 74. Witnesses whom the prosecution is compelled to call because present at the occurrence for which respondent is on trial may be pressed with searching questions in behalf of the people if found not disposed to frankness.—People v. Deitz, 86 Mich. 419.

¶ 75. The court has discretion to permit the prosecuting attorney to ask leading questions of a particeps criminis who testifies in behalf of the people.—People v. Considine, 105 Mich. 149.

¶ 76. In a prosecution for carnally knowing a girl less than sixteen years old, it is discretionary to permit the trial court to ask leading questions of the victim, she being weak mentally.—People v. Bernor, 115 Mich. 692.

¶ 77. In a prosecution for an assault with intent to ravish, it is discretionary with the court to allow somewhat leading questions to the complaining witness as to her outcries at the time of the offense and as to the length of time she was confined to her bed afterwards.—Ulrich v. People, 39 Mich. 245.

§ 17. ——To accused testifying as witness.

Cross-examination of accused, see post §§ 79, 80.

¶ 78. A court may refuse to allow leading questions to be put to the prisoner by his counsel while making his statement; leading suggestions to him in any form are improper, but the court should see to it that the prisoner is not cut off from having his attention called to pertinent subjects through a written suggestion submitted to the judge for approval.—People v. Morrigan, 29 Mich. 4.

§ 18. Maps and diagrams to explain or illustrate.

Use of map or diagram to assist witness, see also Evidence ¶ 2609.

Admissibility of maps as documents, see Evidence §§ 504, 541; Indictment, VIII, B.

¶ 79. It is not error to exclude the use of a map in examining a witness who does not understand maps.—Ulrich v. People, 39 Mich. 245.

¶ 80. A map can be used in evidence, in connection with the testimony of a witness, only to enable the jury to clearly understand the facts stated.—Hoffman v. Harrington, 44 Mich. 183.

§ 19. Interpreters.

Requestioning to test correctness of translation, see post § 29, ¶ 139.
Explanations of testimony, propriety of allowance, see post § 34.
Use of interpreters in taking depositions, see Depositions § 12.
Duty to pursue suggestion of court to clarify answer by further questions, see Indictment, IX, B; Trial, V, C.

¶ 81. The intervention of an interpreter between counsel and witness or witness and jury is justified only by practical necessity, though allowable on a proper occasion, which occasion must usually be determined by the trial court.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15.

¶ 82. The policy which provides shorthand reporters for trials might well provide also by law for competent and permanent translators and interpreters.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15.

¶ 83. It is not ground of error that the next friend of an infant plaintiff was allowed to act as interpreter for a witness who did not speak English. It is a matter of discretion, but should not be permitted except for very peculiar and satisfactory reasons.—Swift v. Applebone, 23 Mich. 252.

¶ 84. Jurors cannot be allowed to intervene as interpreters of witnesses, and whatever goes to the jury must go to all through the same medium.—Lendberg v. Brotherton Iron Mining Co., 75 Mich. 84.

¶ 85. The rules of law excluding improper forms of questions, and hearsay and otherwise improper testimony, and making inadmissible leading questions and other devices for getting in what should be kept out, are as important in case of interpreters as anywhere else.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15.

¶ 86. It is necessary, for the due course of examination, that the interpreter shall give to the witness the precise form and tenor of each question propounded, and no more or less, and that he shall in like manner translate the precise expressions of the witness.—Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15.

§ 20. Refreshing memory.

See also ante ¶ 61.
Papers and memoranda fit or suitable for refreshing, see post §§ 21-24.
Mode of reminding witness, calling his attention, and submission of memoranda for his inspection, see post §§ 25, 26.
Question as to former testimony to refresh memory, see also Evidence ¶ 1876.

¶ 87. The testimony of a witness as to the nature of a certain message being somewhat contradictory, it was held proper, especially on cross-examination, to call his attention to his testimony on a former trial, and to ask him if he did not then state that a particular message was brought.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 88. A witness may be questioned as to testimony given by him upon a former trial for the purpose of refreshing his memory or of impeaching him.—Battishill v. Humphreys, 64 Mich. 514.

¶ 89. In order to refresh the memory of a witness as to observations made by him concerning a sidewalk at the time of an accident, it is competent to call his attention to statements made by him at or about the time he made his observations.—Stone v. Standard Life & Accident Ins. Co., 71 Mich. 81.

¶ 90. A question asked of a witness for the purpose of refreshing his recollection and not for impeachment, even though leading and contradictory of the opposing party's testimony may, in the sound discretion of the trial judge, be allowed.—Dillon v. Pinch, 110 Mich. 149.

¶ 91. Where a witness who had testified to the mental unsoundness of testatrix was unable to remember on cross-examination whether testatrix did or did not attend a certain banquet while visiting her, it was proper to call her attention to certain facts in connection with the banquet, in order to refresh her recollection, the case being one justifying broad latitude in cross-examination.—Prentis v. Bates, 88 Mich. 567.

§ 21. ——Character, authorship and sufficiency of memoranda.

Sufficiency of copies and transcripts, see post § 22.
Sufficiency of memoranda by third persons, see post § 23.
Sufficiency of minutes or transcript of former testimony, see post § 24.
Cross-examination as to manner of making diary used as memorandum, see also post ¶ 197.

¶ 92. A witness may be shown an account-book of original entries to refresh his recollection.—Brown v. Weightman, 62 Mich. 557.

¶ 93. One who is shown to have made a scale of logs can use it to aid his memory in testifying, in an action of trespass for removing them, as to the quantity taken away; and if the correctness of the scale has been sworn to, it is admissible as original evidence.—Skeels v. Starrett, 57 Mich. 350.

¶ 94. A witness may use contemporaneous entries in a diary and pass-book to enable him to fix dates and other circumstances, and it is proper to receive these and to let

the jury inspect them, after being instructed to look at nothing but what bears on the points in question.—Passmore v. Passmore's Estate, 60 Mich. 463.

¶ 95. Checks or receipted bills may be used as memoranda in connection with testimony.—Dyer v. Rosenthal, 45 Mich. 588.

¶ 96. Where a bill of particulars of goods sold contains many items, it is discretionary to let the plaintiff take it to answer the question whether it was a correct list.—Cool v. Snover, 38 Mich. 562.

¶ 97. A bill of particulars used in another suit may be used by a witness, one of the parties therein, to refresh his memory as to items of payment, notwithstanding the possibility that some of those items may therein have been adjudicated.—Avery v. Knight, 99 Mich. 311.

¶ 98. A witness may refresh his memory as to articles comprised in a stock of goods that he formerly owned by referring to memoranda made by him from recollection shortly before the trial.—Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 99. A computation made by the witness when a mortgage was in his hands for foreclosure may be referred to by him in testifying to the amount due thereon without producing the mortgage.—Ford v. Savage, 111 Mich. 144.

¶ 100. A witness may use a memorandum in his own handwriting to refresh his memory.—Heenan v. Forest City Paint & Varnish Co., 138 Mich. 548.

¶ 101. No error is committed in permitting witnesses to use memoranda for the purpose of refreshing their recollection where they have personal knowledge of the facts recorded and testified to; and where they testify that they made or caused to be made said memoranda and with the aid thereof were able to remember the matters testified to by them.—Close v. Ann Arbor R. Co., 169 Mich. 392.

¶ 102. An inventory used by a witness in testifying was an original document made by said witness. He stated that he set down in it what he found at the time it was made, and knew at that time that it was correct. Held, no error was committed in permitting him so to use said document.—Close v. Ann Arbor R. Co., 169 Mich. 392.

¶ 103. In an action against a railroad company for damages for the destruction of plaintiff's ice house by fire originating from one of defendant's locomotives, held, that evidence as to the value of the building given by the builder from estimates made by him was properly admitted.—Union Ice Co. v. Detroit & Mackinac Railway Co., 178 Mich. 346.

§ 22. ——Copies, transcriptions and secondary entries.

See also post ¶ 128.

Admissibility of copies and trancripts as original evidence, see Evidence, IV, B, VIII, C, 2; Indictment, VIII, B.

¶ 104. In an action for obtaining goods by false representations to a commercial agency, the agent of the latter, in testifying as to the statement made to him by defendant, may give the statement from his recollection, aided by a copy made by him at the time, though such copy was not read to defendant or signed by him.—Hinchman v. Weeks, 85 Mich. 535.

¶ 105. It is not error to permit the plaintiff in testifying to refresh his memory by looking at a copy which he himself had made from a book of original entries.—Smith v. Pickands, 148 Mich. 558.

¶ 106. In an action on account where plaintiff testified that he had copied his bill of particulars right from his books he may testify therefrom as to the amount of the claims now due him.—Snyder v. Patton & Gibson Co., 143 Mich. 350.

¶ 107. In ejectment, the use by a witness who was a surveyor, of a copy of his survey instead of the original which had been turned over to the county surveyor, for the purpose of refreshing his recollection, was not prejudicial to defendant where it was fairly inferable from the record that the witness did not, on direct, testify to anything which he did not remember independently of such copy.—Miller v. Shumway, 135 Mich. 654.

¶ 108. Where logs sold were to be delivered afloat, and it was claimed by the vendee that there was a large deficiency in the quantity delivered, a witness for the vendor testified to keeping a memorandum book in which she entered every night the amount delivered as reported to her by the men in charge. Held, that she might use the book to refresh her recollection as to entries, and that it was not error to permit her to show the entries to the jury.—Mason v. Phelps, 48 Mich. 126.

¶ 109. It is not error for the trial court to allow a witness to use a ledger merely to refresh his recollection.—Craig v. Brown, 171 Mich. 256.

§ 23. ——Memoranda or writings by other persons.

Copies and transcripts as memoranda, see ante § 22.

¶ 110. When a witness swears that he has a complete recollection of the facts it makes no difference that the memoranda he uses to refresh his memory are not from his own entries.—Cameron v. Blackman, 39 Mich. 108.

¶ 111. A witness may refresh his recollection by a paper purporting to be written by his agent, and which he has acted on as authentic; and the handwriting need not be proved.—Watkins v. Wallace, 19 Mich. 57.

¶ 112. A plaintiff testifying in his own behalf can refresh his recollection, where he knows the facts, by reading from his bill of particulars when that is a duplicate of the account rendered, and on which he sues, even though it was copied by his clerk from entries in his book as to which he cannot say, without seeing them, whether or not he made them all himself.—Hudnutt v. Comstock, 50 Mich. 596.

¶ 113. A witness may refresh his memory from copies of invoices of goods claimed to have been shipped to him, or from a bill of particulars of the goods filed in the case, and if he can remember receiving the goods, independently of the papers, he may so testify.—Robinson v. Mulder, 81 Mich. 75.

¶ 114. Memoranda in the shape of books and papers purporting to contain a daily record of sales of logs and lumber, made in the course of business by and under the supervision of the witness producing them, may be used by him to refresh his recollection, and, so used, are admissible in evidence.—Crane Lumber Co. v. Bellows, 116 Mich. 304.

§ 24. ——Minutes or transcript of former testimony, or depositions taken.

Former statements other than testimony, see ante § 20.

¶ 115. In order to refresh the recollection of a witness his attention may be called to his evidence on a former trial, and counsel's minutes of the former testimony read for the purpose.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 116. Minutes made by a justice of the peace of the testimony given before him, which he testifies were made at the time and were correct though not complete, may be used by him to refresh his memory.—Spalding v. Lowe, 56 Mich. 366.

¶ 117. The official stenographer, or any one else who hears plaintiff testify upon a former trial, is competent to testify as to what he said, and the stenographer may use his minutes taken on a former trial for the purpose of refreshing his recollection.—Merrill v. Leisenring, 166 Mich. 219.

¶ 118. It is error to permit the prosecution on a criminal trial, against the prisoner's objection, to read to the witness on the stand, and in the presence of the jury, under pretense of refreshing his recollection, his evidence given on a previous occasion, and to ask him whether, after having heard it read, he recollected certain facts stated in it.—Bashford v. People, 24 Mich. 244.

¶ 119. It is competent on the trial of a criminal case for the deputy clerk of the police court, in which the preliminary examination of respondent was had, after testifying that he wrote down the testimony of the complaining witness, and that his recollection would be so refreshed, as he thinks, by looking at said testimony as to enable him to remember, aside from said testimony, whether or not said witness testified to a certain alleged fact, to refresh his recollection from said testimony.—People v. Kennedy, 105 Mich. 434.

¶ 120. The prosecution, upon the examination of an unwilling witness for the people, may call his attention to depositions given by him on other occasions, not for the purpose of impeaching him, but to refresh his memory and elicit the truth.—People v. O'Neill, 107 Mich. 556.

¶ 121. It is not error for the prosecution in a criminal case, for the sole purpose of refreshing the recollection of one of the people's witnesses, occasion for which is shown, on his redirect examination, to call his attention to his testimony given on a former trial of the case.—People v. Palmer, 105 Mich. 568.

§ 25. ——Mode of reminding, questioning or prompting witness.

¶ 122. A witness' testimony taken on a former trial may be read by him to refresh his memory when so offered though the attorney requesting it at first stated that his object was to impeach the witness which being refused with the suggestion that it was admissible to refresh memory it was reoffered.—Pickard v. Bryant, 92 Mich. 430.

¶ 123. Plaintiff sued for money had and received. He prepared the material from which his counsel made up the bill of particulars. Plaintiff's eyesight was so poor that he could not read, but could identify his memoranda. On the trial his counsel was permitted to read certain items from the bill of particulars to refresh plaintiff's memory and to ask leading questions. Held, no error was committed in this respect.—Cairbre v. McQuillen, 162 Mich. 679.

§ 26. ——Submission of memorandum to adversary for inspection and objection.

See also ante ¶ 104.

Reading or submission as basis for cross-examination, see also post §§ 87, 88.

Right to withhold answer until paper is shown, see post § 107.

¶ 124. Opposing counsel have a right to see the memorandum which a witness uses to refresh his memory and to see it at once.—Duncan v. Seeley, 34 Mich. 369.

¶ 125. Memoranda used by a witness for the prosecution should be open to the examination of respondent's counsel so far as

necessary to expose falsehood and arrive at the facts; and this may be so even though the witness testifies that entries on other pages have nothing to do with the case.—People v. Lyons, 49 Mich. 78.

¶ 126. A grand juror who acted as secretary of the jury, who is called to impeach the defendant's witnesses on trial, will not be required to read all of the testimony of the impeached witnesses, from notes which he uses to refresh his memory, although counsel is entitled to see the notes and to examine the impeaching witness on them.—People v. Salsbury, 134 Mich. 537.

¶ 127. Where a witness uses memoranda, an opposing attorney is entitled to an inspection of the paper to aid in cross-examination.—Cortland Mfg. Co. v. Platt, 83 Mich. 419.

§ 27. Refreshing fact or memorandum as evidence.

Scale book as evidence when used to refresh, see also ante ¶ 93.
Map as evidence to explain testimony, see also ante ¶ 80.
Admissibility of memorandum on redirect to corroborate witness, see post § 102.
Admissibility of former testimony in general, see Evidence §§ 337-344; Indictment, VIII, B; Witnesses, VI, D.
Competency of documents as evidence, see Evidence, VIII; Indictment, VIII, B.
Secondary proof of writing by copy of copy used to refresh memory, see also Evidence ¶ 766.
Books of account used to refresh memory as admissible evidence to show witness' knowledge of facts shown, see Evidence ¶ 2691.
Conclusive effect of memoranda admitted in evidence, see Evidence ¶ 2949.
Admission or rejection as harmless error, see Harmless Error; Indictment, XV.

¶ 128. In replevin brought by rescinding vendors on the ground that the vendee falsely stated his financial condition to a reporter for a commercial agency, the reporter, when testifying, may refresh his memory, as to the vendee's representations, from a copy of a statement made by himself at the time; but where he states that he cannot remember the figures, and that he merely went to the vendee and got the statement, he cannot read a copy in evidence, it being mere hearsay.—Caldwell v. Bowen, 80 Mich. 382.

¶ 129. Scale-books made by a scaler at the time the scaling was done, from a scale-board, upon which he put down the measurement of each log and the number of feet it contained, and when full transferred sometimes such measurement, and at other times the number of logs and the number of feet they contained, to said scale-books, which he used as memoranda in testifying to the number of feet of lumber scaled, are admissible in evidence.—Welch v. Palmer, 85 Mich. 310.

¶ 130. Where a witness testifies that he remembers a certain conversation, the only legitimate use of which would be to refresh his recollection, it is not error to refuse to permit the witness to repeat the conversation.—People v. Smith, 106 Mich. 431.

¶ 131. Where a plaintiff is allowed to refresh his memory from a memorandum book, which he has kept in pencil, and on cross-examination his attention is called to a certain page, and he is asked if it has not been rubbed some with a pencil, which he denies, and the page is then offered in evidence, he is entitled to have the whole book before the jury, as a comparison of the page in question with the other pages would disclose whether there was anything peculiar in the appearance of that page.—Countryman v. Bunker, 101 Mich. 218.

¶ 132. A memorandum of account, used to refresh memory upon a defense of set-off and recoupment, may be received in evidence after defendant had been cross-examined upon it against an objection that it is not the best evidence of the account.—Smith v. Jackson, 113 Mich. 511.

¶ 133. For purposes of impeachment of a witness, a court stenographer was called to testify as to the witness' testimony given at a former trial. He stated that he could not remember what the witness said, but identified the typewritten copy in court as being the testimony given by the witness, and stated that he could identify it page by page. The verity of the stenographer's notes was not questioned. Held, they were admissible in evidence.—Johnson v. Union Carbide Co., 169 Mich. 651.

¶ 134. Where a witness testifies that a writing refreshes his recollection, so that he has a present recollection of the fact sought to be established, the writing is not admissible as further substantive evidence of the fact, since in such case it is the testimony of the witness, the recollection, which is evidence, not the document or writing used to refresh recollection.—Koehler v. Abey, 168 Mich. 113, 119.

¶ 135. Where a witness states that he does not remember the facts entered in his memorandum book but that he knows the entries when made were correct, the book is admissible in evidence.—Koehler v. Abey, 168 Mich. 113.

§ 28. ——Reading or making contents known.

Showing memorandum to witness before using it, see ante § 26.
Examination of woman to lay foundation for admitting preliminary deposition in bastardy proceeding, see Bastards § 8, ¶ 40.

¶ 136. A witness who has produced and identified a memorandum which is itself admissible evidence may be permitted to testify

from it, and such testimony is not open to the objection that the memorandum itself should be read to the jury, where the witness merely repeats its contents; it is not material that the counsel should read it rather than the witness.—Raynor v. Norton, 31 Mich. 210.

§ 29. Repetitions and requestioning.

Reframing questions, see post § 30.
To elicit better answer, see also post ¶ 143.
On cross-examination, see post §§ 39, 40.
On redirect examination, see post § 96.
Improper or obstinate repetition and pursuit of objectionable matter as error, see Trial, V; Indictment, IX, B.
Rejection and limitation of cumulative testimony to same fact, see Trial, V; Indictment, IX, B.

¶ 137. Where a witness has clearly and explicitly testified to a certain fact, an objection to a question that merely calls for a repetition of the testimony from him is properly sustained.—Ellis v. Whitehead, 95 Mich. 105; Gutsch v. McIlhargey, 69 Mich. 377.

¶ 138. It is within the discretion of the trial judge to rule out a question that has already been answered in substance.—Busch v. Pollock, 41 Mich. 64; Gutsch v. McIlhargey, 69 Mich. 377.

¶ 139. Where a conversation, partly in a foreign language, has been testified to and interpreted by the witness on cross-examination, it is not error to refuse to allow it to be again detailed to test the correctness of the translation where that is not seriously questioned.—Ulrich v. People, 39 Mich. 245.

¶ 140. It is not error for the trial court to rule that once will do for an attorney to interrogate a witness on the same question, where the record shows that the witness had been twice before thoroughly cross-examined by counsel until apparently through and satisfied, and where numerous other questions had been asked the witness along the same lines, the court allowing ample latitude in that particular.—People v. Davis, 171 Mich. 241.

¶ 141. In an action for damages for personal injuries sustained by being knocked down by a runaway horse which was left standing by a street curb hitched by a weight only, and, after pulling the bridle off, which was too loose, ran away, held that a further question whether the driver had been furnished a bridle which was too loose was rightly excluded where the witness had already testified that he could not remember the bridle which the horse wore on the day of the accident.—Dyer v. Peoples Ice Co., 188 Mich. 203.

§ 30. Reframing questions or offers.

¶ 142. An examiner should avoid an objection to the form of a question by changing its form instead of relying upon bringing error on a ruling sustaining the objection.—Fraser v. Jennison, 42 Mich. 206.

§ 31. Form, construction and sufficiency of answers.

Responsiveness to question, see post § 33.
Argumentative or supposititious answers, see post § 32.
Details as matter of description of object rather than as testimony concerning the details, see post ¶ 164.
Details and particulars to explain answers, see post § 34.
Proper form of question to call out proper answer, see ante §§ 8-10.
Form and phrasing of answers as translated by interpreter, see ante § 19.
Form and sufficiency of opinions of experts in response to questions, see Evidence § 306; Indictment, VIII, B.
Construction of testimony for purpose of weighing it, see Evidence § 590 et seq.
Striking out or elucidation by further questions as proper practice where answer is ambiguous or not plain, see Trial, V, C; Indictment, IX, B.

¶ 143. An answer is not necessarily to be stricken out for uncertainty or ambiguity, but its meaning should be reached by further inquiry.—Merkle v. Township of Bennington, 58 Mich. 156.

¶ 144. Where the court in cautioning a witness states the proper rule to be observed, the testimony of the witness in so far as he obeys is competent; but in so far as it is disregarded, it is not competent.—Marshall v. Wabash R. Co., 171 Mich. 180.

¶ 145. A witness having personal knowledge of the value of the replevied property may be asked to state it, and it is unpecessary strictness to prevent his stating the amount of the appraisement.—Arnstine Brothers & Mier v. Treat, 71 Mich. 561.

¶ 146. Where in a suit in trover for the conversion of lumber a witness testifies in detail as to the market value of lumber in the community involved, it is not error for him to state the value of the timber converted to a person operating a particular mill, where the jury understands from the general examination that the question is directed to the market value.—Hennes v. Charles Hebard & Sons, 169 Mich. 670.

¶ 147. In an action for personal injuries, a statement by a witness that "She always complains of being sore through her lungs" fairly imports that the complaints made and testified to related to present suffering.—Howe v. Chicago, K. & S. R. Co., 139 Mich. 638.

¶ 148. In an action to recover the value of machinery exchanged for land, the refusal of the court to strike out testimony as to a conversation as a witness "understood" it, objected to as stating a conclusion, held not reversible error.—Bowen v. Chandler, 172 Mich. 678.

¶ 149. On the contest of a will on the ground of the mental incompetency of the testator it was not prejudicial error to allow the attorney who drew the will to testify whether or not the testator was mentally and physically competent to make and execute the will, although such a form of question might be construed as calling for the opinion of the witness on a question of law, when taking into consideration the cross-examination and the instructions of the court as to the degree of intelligence necessary it was manifest that the jury understood that the witness has attempted to testify of the degree of intelligence and understanding of the testator.—In re Morse's Estate, 146 Mich. 463.

¶ 150. A physician who examined the plaintiff some time after he sustained an injury may testify that his injuries would give him pain, and that a certain movement of his limb was evidently very painful, and such testimony need not be stricken as a statement of what the patient said or suffered.—Darling v. Grand Rapids, G. H. & M. Ry. Co., 184 Mich. 607.

§ 32. ——Argumentative and suppositious answers.

What witness "understood," see also ante ¶ 148.

Answer that witness "supposes" fact to be true as admission rather than conclusion or supposition, see also Evidence ¶ 1244.

¶ 151. Where on the trial of an action for libel founded on the publication of articles reflecting upon the support by the plaintiff, as a member of the legislature, of an act providing for a boulevard in the city where he resided, two of his colleagues testify, in behalf of defendant, to his statement in a speech made in support of the bill that his main purpose in going to the legislature was to secure the passage of the bill, and incidentally to take care of his constituents, it is not competent for plaintiff, when sworn as a witness in his own behalf, to state the substance of the speech, and argue therefrom to the jury that he did not say what the witnesses have stated because at variance with, or not a part of, the speech as rehearsed.—Randall v. Evening News Ass'n, 101 Mich. 561.

§ 33. Responsiveness to question.

Volunteered testimony, see ante § 2.

Double questions not admitting of proper answer, see ante § 8.

Necessity that opinion of expert be responsive to question and based on hypothesis assumed, see Evidence § 305; Indictment, VIII, B.

Who may object for irresponsiveness, see Saving Questions, II; Trial, V, C; Indictment, IX, B; XIV.

Motions to strike for irresponsiveness, see Trial, V, C; Indictment, IX, B.

Retention of irresponsive question which is relevant if called for, see Trial, V, C; Indictment, IX, B.

¶ 152. In an action against a township for an injury caused by a warped plank in a bridge a witness who testified that he had crossed the bridge a month before the accident was asked, "Did you notice the planking?" and answered, "When I went across it was all right." Held, that the answer was not fairly open to the objection that it was irresponsive, or an expression of opinion.—Merkle v. Township of Bennington, 58 Mich. 156.

¶ 153. Where a witness as to character is asked if he knows what respondent's character was while he lived at a certain place, and answers, "Yes; it was pretty bad," his answer is not strictly responsive; but if no motion is made to strike it out, it may properly be allowed to stand.—People v. Coffman, 59 Mich. 1.

¶ 154. The question, "What did he say to that?" being asked on cross-examination, it was held that the answer, "I could not say what he replied to it; it appeared to be all satisfactory and he assented to it," was irresponsive and should have been struck out for introducing an inference of the witness. —McCreery v. Green, 38 Mich. 172.

¶ 155. It is not responsive to a question asking for a conversation held at a specified date to add statements made by one of the participants to the other at a subsequent date.—Shaver v. Ingham, 58 Mich. 649.

¶ 156. Where a witness being asked to name some of the prominent members of an association states "most of the state and city officers at Richmond, Va., were members, and there were other prominent members in various states whose names I cannot tell," the answer is properly excluded as not responsive.—Angell v. Loomis, 97 Mich. 5.

¶ 157. In an action to recover damages for personal injuries, where a witness, after testifying that plaintiff who worked for him after the injury could do certain things in attending to a team, was asked what there was which plaintiff "did not do" about getting a team ready and answered, "He could not put his arm up to put the harness on," and testified further to things plaintiff did in using his arm, held, such answer was not responsive but its admission was not erroneous in view of what preceded and followed it.—Hall v. City of Flint, 195 Mich. 638.

¶ 158. The answer of a physician to a hypothetical question put to him as an expert must be based upon the facts stated in such question, and is to be excluded if it has recourse to the witness' knowledge of the particular case.—Fuller v. City of Jackson, 92 Mich. 197.

§ 34. Explanation, details and correction of testimony.

Refreshing memory of witness by citing explanatory statements or circumstances, see ante § 20.

Admissibil.ty of book used as memorandum to refresh memory so that erasure appearing in book may be explained, see ante ¶ 131.

On cross-examination, see also post ¶ 209.

Right to cross-examine in explanation of improper matter brought out on direct, see post § 43.

Right on cross-examination to call out complementary or supplementary facts in explanation of matter opened on direct, see post § 46.

Cross-examination to rebut or explain previous discrediting statements, see post § 69.

Cross-examination as to other matters to show whether assigned reason for act was truthful, see post ¶ 369.

Explaining on redirect, see post §§ 97, 98.

Permissible change on redirect, see post ¶ 609.

Explanation or rebuttal of bad inferences by redirect, see post § 100.

Use of leading questions in aid of explanation on redirect, see post ¶ 662.

Recross to explain circumstances of correction of testimony made on redirect, see post ¶ 216.

Admissibility of matter to meet impeachment by explaining, see Witnesses, VI, D.

Admissibility of evidence to explain other evidence in general, see Evidence, III; Indictment, VIII, B; and see specific topics under portions treating of "evidence."

Admissibility of statements explanatory of attentiveness or observation of thing testified to, see Evidence § 81.

Right of witness to explain meaning of letter written by him and in evidence, see also Evidence ¶ 980.

¶ 159. Where a witness not familiar with the full bearing of questions put to him gives answers that seem ambiguous, or raise suspicions of collusion, it is not improper to show what the facts are.—McGuire v. People, 44 Mich. 286.

¶ 160. A witness should be allowed full liberty in explaining alleged discrepancies in his testimony on former occasions (by two justices, two others concurring in result).—Stoudt v. Shepherd, 73 Mich. 588.

¶ 161. It is proper to permit plaintiff, who testified through an interpreter, to take the stand and correct his testimony, where during a recess his counsel had informed him that the testimony varied from what had been told to counsel, and where plaintiff explained that the variance was due to misunderstanding between him and the interpreter.—Erickson v. Milwaukee, L. S. & W. R. Co., 93 Mich. 414.

¶ 162. A witness is properly permitted to explain his reasons for his acts in connection with the transaction to which he testifies, where otherwise the existence of a motive might be inferred unfavorable to the contention of the party calling him.—Burt v. Long, 106 Mich. 210.

¶ 163. In an action to recover for injuries caused to plaintiff's land by fire negligently set by defendant's section men, the man who had charge of the section men testified for plaintiff, and, having been recalled and asked as to his knowledge of the fire, plaintiff's counsel was allowed to call his attention to the fact that his testimony upon a former trial was very unlike his present testimony. Held, that this was within the discretion of the trial court to allow for the purpose of explaining a seeming contradiction.—Gilbert v. Michigan Cent. R. Co., 116 Mich. 610.

¶ 164. Where a witness, being asked if he knew the subject-matter of the suit, replied by giving a general detail in outline of the facts claimed by the parties, it was held to be no assertion of any such facts, and therefore not objectionable.—Eslow v. Mitchell, 26 Mich. 500.

¶ 165. In an action for a negligent injury, physicians who have examined plaintiff are not confined to stating the results of their examination, but may give the details thereof, the value of the evidence depending largely upon the thoroughness of the examination.—Sherwood v. Chicago & W. M. R. Co., 88 Mich. 108.

¶ 166. On an issue of partnership in a business in which an employee negligently caused personal injuries to a third person, testimony of an employee of the alleged partners at the time of the accident as to such partnership in such business are admissible, although given as matters of detail supporting his belief.—Schulte v. Holliday, 54 Mich. 73.

¶ 167. In an action to recover for the destruction of plaintiff's barn by fire, caused, as claimed, by the negligent burning of grass and other refuse upon defendant's right of way by its employees, a witness was asked how he remembered that the wind was blowing so hard the morning of the fire, and answered, "We spoke about it, Mr. Buck and myself." Held, that the testimony was admissible.—Cole v. Lake Shore & M. S. R. Co., 105 Mich. 549.

¶ 168. It is not error to refuse to permit defendant's witness to answer a question of details explanatory of his answer on a technical question on matter not material or pertinent to the issue in the case, where the answer would tend rather to confuse than enlighten the jury.—Anthony v. Cass County Home Tel. Co., 165 Mich. 388.

II. CROSS-EXAMINATION.

Presumption as to effect of cross-examination or improper questioning to create prejudice, see Appeal § 358; Indictment, XVI.
Review of rulings on cross-examination, see Appeal § 406; Indictment, XVI.
Cautionary instructions respecting cross-examination or matter brought out by it, see Instructions, VI; Indictment, IX, E.

§ 35. Nature, purpose and right of cross-examination.

See also post ¶ 487.
Object of cross-examination, see post ¶ 177.
Recross-examination, see post § 41.
Cross-examination on taking of depositions, see Depositions § 11.
Refusal to submit to cross-examination as ground to suppress deposition, see Depositions § 25.
Incapability of cross-examination as ground for exclusion of matter in deposition from evidence, see Depositions, § 30.
Admissibility of cross-examination portion of deposition in evidence, see Depositions § 31.
Cross-examination or opportunity for it as requisite to admissibility of former testimony, see Evidence § 340.
Consideration of cross-examination with direct in weighing evidence, see Evidence § 598.
Right of residuary legatee in suit on his bond to cross-examine general legatee, see Estates of Decedents ¶ 1243.

¶ 169. Testimony given upon a legitimate cross-examination is treated as evidence in behalf of the party calling the witness.—Turnbull v. Richardson, 69 Mich. 400.

¶ 170. The benefit of cross-examination is an essential condition to the reception of direct testimony.—Heath v. Waters, 40 Mich. 457.

¶ 171. An admission by counsel of his client's complete insolvency cannot cut off the right to cross-examine him, as to his stock and debts, in an action of replevin brought by one who has purchased his stock against an officer who afterwards attached it.—Berger v. Clippert, 53 Mich. 468.

¶ 172. It is error to deprive counsel of the opportunity to cross-examine before the witness is discharged from the stand on the close of the direct examination; since the right of cross-examination, within reasonable bounds, secures to litigants the best means of ascertaining the reasonableness and truthfulness of the direct testimony.—Petrie v. Lane, 58 Mich. 527.

¶ 173. Cross-examination of one's own witness is improper where no occasion therefor appears on the record.—Dompier v. Lewis, 131 Mich. 144.

§ 36. ——On matters to which witness might be called in chief.

Right to call out entire transaction or all complementary facts of matters touched on in direct, see post § 46.
Matters of affirmative defense on cross-examination, see post § 44.

¶ 174. One cannot be compelled to make his adversary's witness his own to explain or fill up a transaction which the witness has partially explained already, but may do so by cross-examination.—Chandler v. Allison, 10 Mich. 460.

¶ 175. Cross-examination of a plaintiff on any part of the merits involving his own acts and statements is not to be rejected on the ground that defendant should have made him his own witness, where all the questions present but one substantial issue.—Haughton v. Maurer, 55 Mich. 323.

¶ 176. Defendant should be allowed to cross-examine plaintiff's witness where by so doing he can obtain testimony which he would otherwise be obliged to make the witness his own to obtain.—Bulen v. Granger, 58 Mich. 274.

§ 37. Scope and range in general.

Of witness called on formal or preliminary issues not touching main case, see post § 70.
Of character and impeaching witnesses, see post § 71.
Of expert witnesses, see post §§ 72-75.
Of nonexpert witnesses, see post § 76.
Of party as a witness, see post § 77.
Of wife of party, see post § 78.
Of accused as witness, see post §§ 79, 80.
Of cross-examination of party in his own behalf when called as adversary's witness, see post § 77.
Matters on which adverse party called for cross-examination may be interrogated, see post §§ 81, 82.
Germaneness of cross-examination to direct or to issues, see post § 45 et seq.
Refreshing memory of witness, see ante § 20 et seq.
Calling for incriminating, otherwise privileged, or incompetent matter, see post §§ 42, 43.
Control and discretion of court in regulating scope and extent, see post § 38.
Scope of redirect, see post § 90.

¶ 177. The object of cross-examination is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would present them in a different light.—Chandler v. Allison, 10 Mich. 460.

¶ 178. The doctrine laid down in People v. Horton, 4 Mich. 67, and Campau v. Dewey, 9 Mich. 381, that a party has no right to

cross-examine witnesses upon facts and circumstances not connected with the matters stated in his examination in chief, is amplified to include questions tending to elicit the whole truth concerning the subject-matter of the issues, and to fill up or explain any omissions in the testimony in chief.—Chandler v. Allison, 10 Mich. 460.

¶ 179. Where a plaintiff is offered as a witness, any cross-examination affecting the merits of the cause is admissible, whether the particular transaction sought to be shown by such cross-examination has been referred to on the direct examination or not.—Hay v. Reid, 85 Mich. 296.

¶ 180. A witness may be cross-examined upon all points material to the issue, whether the party producing him has called them out on direct examination or not.—Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163; Hemminger v. Western Assurance Co., 95 Mich. 355.

¶ 181. The latitude allowed in cross-examination should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues on trial and which is, at the same time of such character as to be likely to be applied to them by the jury, and improperly affect a verdict.—People v. McArron, 121 Mich. 1.

¶ 182. On cross-examination a witness may be asked any question material to the issue. —People v. Dupounce, 133 Mich. 1.

¶ 183. Where witnesses in a criminal case distinctly contradict each other in their evidence regarding a transaction which is important to the issue the most searching cross-examination should be permitted.—People v. Long, 50 Mich. 249.

¶ 184. Wide range of cross-examination is proper where an officer testifies to having left premises unlocked at respondent's request, and to having laid in wait for him.—Saunders v. People, 38 Mich. 218.

¶ 185. In a prosecution for murder the testimony of a married woman witness for the defense justified a searching cross-examination into her relations with the defendant.—People v. Higgins, 127 Mich. 291.

§ 38. Regulation and limits on extent.

Restricting repetitions and requestioning, see post §§ 39, 40.

Discretion as to discrediting or impeaching cross-examination on collateral matters, see post §§ 56-69.

Collateral matters of character and antecedents, see post § 62.

¶ 186. The latitude given to cross-examination is within the discretion of the court. —Cummings v. Detroit United Ry., 163 Mich. 304.

¶ 187. The extent to which a witness may be cross-examined is addressed largely to the discretion of the trial judge.—Yonkus v. McKay, 186 Mich. 203.

¶ 188. The extent of cross-examination of witnesses in civil cases is a matter resting in the sound discretion of the trial court.—Hendrickson v. Harry, 200 Mich. 41.

¶ 189. In order that a jury may get a proper appreciation of the fairness and reliability of the testimony of witnesses, considerable latitude is generally allowed in the cross-examination of witnesses, and the extent of such cross-examination is a matter left largely to the discretion of the trial court.—In re Sparks' Estate, 198 Mich. 421; Hodgman v. Sears, Id.

¶ 190. The action of the trial court in limiting the extent of the cross-examination upon an unimportant matter, on the ground that too much time was being occupied thereby, will not call for a reversal.—Burt v. Long, 106 Mich. 210.

¶ 191. Where the good faith of the plaintiff is in issue, the extent to which cross-examination may be carried must be determined by the trial judge.—Grand Rapids Brewing Co. v. Pettis, 159 Mich. 679.

¶ 192. It is largely within the discretion of the trial court, upon an appeal from the justice court, to determine as to how far a cross-examination of the defendant as to proceedings in the justice court, drifting into a controversy between counsel and witness as to each other's veracity and propriety of conduct in the trial of the case in the justice court, should be allowed to proceed.—Salmer v. Hicks, 188 Mich. 391.

¶ 193. A ruling preventing further cross-examination on a subject is not error where there was no apparent reason for further examination on that subject and counsel stated none.—Brown v. Harris, 139 Mich. 372.

¶ 194. In an action for malicious prosecution and false imprisonment, the plaintiff being a witness in his own behalf, it is error for the court arbitrarily to cut off his cross-examination, there being no evidence of any disposition on the part of counsel to abuse his right of cross-examination.—Bennett v. Eddy, 120 Mich. 300.

¶ 195. In an action for a balance due where it appears that a settlement was had between the parties and plaintiff claims that certain items were reserved by defendant who alleges a complete settlement and payment, some latitude should be given defendant in cross-examining plaintiff as to the settlement and items claimed to have been reserved which present the paramount issue and it is prejudicial error to unduly restrict

such cross-examination and to make criticisms which might be taken as an intimation of the view of the court on the merits of the defense.—Darling v. Haff, 175 Mich. 304.

¶ 196. Where the trial court on cross-examination, sustained an objection to a question on the ground that it had been answered before, but immediately thereafter offered to permit the question if there was any doubt about the matter, such action did not unduly hamper counsel in the examination of the witness.—Richards v. City of Ann Arbor, 152 Mich. 15.

¶ 197. After a witness who had made use of a diary to refresh his memory on direct examination, had been questioned on cross-examination, as to various items not having any relation to the matters in issue, sufficiently to show the method by which such diary was made up and where it did not appear that examination as to other particular items would have cast discredit upon its accuracy, held that the refusal of the trial court to allow further cross-examination along the same line was not an abuse of discretion.—Collin v. Kittelberger, 193 Mich. 133.

¶ 198. The discretion of the trial judge in permitting a liberal cross-examination of the plaintiff's witnesses in an action against a saloonkeeper and his surety for an assault on a minor child by her father when intoxicated, in order to show similar assaults previously made when sober, held not an abuse of discretion.—Yonkus v. McKay, 186 Mich. 203.

¶ 199. The extent and rigor of cross-examination of witnesses in criminal prosecutions is largely within the discretion of the trial judge.—People v. Higgins, 127 Mich. 291.

¶ 200. In a murder case, where the respondent and deceased had had some difficulty some time before the actual killing and certain witnesses had testified as to what took place it was error of the court to restrict the cross-examination of the witnesses so as to shut out a theory of the defense as to what had happened, and the defense should further have been permitted to show the whereabouts of the witnesses in the interim between the first difficulty and the killing.—People v. Hull, 86 Mich. 449.

§ 39. Repeating or pursuing inquiry by further questions.

Pursuing question after disavowal or denial, see post § 40.

Repeating and pursuing cross-examination on redirect, see post § 96.

¶ 201. A witness may on cross-examination be asked to repeat what he has testified to on a particular point in his direct examination.—Zucker v. Karpeles, 88 Mich. 413; Beers v. Payment, 95 Mich. 261.

¶ 202. Upon cross-examination a witness may be asked to repeat what he has testified to upon a particular point in his direct examination, for the purpose not only of testing the recollection of the witness, but of ascertaining whether he makes a statement at variance with what he testified to in the direct examination.—Zucker v. Karpeles, 88 Mich. 413.

¶ 203. It is error to refuse to permit the mother of the complainant on a trial for statutory rape to be cross-examined by counsel for the respondent as to how she knew her daughter's age, which she had testified to on direct examination.—People v. Ayers, 182 Mich. 241.

¶ 204. Repetitions of questions in different language are properly excluded on cross-examination after full answers have been given.—Simon v. Home Ins. Co. of New York, 58 Mich. 278.

¶ 205. Where a witness denies that he was ever arrested or convicted on a criminal charge, or that he testified in another suit that he had been, it is within the court's discretion to exclude further questions as to his testimony in that suit; such discretion held not to have been abused.—Helwig v. Lascowski, 82 Mich. 619.

¶ 206. It is not error to refuse to permit further inquiries on matters already fully examined into, where it does not appear that additional or important information is excluded.—Ulrich v. People, 39 Mich. 245.

¶ 207. On an appeal from justices' court the refusal to permit the cross-examination of a party as to his testimony in the lower court, held not prejudicial, where his testimony sufficiently covered the question.—Brown v. Mitts, 187 Mich. 469.

¶ 208. A witness for the prosecution in a trial for an assault with intent to kill, being asked, on cross-examination, whether he did not steal overshoes from one Allen, answered that he never stole overshoes; and to the questions whether Allen did not follow him to his house and take these shoes, and whether he was followed and the overshoes taken from him, answered "no." Held, that no reasonable complaint could be made of the refusal to allow a further question as to whether any one followed him and took the overshoes; and that the court had already been liberal in permitting cross-examination as to this collateral matter.—People v. Niles, 44 Mich. 606.

¶ 209. It is not error for the trial court to refuse to allow counsel on cross-examination to explain a correction which witness made to testimony in another suit, where the witness testified that later at the other trial he corrected his mistake and testified substantially as at the present trial.—People v. Neely, 171 Mich. 249.

¶ 210. A plaintiff was asked on cross-examination for the apparent purpose of showing barratry, if her contract with her lawyer did not give him a percentage of the amount to be recovered. Plaintiff had fully answered the same question before, and objection to its repetition was sustained. Held, the ruling was not error on the ground that defendant's purpose was to prove a conspiracy, when he indicated no such purpose to the court.—Sisson v. Lampert, 159 Mich. 509.

¶ 211. On a trial for larceny, where it had already been developed that the character for chastity of one of the prosecution's witnesses was bad, it was held that the court did not abuse its discretion in refusing to permit further cross-examination tending to impeach her virtue.—People v. Harrison, 93 Mich. 594.

¶ 212. The propounding of questions in apparent good faith on cross-examination as to the chastity of the witness in the past, if not proper cross-examination is not reversible error although the second question is asked after the first has been ruled improper.—Knickerbocker v. Worthing, 138 Mich. 224, Moore, C. J., dissenting.

§ 40. ——After disavowal of knowledge.

¶ 213. It is not error in proceedings to condemn land to exclude on cross-examination of a witness a question as to his opinion upon facts the existence of which he has denied, especially when he has in effect answered the question in his direct examination.—Michigan Air Line R. Co. v. Barnes, 44 Mich. 222.

¶ 214. Where plaintiff when cross-examined as to statements made by his counsel in the argument before the jury on a former trial answers that he does not know what he said, it is proper to exclude an inquiry whether, if his counsel made such statements, it was not because of something plaintiff had told him in regard to the case.—Evans v. Montgomery, 95 Mich. 497.

§ 41. Recross-examination.

Limiting further examination after recross, see post ¶ 601.

¶ 215. Where a party has not been limited in his re-examination, the cross-examination thereon may properly be allowed the same latitude.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 216. The prosecuting attorney was properly allowed on recross-examination of the prosecutrix in rape to ask her if she did not of her own initiative ask him if she might correct her testimony, where, having corrected on redirect examination a statement she had made on cross-examination, she testified on recross-examination that she had talked with the prosecutor relative to her testimony.—People v. Murphy, 145 Mich. 524.

§ 42. Calling for incompetent or privileged matter.

To meet inadmissible matter brought out on direct, see post § 43.

When collateral and immaterial matter is proper subject of cross question, see post § 56 et seq.

Calling for expert opinion from lay witness, see also post ¶ 350.

Asking expert as to matters of common knowledge, see also post ¶ 521.

Previous statements made by third persons or one of the parties to the witness, see also post § 68.

Previous statements affecting credibility of witness, see post §§ 66, 67.

Impropriety of striking hearsay called out by objector's question, see Trial, V, C; Indictment, IX, B.

Cross-examination calling for opinion on negligence, see also Evidence ¶ 1331.

Competency of evidence in general, see Evidence, IV-IX; Indictment, VIII, B.

Privileged communications and transactions, see Witnesses, IV, V.

Claim of privilege, see post § 109; Witnesses, IV, V; Trial, V, C; Indictment, IX, B.

¶ 217. In a prosecution for larceny from a store, committed while the merchant's attention was engaged by defendant, who was tried as accomplice, the merchant, being the complaining witness, and having stated that he had once been in a banking firm, was asked on cross-examination the following question: "Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe-keeping and use the proceeds for stock speculations in New York?" Held, that though the witness might refuse to criminate himself, the question should have been allowed.—People v. Arnold, 40 Mich. 710.

¶ 218. Where the defense of forgery is raised against a note procured by an agent of plaintiff, a farm-machine company, the agent, having testified to the execution of the note, may be asked on cross-examination whether he had not previously turned in a note to another company which falsely purported to be signed by defendant. The witness not claiming the privilege of not answering because it would tend to criminate him, his testimony was admissible as effecting his credibility, and as having some tendency to show that he fraudulently obtained the note in suit.—Johnston Harvester Co. v. Miller, 72 Mich. 265.

¶ 219. The rule that broad latitude should be allowed in the introduction of evidence where fraud is alleged, will not permit the admission of testimony, which is clearly incompetent and prejudicial.—Bales v. Evans, 182 Mich. 383.

¶ 220. It is not proper to cross-examine a witness upon a matter foreign to his direct examination, and as to which the law did not

permit him to testify without the opposing party's consent.—Fox v. Barrett's Estate, 117 Mich. 162.

¶ 221. In an action of trover for goods claimed to have been deposited with defendants as warehousemen and to which they made no claim of title, or of right to hold for any third party, and which were not redelivered on demand, it is not proper on cross-examination of defendants to ask as to the probability of their having delivered the goods by mistake to some one else since that would call for a mere conclusion.—Bissell v. Starr, 32 Mich. 297.

¶ 222. One of two plaintiffs in replevin may be cross-examined as to his own understanding, as to whether he "considered" they had lost certain property, and also as to his coplaintiff's admissions, concerning a material fact in the case.—DeGraw v. Emory, 113 Mich. 672.

¶ 223. In an action for alienating the affections of her husband it is competent to ask the plaintiff on cross-examination her opinion whether her husband would have lived with her if she had stayed on the farm where they lived and not left of her own accord.—Derham v. Derham, 125 Mich. 109.

¶ 224. A question asked on cross-examination, calling for a conclusion as to the cause of an accident, may be excluded, where counsel is allowed to cross-examine fully in relation to the facts of the occurrence.—Gerhard v. Ford Motor Co., 155 Mich. 618.

¶ 225. Upon the question whether a defendant telephone company placed its wires in a safe position, it is proper to refuse to permit the plaintiff's witness to be asked on cross-examination whether, if he had been superintending the putting up of the plant, he would have considered it properly built as it stood, where said witness did not pretend to be an electrician, and on his direct examination was questioned only as to facts.—Anthony v. Cass County Home Tel. Co., 165 Mich. 388.

¶ 226. A witness who has testified that he was not present on occasions when boys were playing with a certain dog, cannot be permitted on cross-examination to answer the question whether he did not as a matter of fact know that some of the boys used to go in and play with the dog and get him to chase them; for that would be hearsay.—Kennett v. Engle, 105 Mich. 693.

¶ 227. In ejectment by a widow, claiming under her husband's will and his possession of the premises, a witness, having testified for plaintiff as to her marriage to such husband, cannot be cross-examined as to his having had another wife living thirty years before and as to that fact having been litigated in a contest of the will under which plaintiff claims; since the probate of the will was conclusive.—Johnson v. Johnson, 70 Mich. 65.

§ 43. ——To meet inadmissible matter brought out by adversary.

Inadmissible matter on cross-examination opening door to redirect, see post § 93.
Recross on matter of re-examination, see ante § 41.

¶ 228. The complaining witness in a prosecution for robbery was cross-examined as to having once been arrested for robbery himself, but he was also permitted to explain the affair as not inculpating him. The respondent then introduced the testimony of the officer who had arrested the complaining witness. Held improper; but as the officer's testimony was admitted, it was proper to allow him to be cross-examined as to that arrest, and to give exculpatory testimony.—Driscoll v. People, 47 Mich. 413.

¶ 229. Where in trover by a vendee against a sheriff who had attached the goods at the suit of the vendor's creditors, plaintiff was allowed to show a tender of the goods by the sheriff to him after the commencement of the trover suit, and his refusal to accept them, the reason of such refusal may be shown on cross-examination.—Buckingham v. Tyler, 74 Mich. 101.

¶ 230. In an action by a passenger on an open street car to recover damages for injuries sustained as the result of his being swept from the running board by a pole along defendant's right of way, held that the admission of evidence on cross-examination as to changes made in the running board after the accident was not error where the witness and another had testified on direct examination that changes had been made in the running boards and that they had been removed from one side of the car.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

§ 44. Calling for matters of affirmative proof or defense.

See also post ¶ 234.
Cross-examination of party in his own behalf when called as adversary's witness, see post § 77, ¶ 534a.

Matters in rebuttal or traverse by cross-examination which might have been brought out in chief, see ante § 36.

¶ 231. An act of misconduct by a servant suing for his wages should be proved by itself by way of set-off if it is to be relied on for that purpose, and cannot be introduced upon cross-examination.—Bolt v. Frederick, 56 Mich. 20.

¶ 232. In a libel case where a witness has been examined on direct examination as to publication of the alleged libel and the circulation of it, it is error to elicit by cross-

examination the fact of previous publications and a mass of current reports bearing on the truth of the charges made and the bad repute of the plaintiff, such being more proper matter of defense under a plea of justification.—Brewer v. Chase, 121 Mich. 526.

§ 45. Germaneness to issues and direct examination.

Right to go into issues beyond matter brought out on direct, see ante § 37.
Right to cross-examine adversary's witness as to matter adducible by questioner in chief, see ante § 36.
Calling out entire transaction or full details complementary of matters touched in direct, see post § 46.
Matter tending to rebut or explain direct, see post §§ 47-55.
When collateral and immaterial questions are permitted and for what purposes, see post § 56 et seq.
Necessity of foundation or showing of connection, see post § 85.
Cross-examination of witness on formal or preliminary matters, see post § 70.
Relation and germaneness of redirect to direct and cross, see post §§ 92-94.
Interrogation of plaintiff to determine whether other party to contract was corporation or its president, see also Corporations ¶ 406.
Improper examination as harmless error, see Harmless Error; Indictment, XV.
Cross-examination as to circumstances of shipment bearing on condition of goods when received, see also Carriers ¶ 233.

¶ 233. A party having testified on her direct examination that she never sold or authorized the sale of certain property may be properly asked on cross-examination questions with a view to show that she is estopped by her conduct from setting up any claim to the property in opposition to a sale made of it by another person.—Dann v. Cudney, 13 Mich. 239.

¶ 234. In replevin for oxen claimed as exempt from execution, the questions whether the plaintiff had sold other property to bring himself down to the exemption, or whether he sold any property during the winter prior to the taking of the oxen in question to avoid paying his debts, if material at all, are matters of defense purely, and in the nature of a confession and avoidance, and they are not competent on cross-examination of a witness who has testified simply to the plaintiff's occupation, and that he had no other team, because they have no tendency to controvert the facts elicited by the direct examination. —O'Donnell v. Segar, 25 Mich. 367.

¶ 235. It being in issue what was claimed, under a warranty of an engine to save fuel "equal to that claimed for the Corliss," a witness who testifies as to the claims so made, stating that he obtained his information regarding such claims from trade-circulars, he may be cross-examined as to the statements in such circulars relative to fuel efficiency.—Wickes Bros. v. Swift Electric Light Co., 70 Mich. 322.

¶ 236. An abstract question not confined to matters brought out upon direct examination in a criminal case is properly excluded on cross-examination.—Ulrich v. People, 39 Mich. 245.

¶ 237. Facts relating to the matters testified to on the direct examination of a witness, and which have an important bearing upon the issue, may be shown on his cross-examination.—Child v. Detroit Mfg. Co., 72 Mich. 623.

¶ 238. On cross-examination of plaintiff, suing as indorsee of a since deceased payee of a note, it is improper to ask whether the payee at his death had money to loan.—Hillman v. Schwenk, 68 Mich. 293.

¶ 239. An abstractor of titles, who has made an abstract of a tract in suit, and has testified that there is no record of a patent from the United States to a person by whose last will the property came into the hands of the grantor of one of the parties, may be asked on cross-examination why he made the abstract showing title from the government to that person, and where he obtained his information of such title.—Dikeman v. Arnold, 78 Mich. 455.

¶ 240. An attorney, suing other attorneys to whom he sent a claim for collection in order to recover from them for proceeds retained by them for fees of assistant counsel, whom they have employed, may be cross-examined as to the extent of his authority and as to his judgment of the value of the assistant counsel's services.—Mead v. Glidden, 79 Mich. 209.

¶ 241. Where a plaintiff has introduced testimony which the jury might consider as corroborative of the testimony of the witness on a given point, it is competent for defendant to cross-examine the witness on the same subject against objection that it is immaterial and irrelevant.—Valin v. McKerreghan, 104 Mich. 213.

¶ 242. In an action of ejectment, the defense being nondelivery of the deed, through which plaintiff claims title and adverse possession, testimony, upon cross-examination of one of the defendants, that he had presented a large claim against the estate of his mother which was disallowed, and that he contested her will which was duly probated, is not germane to the issue and should be excluded.—Carpenter v. Carpenter, 130 Mich. 213.

§ 46. ——Calling out supplementary or complementary matter.

Right to call out rebutting and explanatory matters, see post §§ 47-55.

Developing whole conversation or exact words on redirect, see post § 98.
Cross-examination to draw out full correspondence or conversation, see also Evidence § 91.

¶ 243. Whenever an entire transaction is in issue, evidence which conceals any part of it is defective; and any question which fills up the omissions of the witness is legitimate and proper on cross-examination. A party cannot glean out certain parts which alone would make out a false account and save his own witness from the sifting process without which these omissions cannot be detected.—Chandler v. Allison, 10 Mich. 460.

¶ 244. The defense cannot be compelled to give credit to plaintiff's witness as its own in order to obtain the explanation of facts constituting plaintiff's case, where the plaintiff has omitted part of them in examining him; but is entitled to cross-examine him as to all the facts where the whole transaction is at issue.—New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

¶ 245. If a witness is asked if he had a conversation at a certain time, and the matter is left with an affirmative reply, the other party may call out the conversation if it would have any bearing on the controversy. —Dunbar v. McGill, 64 Mich. 676.

¶ 246. The payee of a draft had testified to an interview with the drawee in which the latter objected to paying because he had an unsettled account with the maker of the draft. Held proper on cross-examination to draw out all that the drawee said on the subject during that conversation.—Lichtenberg v. Mair, 43 Mich. 387.

¶ 247. In an action for an assault and battery growing out of plaintiff's being called to account to defendant for words spoken of him, plaintiff in the course of his testimony stated, "So I rehearsed what I said." Held proper on cross-examination to bring out what was rehearsed by him.—Galbraith v. Fleming, 60 Mich. 403.

¶ 248. Where a witness in an action on contract has been examined as to defendant's declarations, it is proper to cross-examine as to further statements made by him and bearing on the same subject.—Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239.

¶ 249. Plaintiff (who sues as indorsee of a note) having testified to a purchase of it and that the payee had kept it in a pocketbook, whereas defendant claimed that plaintiff forged the indorsement after the payee's death may, on cross-examination, be asked if he had in his possession, after the death, a pocket-book belonging to the payee.—Hillman v. Schwenk, 68 Mich. 293.

¶ 250. Where a witness testifies to certain admissions made by a party to the action when sworn upon a prior trial, the latter is entitled, upon cross-examination, to elicit all of his testimony then given which may tend to explain the statements which he is claimed to have made.—Reiser v. Portere, 106 Mich. 102.

¶ 251. In a prosecution against a public official for embezzlement, where one of the respondent's bondsmen had been permitted to testify to admissions made to him by respondent, and to payments made by his fellow bondsmen and himself, it was error to exclude on cross-examination all of the conversation he had upon such occasion with the respondent and the entire transaction about the payment.—People v. Warren, 122 Mich. 504.

¶ 252. Where the prosecutrix in a seduction case has testified that defendant had told her that certain other girls allowed such liberties as he took it was proper to ask her their names, as evidence bearing on the means used in effecting the seduction.—Lewis v. People, 37 Mich. 518.

¶ 253. Where a witness testified in a rape case that she went with one P. to see the mother of the injured girl in question and related the conversation which took place, cross-examination as to what the witness said to P. was proper.—People v. Rich, 133 Mich. 14.

¶ 254. In a will contest where, as tending to show mental capacity, testimony was offered that the testatrix a few hours after the execution of her will was attended by a priest who administered the last sacrament, and that the testatrix participated and appeared to comprehend the service, it is error to exclude cross-examination of a witness who was present at the service, as to what such service consisted of.—Henrich v. Saier, 124 Mich. 86.

¶ 255. A witness, having testified that he once owned the lands in question damaged by a nuisance, may be asked on cross-examination if he has sold them to plaintiffs.—Neely v. Detroit Sugar Co., 138 Mich. 469.

§ 47. Rebutting or explaining testimony.

To rebut or explain particular facts or matters, see post §§ 48-55.
Particularity required in question as to party's statements out of court offered to rebut his claim, see ante ¶ 23.
To show estoppel to make claim adduced on direct, see ante ¶ 233.
Right to call out matter on cross-examination from adverse party or witness who might have been called in chief, see ante § 36.
Contradictory testimony as ground for latitude, see ante ¶ 183.
Right to make explanation of testimony, see ante § 34.
Redirect to rebut or explain or complement cross-examination, see post §§ 97, 98.

Relevancy of evidence because tending to rebut or explain other evidence in the case, see Evidence § 84 et seq. and references there found; Indictment, VIII, B.
Order in which evidence in chief or in rebuttal should be received, see Trial, V, B; Indictment, IX, B.

¶ 256. It is competent on cross-examination to call out not only any fact contradicting or qualifying any particular statements made on the direct examination, but also anything tending to rebut or modify any conclusion or inference resulting from such statements.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Wilson v. Wagar, 26 Mich. 452.

¶ 257. On cross-examination of a witness for the plaintiff, the defendant may put any question calculated not only to test his credibility and the extent and means of his knowledge, but to draw out any fact which might tend either to contradict, weaken or explain any one of his particular statements, or to weaken any inference from the whole or any part of his testimony in chief that supports either of the main facts essential to the plaintiff's case.—Thompson v. Richards, 14 Mich. 172; O'Donnell v. Segar, 25 Mich. 367.

¶ 258. On cross-examination, questions relating to the subject-matter of the witness' testimony cannot be excluded merely because the precise subject has not been called up on his examination in chief, but may extend to any matter not wholly foreign to the subject-matter of such examination and tending to limit, explain or modify the same.—Haynes v. Ledyard, 33 Mich. 319.

¶ 259. A witness whose testimony makes out a prima facie case may be so cross-examined as to draw out any facts which would tend to destroy the case so made.—Jacobson v. Metzger, 35 Mich. 103.

¶ 260. It is competent for a father on cross-examination to state that he never told his young child that accused was the man who robbed the father, such child having identified accused and testified that the father told that; since the father's testimony tended to render the identification erroneous.—McGuire v. People, 44 Mich. 286.

¶ 261. Where the counsel of a defendant sued for criminally assaulting plaintiff while she was employed in defendant's house, has, in cross-examining plaintiff, emphasized the fact that one L., an employee of defendant, slept in a room adjoining the one occupied by plaintiff, and where plaintiff has been permitted to show, on cross-examining defendant, that, at a previous term of court, defendant procured a continuance on an affidavit showing that L. was a material witness, and that defendant expected to prove by him that he slept in said ajoining room during the time of the alleged assault upon plaintiff, and heard no outcry, that defendant knew the whereabouts of L., but did not produce him, and had concluded not to call him after having had a conference with him, such cross-examination was competent to rebut the inference which defendant sought to draw from plaintiff's failure to produce L. as a witness in her behalf.—Hart v. Walker, 100 Mich. 406.

¶ 262. An indorser, sued upon a note, the amount of which has been raised, may, after testifying that spaces were left before the figures and the written numbers large enough to admit of the insertion of other figures and words, be asked on cross-examination why he did not fill the spaces with marks and whether he did not know it is usual to do so.—Pearson v. Hardin, 95 Mich. 360.

¶ 263. In cross-examining a wife who is suing her father-in-law for alienating her husband's affections it is not competent to ask her whether she did not know that her church did not recognize as binding a marriage between a Protestant and a Catholic when solemnized by a Protestant minister, or to ask her sister, a witness in her behalf, whether she did not know that in the Catholic church the marriage meant no salvation for plaintiff, and whether the witness did not object to that; the proposed testimony being too remote for its purpose of rebutting the testimony of the witness that plaintiff's family did not object to the marriage.—Rice v. Rice, 104 Mich. 371.

¶ 264. In assumpsit, brought by a corporation against its former treasurer to recover an alleged shortage in his account, it is competent for defendant to prove on cross-examination that no demand was made on him for such shortage at the stockholders' meeting when he was relieved of his office, there having been evidence tending to show a constructive demand.—American Seed Co. v. Cole, 174 Mich. 42.

¶ 265. Plaintiff corporation brought assumpsit against one of its former officers to recover for his having overdrawn his account, and defendant claimed a credit by a raise in salary at a director's meeting. In such case, it was competent for defendant, for the purpose of corroborating his own testimony, to cross-examine plaintiff's witnesses as to raise in salaries of other officers at such meeting and as to book entries tending to prove the same.—American Seed Co. v. Cole, 174 Mich. 42.

§ 48. ——Financial conditions and resources.
See also ante ¶¶ 238, 264, 265, post ¶¶ 281, 282, 285.
As to particulars of damages and values, see post § 54.
As bearing on probability of large order being for cash or on credit terms, see post ¶ 293.

¶ 266. Where a prosecuting witness claims to have been robbed of a large sum of money, taken from his person, cross-examination to show that he was straitened and considerably indebted, and that his stock of goods was small, and that on the preliminary examination of the accused he had made statements indicating that his inventory was very much larger than he knew it to have been, is admissible as bearing on the probabilities and to test his candor and credibility.—People v. Morrigan, 29 Mich. 4.

¶ 267. A wife replevied, as her own, property that had been seized on execution against her husband, and on the trial called her husband to show that it belonged to her. Held proper to cross-examine him as to his own use of the property and of its proceeds, and also as to his business, what he did with his earnings, and where his wife got her money to pay for the property in suit.—Gavigan v. Scott, 51 Mich. 373.

¶ 268. Where, in suit against A. and B. for money alleged to have been lent to them as partners, A.'s theory was that B. had no money when he went into business with him, and that B. borrowed part of the money sued for to pay that which he had borrowed to go into business with, it was held proper, B. having testified in behalf of plaintiff, to subject him to a searching cross-examination as to his financial condition and transactions from the time the business began, and to ask him if he did not know at the time he went into business that he had no money for the purpose.—Coller v. Porter, 88 Mich. 549.

¶ 269. In an action upon an obligation given by a man to his divorced wife, the consideration for which was that she should pay certain debts of his, where she had testified that she paid such debts with money obtained from an insurance company, it was proper to cross-examine her as to whether she did not borrow such money on property given her by her husband, the purpose being to show that the money was not borrowed, but was taken out of her husband's store.—Bulen v. Granger, 58 Mich. 274.

¶ 270. In an action on a promissory note, the execution of which is denied, it is competent to cross-examine the payee as to where he obtained the money to make the alleged loan.—Neal v. Neal, 181 Mich. 114.

§ 49. ——Existence, terms, performance, or discharge of contracts.

As to assignments, transfers and sales, see post § 50.

Financial conditions and resources as bearing on contract, see also ante § 48.

Cross-examination as to previous statements respecting existence of instrument, see post ¶ 468.

¶ 271. It is proper to ask a witness on his cross-examination, who has testified on his direct examination to the execution of a policy of insurance, whether, when policies of the kind testified to by him were issued by the company, any other papers were executed by either party in connection with the policy.—Throop v. North American Fire Ins. Co., 19 Mich. 423.

¶ 272. Where defendant in an action for breach of contract does not admit the contract and plaintiff testifies to it, defendant may put in by cross-examination anything that would tend to show that it was unreasonable or could not have been carried out by either party.—Petrie v. Lane, 58 Mich. 527.

¶ 273. Where the execution of a note is denied by defendant, and the agent who claims to have taken it for plaintiff testifies that he was present and saw defendant sign it, he may be cross-examined fully as to all that took place at the time of the alleged signing.—Johnston Harvester Co. v. Miller, 72 Mich. 265.

¶ 274. In an action for services in purchasing and shipping sheep for defendants it is error, on cross-examination of a witness who has given evidence tending to show the purchase from witness by plaintiff of certain specified sheep for defendants, to exclude the inquiry as to who paid him for such sheep; the payment in completion of the bargain might direct the jury to the principal for whom the purchase was made with quite as much certainty as any testimony of witnesses as to their mere understanding; the inquiry is relevant and important.—Parker v. Grinnell, 34 Mich. 199.

¶ 275. In an action against a landlord on an alleged promise to reimburse the costs, expenses and damages sustained by a tenant in taking an appeal from a judgment of eviction in summary proceedings brought against him by a tenant claiming under a prior lease, a witness testified that he told the landlord that he, the landlord, was responsible to appellant if evicted, and also that the landlord gave the witness to understand he would stand by appellant. Held, that it was proper on cross-examination to examine the witness in full as to the circumstances under which he gave such advice.—Cummerford v. Paulus, 66 Mich. 648.

¶ 276. In an action against an attorney upon an alleged agreement to prosecute plaintiff's suit and pay all costs, receiving half the recovery if successful, where plaintiff has testified that defendant solicited him to allow defendant to prosecute appeal from an adverse judgment on such terms, after plaintiff had given up trying to collect it, it is proper to ask plaintiff, on cross-examination, whether he had not tried unsuccessfully to get different attorneys to take the case on shares.—Wildey v. Crane, 69 Mich. 17.

¶ 277. In an action for breach of promise of marriage, plaintiff, having testified to statements circulated by defendant as to her physical disability, may be cross-examined as to statements made by herself on the subject; and, though plea is the general issue, she may be asked whether she has told certain persons that she had a tumor, for this would bear on her capacity to make or carry out at that time a contract of marriage without fraud or injury to defendant.—Goddard v. Westcott, 82 Mich. 180.

¶ 278. A defendant claiming to have signed without consideration and after negotiation to plaintiff, when sued on a note and having testified that he promised to pay the note if plaintiff would discount it, and as a compromise may be asked how much he offered to pay.—Steers v. Holmes, 79 Mich. 430.

¶ 279. A general agent of an insurance company who has testified upon direct examination, in an action by a solicitor against him for commissions, that he paid one-half of the commissions on the first premium on certain policies to a third person, may be asked on cross-examination, for the purpose of rebutting the inference to be drawn from his testimony that his agreement with the solicitor called for less than half the first premiums, as to how much annual commissions he is entitled to on policies after the first year.—Raymond v. Day, 111 Mich. 443.

¶ 280. In an action for non-performance of contract defendant should be allowed to show by cross-examination of the plaintiff that the latter, after the contract was made, had left it discretionary with defendant to rescind.—Petrie v. Lane, 58 Mich. 528.

¶ 281. In an action upon an obligation given by a man to his divorced wife, the consideration for which was that she should pay certain debts of his, it is proper for him to show in defense that she had paid them, if at all, with the surplus moneys furnished her by him for domestic expenses; since such evidence tended to show that she made use of his money instead of her own (if she paid them), in so doing.—Bulen v. Granger, 58 Mich. 274.

¶ 282. Where a person sued for commissions claimed by plaintiff as due him on a sale of land defends on the theory that he has paid the agreed commissions to another real-estate agent, by plaintiff's direction, and that the two were to make a division of the same, and the second agent testifies that he received the money under such an arrangement, which he has not carried out, he may be asked on cross-examination why he has not paid plaintiff his share of the money; since the answer might show a proper application to plaintiff's benefit by his consent. —O'Callaghan v. Boeing, 72 Mich. 669.

¶ 283. Where the defendant in a suit upon a contract for malleable iron seeks to recoup damages for breach of the contract which plaintiff claimed he was unable to fulfill because proper patterns, flasks, and cores were not furnished and defendant claimed that he did furnish proper patterns, flasks and cores, that they were the same he had furnished others, and that no complaint had been made, the defendant may be properly cross-examined relative to such contention.—Rockford Malleable Iron Works v. Tilden, 188 Mich. 80.

§ 50. ——Particulars of assignments, transfers and sales.

As to contracts and their terms in general, see ante § 49.

As to fraud, good faith or notice, see post § 53.

¶ 284. In an action upon an assigned obligation, the assignor, if called as a witness for the plaintiff, may properly be cross-examined as to any material fact affecting the execution of the paper.—Bulen v. Granger, 58 Mich. 274.

¶ 285. Where, in a suit by the vendee of a partner's interest in the firm's business and assets against his vendor, the other partner has testified in defendant's behalf as to the manner of selecting the assigned accounts, and that all of the accounts were not assigned to plaintiff, who claimed that he was to have gilt-edged accounts, it is competent, upon cross-examination, to show the amount of the retained accounts, and what had been realized upon them.—Totten v. Burhans, 103 Mich. 6.

¶ 286. Where the direct testimony of a witness tended to show a sale of articles without any specified price, it is competent in an action for their value to show by his cross-examination that they were furnished under a special contract.—Wilson v. Wagar, 26 Mich. 452.

¶ 287. In an action against a married woman to charge her individually for goods purchased, it is competent, on the cross-examination of plaintiff, who has sworn simply that she bought them at his store, and that they were charged to her on his books, to ask him whether at the time he sold her the goods he knew that she was a married woman.—Powers v. Russell, 26 Mich. 179.

¶ 288. In a suit against a married woman for goods sold her in the way of business it was held proper to cross-examine her and her husband fully as to their habit of purchasing and doing business.—Altman v. Young, 38 Mich. 410.

¶ 289. In an action for the price of wood sold and delivered it was proper on cross-examination of a witness, who had sworn that none of the wood had been sold and removed before the delivery and measurement had been completed, to ask whether it

was not common for persons to buy wood there by the pile and haul it away themselves, since it bore on the probabilities as well as on the witness' knowledge as to what happened there during the time of unloading.—McGraw v. Sturgeon, 29 Mich. 426.

¶ 290. An architect suing for the value of some plans showed that he had delivered them, at defendant's request, to a third person, who swore that defendant had sent him after them. Held, that on the cross-examination of this witness, the question whether defendant had not demanded the plans of him, and he had refused on the ground that he owned them, was properly excluded as neither impeaching nor tending to show as against the plaintiff that he had really bought the plans.—French v. O'Connor, 39 Mich. 106.

¶ 291. A produce broker sued a dealer who had commissioned him to buy corn for future delivery, for refusing to receive the corn when tendered, and testified that while the expectation had been that the dealer would order a sale before the time for delivery, the broker had nevertheless expected to obtain title to the corn for delivery at the maturity of the contracts, if they were not sooner disposed of. Held, that in the absence of any evidence of previous gambling transactions between the parties, it was not proper on cross-examination to ask the broker if on any such dealings he had ever received any corn.—Gregory v. Wendell, 40 Mich. 432.

¶ 292. Where the only question at issue is whether property was transferred under one contract or another, and no question of fraud is raised, there is no ground for cross-examining a party as to the value of the consideration.—Leavitt v. Stansell, 44 Mich. 424.

¶ 293. Where the dispute is whether the terms of a sale were cash or four months' time, it is proper to ask defendant when he bought so large an order before; it being claimed by plaintiff that the purchase on time of so large an order by a dealer in a small town was improbable.—Julius King Optical Co. v. Treat, 72 Mich. 599.

¶ 294. Where a foreign manufacturer is sued for failure to deliver goods at the time agreed in the contract of sale, his agent, having testified to certain reasons for the failure to fill the order, may be cross-examined with a view of showing reasons other than those given.—Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 295. A plaintiff in replevin, to establish his title, testified that the defendant had agreed to make for him the article in dispute, had notified him of its completion, asked him to take it, and afterwards, upon a claim relating to it, had recovered judgment against him, which he had paid; held proper on cross-examination to ask him whether, when defendant had notified him and required him to take the article, he had not refused on the ground that it was not made according to agreement, such a circumstance belonging to the group of facts related, and being adapted to give the affair a different legal aspect.—Lyman v. Becannon, 29 Mich. 466.

¶ 296. Where one who sues for a balance due on a contract to deliver timber claims that delay in delivery was waived by defendant, it is proper, as bearing on the question whether the latter understood he had waived such delay, to ask him, on cross-examination, whether he had a vessel to take the timber on the day fixed for delivery.—Duplanty v. Stokes, 103 Mich. 630.

¶ 297. In an action for goods sold and delivered, where the defendants had agreed to make a cash payment and the balance by giving a note, which was returned by the plaintiff as not properly signed it was proper cross-examination of one of defendants to ask him if a note had not been asked in return for the other one.—Illinois Roofing & Supply Co. v. Aerial Advertising Co., 142 Mich. 698.

§ 51. ——Torts and negligence and circumstances thereof.

Of party respecting tort or negligence, see post § 52.
As to damages and values, see post § 54.
Collateral and immaterial matters as subjects for cross-examination, see post § 56 et seq.

¶ 298. Where a witness has testified that he told deceased—who was about to cross a railroad track in a wagon drawn by a mule—to "whip up his mule," it is proper to bring out on cross-examination the fact that he had frequently joked deceased about the mule; this would be pertinent to the question whether the deceased understood the remark as indicating danger from an approaching train, or as mere pleasantry.—Gugenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 299. In a personal injury case where plaintiff had been struck at a railroad crossing it was competent on cross-examination to ask the physician whether plaintiff had told him whether or not he had seen the engine before he had been struck by it, the purpose being to elicit admissions then made.—Thomas v. Chicago & G. T. R. Co., 86 Mich. 496.

¶ 300. In a statutory assumpsit for recovery of the cost of breaking a log jam alleged to have been caused by defendant's neglect, it was proper cross-examination of the foreman of the log-driving crew, called as a witness by defendant, to ask him if he had given directions to roll logs into the stream and keep its channel full and not to drive out defendant's logs and to make plain-

tiffs drive out defendant's logs first if they wanted to get their own out, there having been testimony in chief tending to show that defendant's logs were rolled into the stream so as to keep it dammed.—Butterfield v. Gilchrist, 63 Mich. 155.

¶ 301. Thorough cross-examination of the plaintiff's witnesses should be permitted in an action against a saloonkeeper and his surety by a minor child for an assault on her by her father while intoxicated, to show previous similar assaults by him when sober. —Yonkus v. McKay, 186 Mich. 203.

¶ 302. In an action for injury suffered by escape of electric current over trolley span wires through improper insulation, it is proper cross-examination of defendant's foreman to ask if he had warned workmen against hot span wires.—Warren v. City Elec. Ry. Co., 141 Mich. 298.

¶ 303. In an action for injury done by negligent driving it was held proper, on cross-examination of the driver, to exclude evidence that at the time of the injury he refused to give the name of the owner of the team he was driving. This could not have aided in fixing the liability.—Mabley v. Kittleberger, 37 Mich. 360.

¶ 304. Where defendant automobile owner's servant, in a suit for injuries from an accident, testifies that he ran his master's cars slowly all through town in testing them, cross-examination is permissible to show what his usual rate of speed was.—Matla v. Rapid Motor Vehicle Co., 160 Mich. 639.

¶ 305. In an action at common law for the negligent death of a railway pump operator in which it was alleged that defendant failed to furnish deceased with a place and machinery reasonably safe in which and with which to work, and in which a witness for defendant testified that the machine in question was in common and general use at the time of the accident and that the company by whom he was employed had sold this machine on a specified date, and that up to the date of the accident, a period of thirteen years, a certain number of machines was placed upon the market, held that it was proper by cross-examination of such witness to show that a great number of such machines were of different construction in that they had an entirely different clutch and had guards.—Snowden v. Detroit & M. Ry. Co., 194 Mich. 87.

§ 52. ——Of party respecting tort or negligence.

Of party in general, see post § 77.
As to extent of personal injury and disability, see post § 54.

¶ 306. The nature of the possession of a plaintiff in trover can be inquired into in cross-examining him.—Stearns v. Vincent, 50 Mich. 209.

¶ 307. In an action for malicious prosecution based on charges of maliciously breaking a church window, it was not error to allow a full cross-examination of plaintiff as to his knowledge of or connection with other injuries to the church both before and after the injury complained of, such questions bearing on his motives and the extent of his injury from the prosecution.—Gurden v. Stevens, 146 Mich. 489.

¶ 308. Defendant may be cross-examined fully in regard to his former relations with plaintiff; in an action for assault and battery and malicious prosecution.—Peterson v. Toner, 80 Mich. 350.

¶ 309. In an action for assault and battery it is proper to ask plaintiff, on cross-examination, whether, before the parties came to blows, he did not assume a threatening attitude and advance toward defendant. —Galbraith v. Fleming, 60 Mich. 403.

¶ 310. In case of an assault, where the defendant claimed that the occurrence was merely a friendly scuffle, it was not error to permit cross-examination of him as to whether he threw cayenne pepper in a boy's eyes subsequent to the assault in question, the only objection having been on the point of time and the fact being relevant to defendant's disposition to play pranks on others.—Lee v. Longwell, 136 Mich. 458.

¶ 311. A defendant in a suit for assault and battery testified by way of justification that the plaintiff had a quarrelsome disposition, and defendant was in great fear of him on the occasion in question. Held, it was error to refuse the plaintiff permission to cross-examine the defendant as to his own traits for the purpose of showing that he was in fact not afraid.—Ulmer v. Seelman, 159 Mich. 253.

¶ 312. In an action for damages for assault and battery where defendant testified that he picked up the stone with which he struck plaintiff because he was afraid of plaintiff, held that it was proper on cross-examination to ask defendant if he did not at one time throw a club at another person and if he had not carried a piece of iron in his pocket and boasted that he would get a certain man with it for the purpose of showing his character and disposition.— Cornell v. Fidler, 194 Mich. 509.

¶ 313. In an action for libel where the newspaper article claimed as libelous alleged that plaintiff, a sheriff, was drunk and frequented saloons after hours, and the defendant pleaded justification, it was held error to exclude questions on cross-examination of plaintiff tending to show his habits as being a frequenter of saloons after closing hours.—Aronson v. Baldwin, 178 Mich. 565.

¶ 314. In an action for damages from defendant's careless driving it is not admissible

on cross-examination of plaintiff to ask him as to his own habits of running horses on the highway, or of being intoxicated while driving, if it is not contended that he was indulging in either of the habits at the time of the injury.—Hill v. Snyder, 44 Mich. 318.

¶ 315. Where an action for an injury caused by the negligence of defendant's driver in colliding with plaintiff's wagon, plaintiff testified that if the defendant's driver had driven in a straight line from where plaintiff saw him he would not have touched plaintiff. It was proper to ask him how far in such case the wheels of defendant's truck would have come from him.—Boick v. Bissell, 80 Mich. 260.

¶ 316. In an action for injuries to a threshing machine outfit caused by the fall of a bridge, a question asked on cross-examination of a plaintiff as to whether it was not carelessness to drive the machine on the bridge without first examining the strength of it, was proper, although objected to on the ground that he might have assumed that the bridge was strong enough, and used it on that assumption.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 317. In a suit against the owner of a building for personal injuries arising from the failure to provide automatic gates at the elevator shaft, defendant asked plaintiff on the cross-examination whether, if he had had a good bright light, he would have seen that the elevator was not at the landing. Held, the exclusion of this by the court was not error as preventing defendant from showing that there was no light at the elevator shaft and from showing the general condition with respect to the light.—Barfoot v. White Star Line, 170 Mich. 349.

§ 53. ——Frauds and fraudulent conveyances, good faith, and notice.

Questions as to collateral matters bearing on fraud, see post § 56 et seq.

Respecting collateral frauds and misdoing to affect credibility, see post § 64.

As to prior statements admissible of the fraud, see post § 67.

¶ 318. Wide latitude of cross-examination may be allowed in cases involving fraud.—Anderson v. Walter, 34 Mich. 113; Jacobson v. Metzger, 35 Mich. 103; Snow v. Nowlin, 43 Mich. 383; Daniels v. Dayton, 49 Mich. 137; Ganong v. Green, 71 Mich. 1; Stevenson v. Woltman, 81 Mich. 200; Miller v. Hanley, 94 Mich. 253; Gumberg v. Treusch, 103 Mich. 543; Barnett v. Farmers' Mut. Fire Ins. Co., 115 Mich. 247.

¶ 319. A wide latitude should be allowed in the cross-examination of a witness who participated in a transaction to which the defense of fraud is set up.—Neal v. Neal, 181 Mich. 114.

¶ 320. Where a principal charges collusion between his agent and a third party to defraud him, cross-examination of the principal as to making a claim against the agent's bondsman, is proper.—B. Marx & Son v. King, 177 Mich. 662.

¶ 321. In an action for fraud a person concerned with defendant testified with regard to the latter's purchase of a certain horse that he himself had objected to, cheating the owner of the horse because the owner had a crippled mother to support, and that defendant had carried out the cheat himself. On cross-examination defendant was asked, against objection, as to the crippled condition of the woman, and admitted it. Held, that this was admissible as bearing on the probabilities as corroborating the first witness.—Daniels v. Dayton, 49 Mich. 137.

¶ 322. On an application to dissolve an attachment granted on the ground that defendants had disposed of their property with intent to defraud creditors, it was proper to question a witness who testified that he held a mortgage on some of defendants' property as to what the particular property was and whether he had ever paid defendants anything for the mortgage.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164.

¶ 323. Where in an action by an indorsee upon a note defendant alleged that it was obtained by fraud, and that plaintiff knew it, and showed that other notes were fraudulently obtained and sold to third parties before maturity. Held, that plaintiff could not show, on cross-examination, the reputable character of the third parties.—Mace v. Kennedy, 68 Mich. 389.

¶ 324. Where a mortgagee seeks to recover the value of mortgaged property sold on execution, and the mortgage is charged to have been fraudulent, he may be cross-examined as to his disposition of other property covered by the mortgage but not involved in the suit.—Ganong v. Green, 71 Mich. 1.

¶ 325. Where, in a suit involving an alleged fraudulent sale of property, a vendor is sworn as a witness in behalf of the vendee and plaintiff, defendant on cross-examination may draw out any material fact tending to show that the sale was fraudulent as to creditors.—Pickard v. Bryant, 92 Mich. 430.

¶ 326. In a proceeding under How. St., § 8091, to hold garnishees on account of conveyances fraudulent as to the principal defendant's creditors, the manager of a commercial agency, after testifying in plaintiff's behalf to a statement made to him by the principal defendant as to his financial condition, and after testifying on cross-examination that he had known the garnishees several years, should not have been asked if he had known of their having been engaged

during that time in any dishonest transactions.—Gumberg v. Treusch, 103 Mich. 548.

¶ 327. In garnishment proceedings where the defense was that no sale was made to the garnishee defendants but to a third party from whom they purchased and the plaintiff insisted this was a subterfuge, evidence produced through cross-examination of the garnishee defendants about other sales to other parties is immaterial, and especially improper when not touched on in the direct examination, and evidence that this sale to a third party was a fraudulent one was improper as impeaching evidence.—Seitz v. Starks, 144 Mich. 448.

¶ 328. In cross-examination of plaintiff in an action to recover for medical services, where defendant claims a fraudulent agreement between the plaintiff and his assistant to divide the fees, considerable latitude should be allowed as to such agreement.—McNair v. Parr, 177 Mich. 327.

¶ 329. Where it is claimed that one who sues upon a renewal note had knowledge of the invalidity of the original, he may be subjected to full cross-examination as to his conversations with defendant at the time he took the note.—Hunt v. Rumsey, 83 Mich. 136.

¶ 330. Where the testimony in a suit by an alleged bona fide holder of a "Bohemian Oat Note" tended to show that the plaintiff had knowledge of the true character of the paper before its purchase, he may be cross-examined touching his knowledge, before or at the time of such purchase, of Bohemian oat notes in general, or as to his information or knowledge specially in regard to any such note which had come into his hands or to his attention.—Ward v. Doane, 77 Mich. 328.

¶ 331. Witnesses for plaintiff may be cross-examined at length upon the question of bona fides, though they were not examined upon that subject in the direct examination, where the issue is whether the plaintiff bank is a bona fide holder of a fraudulently certified check.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 332. In an action of assumpsit for fraud and deceit under Comp. L. 1897, § 10421, based upon the exchange of a hotel for some land, where plaintiff claimed that defendants had represented that the hotel was rented and the lessee was called to testify that the alleged lease was a mere pretense it was proper cross-examination to ask him if at the time of signing the lease it was understood that the officers were looking up evidence to prosecute for violation of the liquor law and the statute against gambling.—Pinch v. Hotaling, 142 Mich. 521.

¶ 333. Where plaintiff sues defendant to recover, on the ground of fraud, money advanced to defendant under a certain contract, it is proper to cross-examine defendant as to where he secured the form of contract used.—Ward v. Cook, 158 Mich. 283.

¶ 334. In an action for personal injuries caused by defendant's dog, cross-examination of defendant, to inquire into defendant's disposition of his property pending the suit is improper.—French v. Wilkinson, 93 Mich. 622.

§ 54. ——Damages or values and personal injuries and details thereof.

Cross-examination to show that contract was rescindable at option, see also ante ¶ 280.
Cross-examination of plaintiff in action for breach of promise to marry as bearing on damages, see Damages ¶ 1273.
Redirect to meet inference that injury was slight, see post ¶ 647.
Cross-examination as to means of knowing values, see post § 57.
Redirect as to data of valuation, see post § 97.
Admissibility of evidence bearing on damages, see Damages, XI.
Admissibility of evidence bearing on values, see Values.

¶ 335. In an action against a carrier for injury to hay by wetting where evidence has been admitted as to its condition at a previous connecting point of transshipment, it is proper cross-examination to inquire into the mode of transshipment, conditions of storage, weather, and condition in which it was delivered to defendant carrier.—Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251.

¶ 336. In trover the value of the property in suit only is material, and evidence as to the value of other property described in the bill of sale under which plaintiff claims title is inadmissible under cross-examination.—Burrill v. Wilcox Lumber Co., 65 Mich. 571.

¶ 337. In an action for damages for false imprisonment, the plaintiff introduced evidence that she was a physician and offered to show the value of her practice. Held proper cross-examination to ask how she got it, as by advertising, through hand-bills, or otherwise.—Van Deusen v. Newcomer, 40 Mich. 90.

¶ 338. On cross-examination of a physician sued for malpractice, inquiry as to his having been engaged in farming pursuits during the time he has been practicing as a physician is proper.—Mayo v. Wright, 63 Mich. 32.

¶ 339. Where in an action for false imprisonment plaintiff was allowed, in proving damages, to show that he had subpoenaed witnesses, and the amount he had paid them, he was properly asked on cross-examination to state the specific amount paid a given witness.—Thurston v. Wright, 77 Mich. 96.

¶ 340. Where one sued for services in moving a building seeks to recoup damages for injury thereto, and testifies that it was worth $400 or $500 when he bought it, it is proper, as tending to discredit his statement of the value, to draw out from him on his cross-examination the fact that he paid $85 for the building.—Curren v. Ampersee, 96 Mich. 553.

¶ 341. Plaintiff having testified to rental value at a certain sum corresponding to rent reserved in leases introduced for the same purpose, it was competent on cross-examination to show that he actually received a less sum the year before for the use of said premises, and that he furnished heat for the same, said proposed evidence tending to contradict or weaken his testimony as to said rental value.—Vincent v. Defield, 105 Mich. 315.

¶ 342. The defense, in an action for damages to a dock owner, resulting from the construction of a bridge near by which tended to prevent vessels from stopping at the dock, may cross-examine the plaintiff as to the particulars upon which the general estimate which he gave in testimony as the annual damage, was formed.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 343. On the question whether accounts transferred on sale of an interest in a firm were good and collectible, a witness examined for the adverse party, and who has testified as to the manner of selecting the assigned accounts and that some of them had not been assigned, may be cross-questioned as to what was afterwards realized on those not assigned.—Totten v. Burhans, 103 Mich. 6.

¶ 344. In an action for breach of warranty in the sale of fruit trees on account of furnishing trees of inferior variety, where the witness has testified as to the increased value of real estate with trees upon it, cross-examination on the cost of raising trees is competent to test the credibility and the competence of the witness and to assist the jury in determining the value of the land with trees of proper varieties.—Angell v. Pruyn, 126 Mich. 16.

¶ 345. In assumpsit for goods sold and delivered to a retailer and a plea of recoupment for defects in the goods, it is proper to cross-examine the defendant as to the price he received for the goods, where he has testified on direct examination as to the usual custom.—Jackson Sleigh Co. v. Holmes, 129 Mich. 370.

¶ 346. In trover for the conversion of mortgaged tools by the mortgagee, the plaintiff having testified as to the value of the tools, it is erroneous to exclude cross-examination on the identity and value of certain tools alleged to be part of those mortgaged.—Lemon v. McBride, 134 Mich. 295.

¶ 347. Plaintiff brought mandamus to compel defendant city council to accept a saloon bond. Defendant called one Exelby to make a valuation of the farm of a surety, one Allen. Exelby owned a farm near Allen's farm. Held, that on cross-examination the court properly refused to permit Exelby to be asked whether he would sell his farm at the same valuation per acre.—Knabush v. Common Council Village of Britton, 158 Mich. 577.

¶ 348. Where plaintiff in an action for negligent injury had testified that he could not do any work until the next spring after he was injured, he may be asked whether he was obliged to hire a man during that time.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 349. In an action for personal injuries, the admission, upon cross-examination of plaintiff, of evidence to show his physical condition for some time before the accident, and that he was drawing a pension for injuries received during the war, is not ground for reversing a verdict for defendant, although it appears that plaintiff was cured of such injuries before the accident.—Le Beau v. Telephone & T. Const. Co., 109 Mich. 302.

¶ 350. Where the daughter of the plaintiff on cross-examination testified that her mother did not go out as much as before her accident but she could not say it was wholly due to the accident, and she was asked whether her mother had other sicknesses that might cause it as well as the injury, such question is properly excluded on an objection that the witness was not an expert; but defendant might show whatever witness knew plaintiff had been afflicted with at or right after the accident.—Barker v. City of Kalamazoo, 146 Mich. 257.

¶ 351. In a suit for personal injury suffered by plaintiff in alighting from defendant's street car, held, it is proper to permit plaintiff to be cross-examined as to her employment and as to an occurrence in which she participated two months after the accident, where she testified that she could not resume her work for four months on account of the injury.—Cummings v. Detroit United Ry., 163 Mich. 304.

¶ 352. Plaintiff attorney at the trial of his suit for personal injuries was a candidate for judge, and on the question of the extent of his injury was asked on cross-examination if he wanted it to go out to the people of the county that his earning capacity had been lessened by reason of the accident. Held, the answer to said question was properly excluded.—Wilkins v. Detroit United Ry., 169 Mich. 437.

¶ 353. In an action for personal injuries the question asked the plaintiff on cross-ex-

amination, as to whether there was anyone dependent upon him for support, held properly excluded.—Foley v. Detroit & M. Ry. Co., 193 Mich. 233.

¶ 354. In an action to recover damages for personal injuries, where impairment of plaintiff's memory was claimed as one of the results of the injuries, testimony on cross-examination of plaintiff that he had been under observation in a psychopathic hospital on commitment by a probate court some time before the accident, held admissible as bearing on the question of plaintiff's condition of health prior to the accident as testified to by him.—Griggs v. Saginaw & F. Ry. Co., 196 Mich. 258.

§ 55. ——Circumstances of crime.

Relevancy and competency of circumstances as proof of crime charged, see Indictment, VIII, B.

¶ 355. A witness for the prisoner was examined as to the prisoner's being present and transacting business near the scene of an alleged murder, and near the time when it was claimed to have been committed; and it was held not improper to permit the prosecution to show, on his cross-examination, any facts having a tendency to show from which direction the prisoner came to that place; as that the witness went out and found tracks which, at the time, he believed and stated were the prisoner's coming towards the place, and the like.—Dillin v. People, 8 Mich. 357.

¶ 356. Where in a prosecution for a violation of a village ordinance which declares any assemblage of persons, in any place in the village, engaged in any noisy, etc., language or strife, or who shall be fighting or quarreling therein, a disorderly assemblage, and providing for the punishment of any person or persons who shall be convicted of a violation of said ordinance, the complaint alleges, and the testimony tends to show, that the disorderly assemblage was in a saloon in said village, it is not error for the court to permit the prosecuting attorney to cross-examine respondent as to facts occurring after he had left the saloon, it appearing that the inquiry related to the subject of whether or not he was attempting to follow up the parties with whom he was engaged in the quarrel in the saloon, thus bearing upon the question of motive.—Village of Vicksburg v. Briggs, 102 Mich. 551.

¶ 357. On a prosecution for seduction, the prosecutrix being a divorced woman 21 years of age and the sole witness for the people, held that the defendant should have been allowed, as bearing upon the previous manner of life, knowledge and worldly experience of the prosecutrix, to fully cross-examine her as to her relations with her former husband, the facts relating to the obtaining a divorce from him, and the allegations in her sworn bill of complaint for divorce.—People v. Turton, 192 Mich. 331.

§ 56. Collateral and immaterial matters.

To show knowledge or correct observation, see post § 57.

To show bias, interest or motive, see post §§ 58-61.

To affect character or show discrediting antecedents, see post § 62.

To affect credibility by showing relations of witness to parties, see post § 63.

To show other frauds, misdoings and crimes, see post §§ 64, 65.

To show previous statements or testimony affecting credibility, see post §§ 66-68.

Explanation or rebuttal of proven prior statements, see post § 69.

General rule as to scope of cross-examination, see ante § 37.

Admissibility of evidence on ground that it impeaches or corroborates a witness, see Witnesses, VI, D.

Rule that one cannot impeach or contradict his own witness on a collateral matter, see Witnesses, VI, D.

Improper examination as error made harmless by other matters in case, see Harmless Error; Indictment, XV.

¶ 358. Cross-examination tending to impeach a witness is proper.—People v. Tubbs, 147 Mich. 1.

¶ 359. Questions on matters immaterial to the issues cannot be employed in cross-examination to test the credibility of a witness, and are properly excluded.—Loranger v. Carpenter, 148 Mich. 549.

¶ 360. That the plaintiff had recovered judgment against the defendant and satisfaction therefor for a previous injury, cannot be shown on cross-examination in an action for a subsequent injury.—Johnson v. Union Carbide Co., 181 Mich. 403.

¶ 361. Where the notes of a certain person were in question and the defendants were charged with being in a conspiracy to use them in fraud of the plaintiff, and a witness had testified on cross-examination to having let different persons have some notes made by the same man, and there was nothing in the direct examination about the same matter, and the question was not calculated to draw out anything tending to show that the witness was connected in any common design with either of the defendants in disposing of, or trading in, these notes, the question was held inadmissible, as the answer might possibly have affected the witness' credit before the jury, as in their minds showing a bias in favor of the defense.—Beebe v. Knapp, 28 Mich. 53.

¶ 362. On a contested proceeding to establish a will it is improper to cross-examine one of proponent's witnesses as to the fact of proponent's son having been born very soon after her marriage and as to what witness heard some one else say about it.—Rickabus v. Gott, 51 Mich. 227.

¶ 363. It is error to ask plaintiff, a woman, suing for a carnal assault, and who has testified that she was being treated at a medical college, whether such treatment was in the presence of the student's class.—Derwin v. Parsons, 52 Mich. 425.

¶ 364. Where in an action on a fire insurance policy the plaintiff has testified as to the condition of her dress and her children's hasty escape from the fire, cross-examination on this point is immaterial and not admissible unless fraud is charged or the fire was improper.—Simon v. Home Ins. Co. of New York, 58 Mich. 278.

¶ 365. In an action wherein the assessability of lumber for taxation is in issue it is proper to bring out on cross-examination of the owner that taxes of former years on the property had been paid by him without protest in the same place, as tending to show in what light the owner regarded his occupancy and use of the premises upon which the lumber was piled or stored.—Hood v. Judkins, 61 Mich. 575.

¶ 366. A commercial traveler, suing for his wages, testified without contradiction that his samples were to be looked after by himself personally, and as he had no orders to send them by express he had to go with them when they were called in. Held proper, on cross-examination, to exclude the question whether they might not as well have been sent by express.—Lamb v. Henderson, 63 Mich. 302.

¶ 367. Respondent was informed against for receiving a bribe upon an agreement to vote for the adoption of a certain school seat at a prospective meeting of the board of education, of which he was a member. On the trial the testimony of one of the witnesses for the people, who was agent for one of the competing seating companies, showed that the witness encouraged another member of the board of education to advise respondent that the witness would accept a proposition from the respondent to sell his vote for a given sum; that the witness informed the mayor of the city of such fact; that the mayor was willing to aid in detecting respondent, if he should make such a proposition, and to that end an interview was arranged for between the witness and respondent within hearing of a stenographer and a police officer, whose presence was unknown to respondent, at which, as claimed, the criminal arrangement was made. Held, that respondent was entitled on the cross-examination of the witness to all of the facts that led up to the transaction, including the interviews with the mayor and police officer in relation to the proposed detection of the contemplated bribery, and the names of all who had to do with it, as bearing upon the credibility of the witness' testimony, and perhaps furnishing the means of refuting it.—People v. Liphardt, 105 Mich. 80.

¶ 368. To affect the credibility of a witness who testified that he was present at the assault, and that it was not made by respondent, but by another person, it was proper to show on cross-examination, that he attended the preliminary examination of respondent and of such other person, who were jointly charged with the offense, heard the latter swear that he did not commit the assault, and permitted him to be discharged, and respondent held for trial, without imparting his knowledge.—People v. Wirth, 108 Mich. 307.

¶ 369. Where a party has testified that he destroyed certain notes because he had been told by the probate judge that he might be "put through" for retracing them, he may, as bearing on the probability of the reason given by him, be asked on cross-examination, whether he destroyed any other notes at the same time.—Schulz v. Schulz, 113 Mich. 502.

¶ 370. In an action for damages caused by an explosion of adulterated kerosene, where a deputy inspector has testified as to the inspection and a loose system of inspection has been shown, a rigid cross-examination is permissible as to the accuracy of his report even in the matter of his charges for expenses; since such matters might bear upon his credibility.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 371. In an action against a druggist and his bondsmen for the unlawful sale of liquor it was prejudicial error to allow the plaintiff to cross-examine the defendant bondsman as to how many druggist's bonds he had signed, and as to whether or not it was a fact that on all the drug bonds he had signed, the wholesale dealers were back of him and had given him security, there having been no direct testimony on those points.—Martin v. Fisher, 143 Mich. 462.

¶ 371a. In proceedings to contest the probate of a will on the ground of incapacity and undue influence induced by monomania on the subject of spiritualism it was discretionary with the court to refuse to compel one of the witnesses for the contestant upon his cross-examination to state which of several circumstances indicating insanity was in his judgment, most significant.—O'Dell v. Goff, 149 Mich. 152.

¶ 372. In proceedings to contest the probate of a will on the ground of incapacity and undue influence induced by monomania on the subject of spiritualism, a witness for contestant who had testified to lack of testamentary capacity, could not be cross-examined on the subject of other religions and their effect upon testamentary capacity.—O'Dell v. Goff, 149 Mich. 152.

¶ 373. In a suit for personal injuries from a runaway of plaintiff's horse, which was frightened by defendant's automobile, the

companions of defendant gave their version of the occurrence. Held, the court did not abuse his discretion in permitting said companions to be cross-examined as to whether they were intoxicated on the day in question at an hour subsequent to the accident.—Chapman v. Strong, 162 Mich. 623.

¶ 374. In a suit to recover damages for the death of plaintiff's husband from intoxication caused by the sale of liquor to him by defendant saloonkeepers, plaintiff cross-examined defendants' witnesses vigorously to show that they were at the time of the trial receiving free drinks at defendants' saloons, and to learn what they understood by drinking to excess. Held, the court did not abuse its discretion in permitting such cross-examination.—Weatherbee v. Byam, 160 Mich. 600.

¶ 375. In a prosecution for seduction, a witness was put on to testify that he had falsely made a deposition at the solicitation of defendant, and had sworn to, not what he knew, but what defendant told him. Held, the court properly refused to permit defendant to cross-examine him to show that the witness had heard what he swore to from others besides defendant.—People v. Adams, 162 Mich. 371.

¶ 376. In an action over the allowance of discounts, though affirmative proof of third parties concerning similar transactions is inadmissible, a party may be cross-examined as to such transactions as bearing on the question of credibility.—B. Marx & Son v. King, 177 Mich. 662.

§ 57. ——Testing witness' observation, knowledge or opportunity for knowledge.

See also ante ¶ 257.

Contemporaneous details to fix memory by association, see also ante ¶ 167.

As to means of knowledge of fact of ownership testified to, see also Evidence ¶ 577.

Testing expert handwriting witness by use of irrelevant writings not in case, see also Evidence ¶ 1683.

¶ 377. Where three persons had been indicted for burning a barn with intent to defraud insurers, a witness who swore to seeing the three conversing by themselves soon after the fire should have been allowed to be cross-examined whether this impressed him at the time and when he first mentioned it. It is always important to know whether impressions have been warped or changed by subsequent suspicions, or whether at the time they were such as to strike attention and become accurately fixed in memory. The whole value of circumstantial evidence depends on the truth and accuracy of observation.—Hamilton v. People, 29 Mich. 173.

¶ 378. Where the plaintiff in an action for the price of merchandise has been examined as to the details of the transactions between the parties to the suit it is not error to allow him to be cross-examined as to the extent, kind and localities of his business if it tends to show his opportunity to know the facts he has testified to and the probability as to the correctness of his statements.—Peter v. Thickstun, 51 Mich. 589.

¶ 379. In an action for the amount due on a mortgage which it was claimed had been foreclosed and the property sold a witness for plaintiff who has testified that there were no payments or credits on the mortgage may be asked on cross-examination what he knows about the former suit.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315.

¶ 380. Where a farmer sued by a former employee for carnally knowing her against her will has testified on his direct examination that on many occasions when he came home Saturday nights from a neighboring village he found plaintiff and a young man with whom she was keeping company sitting in a hammock, he may, to negative his opportunity for witnessing alleged familiarities between the two, be cross-examined as to his staying out late Saturday nights in said village.—Hart v. Walker, 100 Mich. 406.

¶ 381. Defendant, to account for his opportunity to witness conduct occurring at night, having testified that he frequently remained in the village until midnight, and volunteered the statement that he did not stay later than any other farmer who had business there, it is not error, in view of such statement, to permit as further cross-examination the question whether there were many farmers who stayed there as late as midnight.—Hart v. Walker, 100 Mich. 406.

¶ 382. Where the wife of a defendant, sued for a criminal assault upon plaintiff, has, for the purpose of giving the jury the impression that plaintiff was pregnant during the time she worked in defendant's house, testified that during that time plaintiff had morning sickness, she may, on cross-examination, to affect her candor and credibility as a witness, be asked at what stage of pregnancy morning sickness occurs.—Hart v. Walker, 100 Mich. 406.

§ 58. ——To show bias or interest of witness.

Particular elements of bias or interest, see post § 59.

To show credibility or bias of party testifying as witness, see post § 77.

Respecting pecuniary interest in suit or contributions to it, see post § 60.

Respecting relations of witness to parties or others, see post § 63.

To show motive, purpose or reason moving witness, see post § 61.

Redirect to contradict denial by witness, see post § 99.

¶ 383. The animus of a witness may be shown on his cross-examination as bearing

on his credibility.—Brushaber v. Stegemann, 22 Mich. 266.

¶ 384. The bias of a witness is always open to full cross-examination, and he may be properly asked as to the interest he has taken in the case and in getting proof.—Hamilton v. People, 29 Mich. 195.

¶ 385. As a general rule any question upon cross-examination which will develop the interest or bias of the witness is admissible.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

¶ 386. The latitude to be allowed in collateral inquiries as to difficulties between a witness and one of the parties is a question resting somewhat upon the discretion of the trial court, and a court of review will not reverse a judgment for the exclusion of such inquiries unless a clear abuse of discretion is made to appear.—McGinnis v. Kempsey, 27 Mich. 363.

¶ 387. Control of cross-examination as to motive, purpose and intent as bearing on the credibility of a witness is largely within the discretion of the trial judge.—People v. Davis, 171 Mich. 241.

¶ 388. It was error to refuse to allow a witness who appeared as state's evidence to be asked on cross-examination whether he had pleaded guilty, and said that he would not go to state prison alone. It bore directly on his disposition towards his codefendants.—Hamilton v. People, 29 Mich. 195.

¶ 389. It is competent for defendant on the trial of an indictment for a nuisance by keeping up a mill-dam to show by the cross-examination of witnesses for the prosecution that they have commenced civil suits for injury caused by the same dam, and then agreed together to suspend action in such suits and get defendant indicted, and in that way procure the removal of the dam. Such evidence is admissible to show the interest of the witnesses in the public prosecution, and the influence it might have on their testimony.—Crippen v. People, 8 Mich. 117.

¶ 390. Where plaintiff suing for slander has testified in regard to divorce proceedings between himself and defendant's daughter and to defendant's consequent hostile feelings towards himself, it is proper to ask him on cross-examination as bearing on his own animus and bias whether he had not been compelled to pay $500 for the support of his child and had not threatened to get part of it back.—Hitchcock v. Moore, 70 Mich. 112.

¶ 391. Questions on cross-examination of defendant's witness tending to show hostility to and prejudice towards one of plaintiff's attorneys, held properly admitted for such purpose.—Snyder v. Mathison, 196 Mich. 378.

§ 59. ——Particular elements of bias or interest.

Pecuniary interest in suit or contribution of time or money to it, see post § 60.
Mulcting of witness in damages, see ante ¶ 390.
Admissibility of evidence to impeach or contradict, see Witnesses, VI, D.

¶ 392. A witness shown to have been in litigation with the opposite party may be interrogated on cross-examination as to the subject of the litigation.—Threadgool v. Litogot, 22 Mich. 271.

¶ 393. A trustee named in a will who has testified as a subscribing witness to its due execution and to testator's sanity cannot be asked on cross-examination whether he has proved a claim against the estate.—Fraser v. Jennison, 42 Mich. 206.

¶ 394. It is improper cross-examination and also irrelevant to ask a witness for the prosecution in a murder case about circumstances between himself and respondent's mother from which ill-will would not necessarily be implied; such as whether he owed her for board.—People v. Macard, 73 Mich. 15.

¶ 395. In trover for horses seized under a void attachment it is proper, for the purpose of ascertaining plaintiff's bias or interest in the case and of testing his credibility, to ask on his cross-examination whether he knew the attachment was issued when he bought the horses, and whether he had not aided the debtor in other suits with the attachment plaintiff by becoming his surety.—Mears v. Cornwall, 73 Mich. 78.

¶ 396. Defendant sued in replevin for a horse, purchased by him for plaintiff and himself (as he claims), with plaintiff's money and their joint note, may be cross-examined as to a secret understanding between vendor and himself that he should have $50 of the purchase-money, as this would affect his credibility as a witness.—Ellis v. Simpkins, 81 Mich. 1.

¶ 397. Where a witness for a lessor sued for eviction has testified to lessee's admitting a surrender of the lease, it is not competent to show on cross-examination of such witness that he had held a lease from defendant of lands which, with those leased to plaintiff, were subsequently sold by defendant, and that defendant paid witness a certain sum for agreeing to vacate; such testimony would not tend to show that plaintiff had not surrendered before the sale the lands rented by him, nor was defendant's payment to effect a sale of his lands competent to show what the land was worth to witness, or what damages plaintiff had suffered.—Taylor v. Cooper, 104 Mich. 72.

¶ 398. In an action for libel imputing to plaintiff a homicide by abortion in which a

witness had testified as to the relations between the plaintiff and the woman, it was proper to cross-question the witness as to the impressions on her mind and the feelings towards the plaintiff resulting therefrom.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457.

¶ 399. A party to a suit who has drawn out the fact that the opposite party has been arrested for a criminal offense may be asked on cross-examination, as bearing on the question of animus, if he did not instigate the making of the complaint upon which the arrest was founded.—Burt v. Long, 106 Mich. 210.

¶ 400. In the contest of a will, proponents counsel, for the avowed purpose of showing the interest of one of the contestants, who was sworn as a witness, cross-examined her closely as to whether certain of the contestants had not professed a willingness in the probate court to withdraw from the contest. The witness had previously frankly admitted her ill-feeling towards proponents. Held, that the examination was not competent for the purpose stated.—Bush v. Delano, 113 Mich. 321.

¶ 401. A cross-question to a contestant whether on probate some of contestants had offered to withdraw their opposition, designed to show feeling of the witness, was made competent by contestants' placing in evidence a letter written by one of the proponents, in which the decision of the contestants previously mentioned to withdraw from the contest was asserted; it being proper to show that this was not a misstatement.—Bush v. Delano, 113 Mich. 321.

¶ 402. Plaintiff in replevin to recover possession of goods purchased through fraud by one defendant and sold by him to another defendant before the commencement of the suit may be cross-examined as to the several times and cases in which he has testified in regard to the title to the goods in suit, for the purpose of showing his interest in the controversy and in the subject-matter involved, and his anxiety to bring it to a successful issue.—Schloss v. Estey, 114 Mich. 429.

¶ 403. On cross-examination of a particeps criminis who, while testifying as a witness in behalf of the people, has stated that he is under arrest in the cause and is out on bail, it is proper to exclude as immaterial the question whether the prosecuting attorney did not prepare his bail bond at the time he was arrested.—People v. Considine, 105 Mich. 149.

¶ 404. In an action of trespass by an alleged stockholder for being ejected from a stockholder's meeting, a question asked the plaintiff whether he had had considerable previous litigation with the corporation is on a collateral issue; and the discretion of the court to exclude it is not reviewable.—Noller v. Wright, 138 Mich. 416.

¶ 405. It was permissible for counsel for defendant in trover for conversion of logs, upon cross-examination of witnesses, called by plaintiff, who upon direct examination had testified to the sawing of logs for defendant and that such logs bore the log-mark of plaintiffs, to ask such witnesses if they had not had trouble with defendant and bore him ill-will, in order that the jury might better judge the value of their testimony; but whether a feeling shown to exist ought, or ought not, to exist, was immaterial.—Seymour v. Bruske, 140 Mich. 244.

¶ 406. In an action for personal injuries, it was proper to rule out a cross-question asked one of plaintiff's witnesses in order to show interest after he had testified that he attempted to settle plaintiff's case, as to whether he stated what he would settle for; as the fact of his attempt to make the settlement itself showed his interest.—Pomaski v. Grant, 119 Mich. 675.

¶ 407. The admission of cross-examination showing the conduct of a witness for the defense towards the claimant against the estate, his stepmother, is not error where the witness testified on direct examination that his relations with the claimant were friendly.—Taylor v. Taylor's Estate, 138 Mich. 658.

¶ 408. A witness for the prosecution who was with defendants part of the time while the crime of larceny was being committed may be asked on cross-examination if he did not make a statement concerning the crime to the police because of fear of being arrested for other crimes as tending to show his motive in assisting the police.—People v. Breen, 192 Mich. 39.

§ 60. ——Pecuniary interest in or contribution to suit.

See also ante ¶ 389.
On cross-examination of expert witness, see also post § 72.

¶ 409. Cross-examination of a witness as to his contribution to the expenses of the suit bears on his interest or bias, and is admissible.—Howard v. Patrick, 43 Mich. 121.

¶ 410. In an action against a village for injuries received from a defective sidewalk, it is not error to permit plaintiff's counsel, upon the cross-examination of a witness for defendant, to show that such witness has assisted in looking up testimony and that he is a large taxpayer in the village. (The facts herein stated are shown in the syllabus but not in the opinion.)—Will v. Village of Mendon, 108 Mich. 251.

¶ 411. Where, in a suit to recover for professional services, an attorney has testified

that his client authorized him to employ counsel to assist in the case, it may be shown, as affecting his credibility, that he had agreed for a specified sum to conduct the suit to a successful issue.—Fraser v. Haggerty, 86 Mich. 521.

¶ 412. If an attorney in the cause presents himself as a witness he may be asked, as affecting his credibility on the ground of interest, concerning the arrangement made to compensate him.—Denman v. Johnston, 85 Mich. 387.

¶ 413. In an action for injuries alleged to have been caused by a defective sidewalk, it is within the discretion of the court to permit questions tending to show the interest of a witness as a taxpayer.—Styles v. Village of Decatur, 131 Mich. 443.

¶ 414. In a prosecution for violation of the liquor law, it was proper to sustain an objection to a question on cross-examination of a witness for the people who had shown no disposition to suppress or withhold anything, asking whether she had not done all that she could to secure a conviction in the case at bar.—People v. Rice, 136 Mich. 619.

¶ 415. An attorney who gives material evidence on behalf of his client may be cross-examined as to whether he is not to receive for his services a portion of the amount recovered in the action.—Luckhurst v. Schroeder, 183 Mich. 487.

¶ 416. An attorney who becomes a witness for his client may be cross-examined as to his financial interest in the result of the litigation.—McCloy v. Vaughan, 185 Mich. 189.

¶ 417. In an action to recover damages for personal injuries held that a question put to a witness for plaintiff on cross-examination as to whether any part of the bill for medical services which the witness had presented to plaintiff had been paid was admissible for the purpose of determining the interest or bias of the witness.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

¶ 418. In an action by a husband to recover damages suffered because of an injury to his wife from a collision of plaintiff's buggy with defendant's automobile, including charges for medical services, a question propounded to the attending physician upon cross-examination by the defendant as to whether he did not expect to get the bill out of the litigation, held incompetent.—Jolman v. Alberts, 192 Mich. 365.

§ 61. ——Motive, purpose or reason moving witness.

See also ante ¶¶ 387, 389.

To show bias and interest of witness, see ante §§ 58, 59.

Explanation or rebuttal of prior statements proved, see post § 69.

Question as to motive as warranting redirect on same matter, see post § 92, ¶ 606.

Showing reasons or motive on redirect, see post § 97.

¶ 419. When, on cross-examination to show that a witness was interested as a purchaser, he testifies that the purchase was never carried out, his reason for not completing it is properly excluded unless it is claimed that the answer will not show interest or affect his credibility.—Sager v. Tupper, 38 Mich. 258.

¶ 420. In an action by one partner against another upon an account stated, where defendant had testified to a partnership, though admitting that on former trials he testified to the contrary, which he explained by saying that he did not suppose his arrangement with plaintiff constituted a partnership, it was proper to ask him, on cross-examination, whether there was any reason why he should not form a partnership with plaintiff, it appearing from his answer that he had been in the business of the partnership before, and had leased it, agreeing not to engage in it for five years.—Miner v. Lorman, 66 Mich. 530.

¶ 421. In a prosecution for seduction, prosecutrix testified that the act of intercourse occurred between 11 and 12 o'clock. On cross-examination she admitted that she testified in the preliminary examination that it occurred about half-past 9 o'clock. Objection was then sustained to the question "Then why did you tell it?" Held, error, since where the prosecution depended almost wholly upon her testimony, respondent was entitled to the benefit of full cross-examination.—People v. Payne, 131 Mich. 474.

¶ 422. In an action by an interurban car passenger against the railroad company for damages for personal injuries received while attempting to board one of defendant's cars, held that it was proper to cross-examine defendant's claim agent as to the purpose in gathering statements from witnesses of the accident for the purpose of showing that the statements which he made were as favorable to the company as possible where the only reference to an attempt to settle the case was made by defendant itself.—Musliner v. Detroit United Ry., 197 Mich. 409.

§ 62. ——Character, habits and antecedents of the witness.

Of party testifying as witness, see also post ¶ 534.

Cross-examination of character witnesses, see post § 71.

Limiting character cross-examination, see also ante ¶ 211.

To show intoxication at given time, see also ante § 56, ¶¶ 373, 374.

Credulousness of witness to destroy value of his testimony as to good character of another, see post ¶ 501.

¶ 423. The cross-examination is not confined to the matters in issue, but may include such collateral questions as will enable a jury to obtain an insight into the witness' character and history, and thus to judge of his credibility.—Wilbur v. Flood, 16 Mich. 40.

¶ 424. On cross-examination the trial court must be allowed considerable latitude of discretion in permitting questions meant to draw out information as to the past life and conduct of the witness, and to enable the jury to see "what manner of man he is."—Beebe v. Knapp, 28 Mich. 53.

¶ 425. On cross-examination considerable latitude of discretion is allowed in permitting questions calculated to elicit information as to a witness' past life and conduct. —People v. Winney, 196 Mich. 347.

¶ 426. Cross-examination of plaintiff's witnesses as to their character, without reference to the issue, should be regulated at the discretion of the judge.—Bissell v. Starr, 32 Mich. 297.

¶ 427. Questions put to a witness upon cross-examination in order to affect his credit by showing his previous life and conduct are within the discretion of the court, and even if the proper discretion should be exceeded, it will be no ground for reversing a judgment when such evidence could have had no possible effect prejudicial to the party complaining.—Threadgool v. Litogot, 22 Mich. 271.

¶ 428. It is not error to permit counsel to inquire into the antecedents of a party when on the stand as a witness in his own behalf. The length to which such inquiries may go is in the discretion of the trial judge.—McBride v. Wallace, 62 Mich. 451.

¶ 429. Where the defendant in a civil action for an indecent assault appears as a witness therein, it is admissible for its bearing on his credibility to cross-examine him as to the antecedents of his life, if the questions do not call for self-crimination.—Leland v. Kauth, 47 Mich. 508.

¶ 430. Where, in a criminal prosecution, evidence is introduced as to respondent's good character, it is proper, on cross-examination, to inquire in regard to specific acts of his prior to the offense charge.—People v. Pyckett, 99 Mich. 613.

¶ 431. It is improper to ask a defendant, on cross-examination, to test his credibility, if he has been on the witness stand before, or to offer to show, when an objection to such question is sustained, that he has been such witness one hundred times, or to state to him, in the form of a question, that he has had about ten cases in the supreme court. —Brennan v. Busch, 67 Mich. 670.

¶ 432. That one is in the habit of drinking beer does not affect his credibility as a witness in a trial for the unlawful sale of spirituous liquors, and it is error to allow such habit to be inquired into on cross-examination.—People v. Kahler, 93 Mich. 625.

¶ 433. An employer who testifies that another employer's laborer has been discharged by his master for drunkenness cannot be asked upon cross-examination whether he himself is a total abstainer.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243.

¶ 434. Cross-examination of a witness with reference to his habits is competent in the discretion of the court (Syllabus 6 states: So held where a witness was questioned in relation to his use of intoxicating liquors.) —Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96.

¶ 435. A witness for respondent in a murder case testified that the deceased had tried to hire him to kill respondent. After admitting on cross-examination that he married his wife from a house of prostitution, the witness was asked if she was a prostitute, and the question, as also another of a similar character, was excluded. Held, that the story of the witness was such as to render a very rigid cross-examination of his life and character competent; that, there being nothing to show that the excluded questions were not asked in good faith, they were not of such a character as to justify the holding that they prejudiced the jury.—People v. Palmer, 105 Mich. 568.

¶ 436. The extent to which cross-examination of witnesses relative to their character for chastity should be permitted to test their credibility is largely a matter of discretion with the trial judge which will not be interfered with by an appellate court in the absence of a clear abuse thereof.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, per McAlvay, C. J., Carpenter, Montgomery and Moore, JJ.

¶ 437. It is permissible, within the discretion of the court, to discredit a witness upon cross-examination by showing the witness' want of chastity.—People v. Cutler, 197 Mich. 6.

¶ 438. Inquiry on the cross-examination of a defendant in replevin as to his history in business matters before making the contract upon the alleged breach of which the suit is brought, which inquiry is not directed to showing that defendant has been guilty of any offense against the law, and raises immaterial issues, is properly limited by the circuit judge.—Mason v. Partrick, 100 Mich. 577.

§ 63. ——Relations of witness with other parties and persons.

Dissolute and depraved character of witness' wife, see ante ¶ 435.

As matter impeaching or discrediting witness, see Witnesses, VI.

¶ 439. Where the plaintiff in a civil case testifies in his own behalf, inquiries concerning his past life and associations are admissible on cross-examination as bearing upon his character and credibility as a witness; but such matters are not thereby put in issue so as to be open to proof by direct testimony.—Kingston v. Fort Wayne & E. R. Co., 112 Mich. 40.

¶ 440. The extent to which cross-examinations may go into the relations existing between the witnesses and the parties, is largely within the discretion of the trial court, and dependent upon the particular situations developed at the trial.—Seymour v. Bruske, 140 Mich. 244.

¶ 440a. It was not prejudicial as giving the jury the impression that the plaintiff, in an action for false imprisonment and malicious prosecution, came frequently in contact with the officers of the law as a law breaker, to permit the defendant to show upon cross-examination of plaintiff that plaintiff knew a certain deputy sheriff, who was not the officer who made the arrest, and had been to his office a couple of times.—Lansky v. Prettyman, 140 Mich. 40.

¶ 441. The scope of an examination as to the relation between witness and defendant is in the discretion of the court, and unless this discretion is abused the judgment of the lower court will not be disturbed.—People v. Mulvaney, 171 Mich. 272.

¶ 442. On cross-examination of the housekeeper of the defendant who saw the alleged crime, the prosecution may go into the question of the relations between the defendant and the witness, it being admissible as affecting her credibility and good faith.—People v. Mulvaney, 171 Mich. 272.

¶ 443. On cross-examination of a complaining witness in a criminal prosecution for assault with an intent to do great bodily harm, less than the crime of murder, he may be interrogated as to the relations between himself and the accused, and any circumstances tending to show whether they were friendly or unfriendly, as bearing upon the degree of credit his evidence should receive; the particulars and causes of the hostile feeling when shown may be inquired into as bearing on the fairness and truthfulness of the witness.—People v. Durham, 170 Mich. 598.

¶ 444. In a prosecution for robbery it was shown that after the robbery the complaining party went into a house in the door of which a woman was standing. Held, that the witness could not be cross-examined as to the reputation of this woman as a prostitute, thief and brothel-keeper.—People v. Whitson, 43 Mich. 419.

¶ 445. The trial court, in an action by a husband for alienation of the affections of his wife, does not abuse its discretion in refusing to allow a witness for the husband with whom he had some times associated to answer a question on cross-examination, as to whether a certain third person ever took her to a house of prostitution.—Hendrickson v. Harry, 200 Mich. 41.

§ 64. ——Other frauds and misdoings.

Other crimes and criminal associations and arrests and prosecutions, see post § 65.

Admissibility of other frauds evincive of system or method as showing intent, see Fraud, III.

¶ 446. Where, in a criminal prosecution for an aggravated assault, the complainant testifies on cross-examination that he has been arrested for drunkenness, the question how many times he has been drunk since is properly excluded as having no bearing on the issues involved.—People v. Sutherland, 104 Mich. 468.

¶ 447. In an action upon a fire-insurance policy, where the defense set up is a wilful burning of the property insured, plaintiff may be cross-examined as to his alleged fraudulent conduct with respect to insurance upon other property.—Barnett v. Farmer's Mutual Fire Ins. Co., 115 Mich. 247.

¶ 448. In an action for slander in charging plaintiff, a stock buyer, with cheating in the weight of defendant's hogs, it was proper, as bearing on the credibility of plaintiff, who had taken the stand in his own behalf, to permit defendant's counsel to ask him, upon cross-examination, questions tending to show that he had been dishonest in weighing stock for others.—Georgia v. Bond, 114 Mich. 196.

¶ 449. In a will contest the admission of evidence on cross-examination of one of the contestants and her former husband that such husband a short time prior to his death took his aged father to his home and procured a deed to him of all the father's property, and the wife received a deed of part of the property from the husband, and, after the father's death, the deed was set aside in proceedings by other children for its cancellation, for the purpose of showing the character of the witnesses, held not to be prejudicial error.—In re Sparks' Estate, 198 Mich. 421; Hodgman v. Sears, Id.

§ 65. ——Other crimes, arrests and criminal associations.

Other frauds and misdoings affecting credibility, see ante § 64.

As to testimony given in other prosecutions, see post § 67.
Cross-examination of accused as to other crimes and prosecutions, see post § 80.
Respecting relations of witness with parties or others, see ante § 63.
As to wife of witness being prostitute, see ante ¶ 435.
Associating with prostitutes, see also ante ¶¶ 444, 445.
As to plea of guilty by state's witness accomplice of defendant's, see ante ¶ 388.
Cross-question of witness whether he made complaint resulting in arrest of other party, see ante ¶ 399.
Necessity of record to prove prior conviction, see post § 86; and see also Indictment, VIII, B.
Other crimes and attempts evincive of system and intent or knowledge, see Indictment, VIII, B.

¶ 450. A witness may be asked on cross-examination if he has been guilty of desertion from the army, or been charged with crime.—Hamilton v. People, 29 Mich. 173.

¶ 451. A witness may be asked on cross-examination whether he has not been indicted and convicted of a criminal offense.—Clemens v. Conrad, 19 Mich. 170.

¶ 452. A witness may be cross-examined, within the proper discretion of the court, not only as to whether he has ever been convicted of crime, but as to any serious charge brought against him.—Driscoll v. People, 47 Mich. 413.

¶ 453. Where a codefendant in an action of damages for an assault had pleaded guilty on the appeal of criminal proceedings from before a justice, there was no harm done in asking him on cross-examination whether he was convicted before the justice.—Kuney v. Dutcher, 56 Mich. 308.

¶ 454. In trover for converting pension money collected by defendant, there is no error in refusing to allow a witness for the plaintiff to be cross-examined as to whether he had ever been arrested for conspiring to procure fraudulent pensions.—Mark v. Hillsendegen, 46 Mich. 336.

¶ 455. In a civil action for an indecent assault it was held proper to cross-examine the defendant as to whether he was ever arrested on a criminal charge made by a woman, and whether he settled it by payment.—Leland v. Kauth, 47 Mich. 508.

¶ 456. A lawyer was arrested for feloniously entering a court building and removing public records. A policeman testified that the prisoner had asked him to leave the court room door unlocked so that he could get the papers, and that after consulting with his superior officer he had consented, and afterwards lay in wait for him. Held proper to subject this witness to very searching cross-examination, and to ask him whether he had not previously had improper dealings with the prisoner and put in false swearing for him. The jury was entitled to all the light that would have been furnished by former transactions between them, and such a question might have tested the witness' credibility.—Saunders v. People, 38 Mich. 218.

¶ 457. On cross-examination of defendant's witness his ill-will towards plaintiff may be shown, but he cannot be asked questions tending to charge him with perjury and with an attempt to swindle plaintiff in another transaction.—Clink v. Gunn, 90 Mich. 135.

¶ 458. In the contest of a will, the chief beneficiary testifying on her own behalf, it is erroneous to cross-examine her as to how many times her husband had been arrested and how many times she had appeared as a witness for him, her husband not having been a witness in the present case.—Lange v. Wiegand, 125 Mich. 647.

¶ 459. In an action for malicious prosecution, cross-examination of the defendant asking him concerning various civil suits in which he had been defendant and concerning other cases in which he had been accused of crimes is improper and reversible error.—Gould v. Gregory, 126 Mich. 594.

¶ 460. A defendant was properly asked on cross-examination whether he ever pleaded guilty to stealing certain property; such testimony being admissible as affecting defendant's credibility.—Pratt v. Wickham, 133 Mich. 356.

¶ 461. On action for assault and battery and ravishment it is within the court's discretion to allow a witness to be questioned on cross-examination concerning his arrest and trial for a crime.—Totten v. Totten, 172 Mich. 565.

¶ 462. In an action upon assigned insurance policies held that the court did not exceed its discretion in permitting the cross-examination of witnesses for the plaintiff as to the indictments of an attorney for the assignors, who had been originally employed to adjust the loss, which did not result in conviction.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

§ 66. ——Previous statements or testimony by witness.

Of party on the stand, see post § 67.
Of witness as to previous statements to him by others, see post § 68.
Admissible cross-examination in rebuttal or explanation of previous statements, see post § 69.
To meet cross-examination variant from former testimony, see post § 103.

Offer and reading of minute or transcript, see post § 88.
Refreshing memory of witness by calling attention to prior statements or testimony, see ante § 20 et seq.

¶ 463. To ask a witness on cross-examination, for the purpose of contradicting or impeaching him, what he testified to on a former occasion concerning a matter which his present testimony does not mention, is incompetent, since there is no occasion to lay a foundation for impeachment.—Fox v. Barrett's Estate, 117 Mich. 162.

¶ 464. A witness questioned on stenographer's notes as to testimony given in a justice's court need not be confined to the deposition given and returned and read, as such a statement made, like other statements out of court, is subject to explanation even if not contained in the deposition.—People v. McArron, 121 Mich. 1.

¶ 465. A question to a witness, whether he did not, on a former trial, testify that he said yes and no, and played good Lord and good devil, because he did not know into whose hands he might fall, is admissible, as going directly to his fairness and candor.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 466. A letter is a legitimate part of the cross-examination of a witness who wrote it, and who has denied giving any such advice as it contains.—Krolik v. Graham, 64 Mich. 226.

¶ 467. On cross-examination it is proper to show, by way of impeachment, that in a former action where the same questions were involved, the witness gave different testimony from that given on his direct examination in the present trial.—Graham v. Myers, 67 Mich. 277.

¶ 468. A witness, who testified that he was present and saw the signing of the note sued on and that he knew nothing of the consideration of the prior note which it renewed, may be cross-questioned whether he previously stated out of court that he did have such knowledge.—Johnston Harvester Co. v. Miller, 72 Mich. 265.

¶ 469. A witness who testifies upon his direct examination as to statements made by him while under arrest for participating in the crime of which respondent is accused may be cross-examined by the prosecutor with respect to such statements.—People v. Baker, 112 Mich. 211.

¶ 470. Upon a trial for murder where it was charged that respondent poisoned his wife to get rid of her because of his intimacy with another woman, respondent's brother, whose direct testimony had made no allusion to the relations of respondent with such woman, was required, on cross-examination, after he had sworn he never had seen any improper relations, to testify to expressions of opinion made by himself to various persons concerning improper relations between the two. Held, that such testimony was incompetent.—People v. Foglesong, 116 Mich. 556.

¶ 471. In an action for commissions in negotiating a sale of real estate, where the issue was as to whether the sale was made on the terms authorized by defendant, a declaration made by the purchaser to the defendant as to the terms on which he was willing to accept a conveyance may be shown in cross-examination of such purchaser as a witness for the plaintiff, where he testified as to his willingness to purchase the land.—Weaver v. Richards, 156 Mich. 320.

¶ 472. On a trial for murder occurring after a dispute over a drain where the surveyor had testified as to the peaceable disposition of the accused it was proper cross-examination to ask the surveyor if he had not made statements to the contrary.—People v. Tubbs, 147 Mich. 1.

¶ 473. In an action for physician's services, it was proper to hand a statement which was substantially a copy of plaintiff's bill of particulars, to witnesses for the defendant, and ask them whether they had not, when such paper had been shown to them previous to the trial, stated that the charges contained therein were reasonable; the paper having been offered in evidence, and the testimony having been limited to the single purpose of contradicting the witness.—McKnight v. Detroit & M. Ry. Co., 135 Mich. 307.

¶ 474. A witness who on direct denied the existence of a partnership between himself and plaintiff, was properly asked on cross, for the purpose of impeachment, whether he had not made statements admitting such partnership; in view of the conflicting testimony about the partnership.—Weeks v. Hutchinson, 135 Mich. 160.

¶ 475. In an action for personal injuries, a witness for the plaintiff who was in the same accident cannot be questioned as to the contents of the declaration in his own personal injury suit nor are the files of the other suit admissible; but it is competent to cross-examine the witness concerning his testimony in the other suit.—Monyhan v. Detroit & Saline Plank-Road Co., 129 Mich. 549.

¶ 476. Defendant was sued on a note, and denied the genuineness of the signature. One Younglove testified in support of the genuineness of the signature, and stated that he had once sued defendant on a note, and defendant made a similar defense. On cross-examination he was asked whether he did not on the occasion referred to admit

that the alleged signature of defendant was not genuine. Held, it was not reversible error to sustain an objection to this question.—Jewett v. Bryant, 159 Mich. 345.

¶ 477. In a suit to recover for property destroyed by fire from a locomotive, plaintiff's witness may be cross-examined with reference to what he said to others, as to the cause of the fire.—J. H. Worden Lumber & Shingle Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 168 Mich. 74.

¶ 478. In an action for damages for assault and battery where the father of the defendant, who had attempted to intercede, had testified in support of the defendant's claim that he threw the stone in self-defense, held that it was proper on cross-examination to ask the witness if a certain person did not inquire of him shortly after the affray what the trouble was about and if he did not reply that it was the work of his son.—Cornell v. Fidler, 194 Mich. 509.

¶ 479. In an action for statutory rape upon a female child, questions whether the complainant had not made charges similar in nature against other persons are proper, where such questions are asked on cross-examination as laying the foundation for collateral impeachment and as an offer of independent evidence relating to similar charges and their falsity evincing a morbid mind in the girl.—People v. Evans, 72 Mich. 367; People v. Wilson, 170 Mich. 669.

¶ 480. The defendant in a prosecution for seduction should be permitted to fully cross-examine the prosecutrix as to her testimony at the preliminary examination that she yielded on a promise of marriage conditioned on pregnancy resulting from their intercourse where her testimony on trial was that the promise was unconditional.—People v. Carlos, 183 Mich. 269.

§ 67. ——Previous statements or testimony by party testifying.

See also ante ¶ 277.

Of witnesses other than parties, see ante § 66.

Portion of record of former statement necessary as basis for cross-examination, see post § 86.

Propriety of exclusion of question about irrelevant prior statements though subsequent evidence made it proper rebuttal matter, see Trial, V, C; Indictment, IX, B.

¶ 481. In order to affect plaintiff's credibility as a witness in a civil suit her former conviction for crime may be shown, but she cannot be cross-examined as to her testimony in a criminal cause and then have her credit impeached by showing that she has at different times made statements contradictory to those made on such cross-examination.—Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77.

¶ 482. It is proper on cross-examination of a party to ask whether he had not admitted fraud in the transaction at issue, as the question bears directly upon the trustworthiness of his evidence.—New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

¶ 483. A party examined as a witness to prove extra work in building a culvert of stone instead of brick, as called for by the contract under which it was done, and whose testimony on direct examination tended to show that construction of stone was more expensive, may be asked on cross-examination whether he had not said on a specified occasion that the culvert was put in under his contract in lieu of brick and at a much less expense.—Turner v. City of Grand Rapids, 20 Mich. 390.

¶ 484. The prosecution in a criminal case may show on cross-examination that respondent has testified in another suit directly contradictory of his direct testimony which contradicts the complaining witness on a material fact.—People v. Jensen, 66 Mich. 711.

¶ 485. In an action for an injury alleged to have been caused by an obstruction in a highway, plaintiff may be asked on cross-examination a question tending to bring out whether he had ever made any different claim or given any different history of the accident.—Langworthy v. Township of Green, 88 Mich. 207.

¶ 486. Quære, whether plaintiff may not be asked on cross-examination if he did not formerly make a particular statement to his counsel, it not being a privileged communication.—Evans v. Montgomery, 95 Mich. 497.

¶ 487. In a bastardy case the defense should have been allowed to ask the complaining witness on her cross-examination whether she and her mother had not stated to certain specified persons that she was going to get a prostitute out of the house of correction to swear a case against respondent; such a question would bear on the witness' character and veracity and her disposition to resort to criminal practices. And when such cross-examination had been excluded it was further error to permit complainant's counsel to ask for her own version of the facts and to receive it without cross-examination.—People v. White, 53 Mich. 537.

¶ 488. In an action against a surgeon for want of skill, defendant claimed that plaintiff at a certain time had thrown off his splints and walked on crutches. Plaintiff, being asked if he had not caused one of the hospital nurses to write to that effect to a specified person, said he did not remember. Held proper, for the purpose of identifying the writer, to ask him further whether he had not afterwards caused the person said

to have been addressed to write to the nurse.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 489. On the trial of a replevin suit brought by the debtor's vendee to recover attached property, plaintiff in the attachment suit having testified that, in a conversation had with the debtor and his wife about a week prior to the issuance of the writ of attachment, he did not tell the debtor how much he owed him, because he did not know, and that he had never figured out the indebtedness at all, it is proper to ask him on cross-examination if he did not swear in the attachment affidavit that the debtor owed him $100, as near as he could estimate the same, and if he never did any figuring on the account, or made any computations or estimate of the amount the debtor was owing him, how he came so to swear in said affidavit.—Daniels v. Weeks, 90 Mich. 190.

¶ 490. A defendant, when arraigned for murder, admitted the homicide and asked the court to fix the crime. The court then called a jury to determine the crime and accused was again sworn and gave testimony as to his conversation with deceased at the time of the killing. On cross-examination the state was allowed, over defendant's objection, to go into the testimony given by defendant on this point before the court when arraigned, the purpose being to show a discrepancy in testimony. Held, overruling of defendant's objection was not error.—People v. Poole, 159 Mich. 350.

¶ 491. In a suit for damages arising out of a real estate transaction and building contract, the trial court commits reversible error in refusing to allow defendant to show by cross-examination of plaintiff that he testified differently at a former trial and made to a third person a different statement of his claim.—Bennett v. Wallace, 165 Mich. 66.

§ 68. ——Previous statements to witness by or affecting party.

Admissibility of declarations out of court and confessions to witness, see Evidence, VII; Indictment, VIII, B.

¶ 492. It is improper cross-examination to permit a witness testifying only to an alleged slander to testify to a remark by plaintiff to the effect that if beaten on the trial she would take the case up higher, that she would beat defendant, that defendant would then have to move out, and that plaintiff would "take possession of the premises," though it might be proper on cross-examination of plaintiff.—Proctor v. Houghtaling, 37 Mich. 41.

¶ 493. In a suit by a husband against his wife's brother for assisting her in forcibly removing the household goods from their house, a witness, testifying to a conversation with the brother while the goods were being removed, cannot be asked on cross-examination to state what the wife said at the time, if, in fact, the husband was not present, and the witness had not testified to any conversation with the wife.—Burns v. Kirkpatrick, 91 Mich. 364.

¶ 494. Having testified in a replevin suit that he sold the horses in question to the wife of the defendant, that the defendant had told him the property given in exchange for the horses belonged to the defendant's wife and that it looked as though he would get beaten, the witness' answer on cross-examination that the defendant said he was so blind he could not see and if he did not get the horses he would go to the poor-house, cannot be held competent as testing the recollection of the witness as it is irrelevant.—Atherton v. Defreeze, 129 Mich. 364.

§ 69. ——Explanation or rebuttal of previous statements.

Rebuttal and explanation when on main issues, see ante § 47 et seq.

¶ 495. In a prosecution for seduction evidence of a conversation between the complaining witness and her mother and sister explanatory of what had been drawn out by the defense on cross-examination of the sister as to occurrences on the occasion of the alleged seduction, is admissible.—People v. Gibbs, 70 Mich. 425.

¶ 496. In an action for injuries resulting from being thrown from a car while rounding a curve where it was shown that two witnesses had been promised a new suit of clothes by the plaintiff if they would testify for him and he won his case, it was not error to allow a cross-examination by the plaintiff which simply brought out what had been said, the circumstances thereof and its effect tending to show that no harm was intended, and that it did not influence the testimony of the witnesses.—Dupuis v. Saginaw Valley Traction Co., 146 Mich. 151.

¶ 497. Where, in an action against a principal, the letter of an agent is put in evidence to show ratification, it is error to exclude on cross-examination a subsequent letter which would rebut the inferences to be drawn from the first.—Turner v. Phoenix Ins. Co. of Hartford, 55 Mich. 236.

§ 70. Of witnesses not called or examined on main issues.

Of character witnesses and impeaching witnesses, see post § 71.

Of expert witnesses, see post §§ 72-75.

¶ 498. A party calling a witness, even for formal proof of a fact communicated to accused, thereby makes him his witness, and the adverse party may cross-examine him upon all matters material to the interview at which it was communicated.—People v. Barker, 60 Mich. 277.

¶ 499. Where defendant was called as a witness by plaintiff simply to identify and introduce a written statement of a fact found in defendant's book and in his own handwriting, for the purpose of explaining certain testimony previously introduced on defendant's part, it was held not proper cross-examination to ask him about other questions involved in the case.—Blackwood v. Brown, 32 Mich. 104.

¶ 500. In an action on promissory notes made by an agent, the principal question related to the agent's authority, but the plaintiff, who called him as a witness, did not examine him as to his signature to the notes and did not introduce the notes until after he was examined. Held proper, notwithstanding, so to cross-examine him as to fraudulent issues of notes to bring out the whole truth.—New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

§ 71. Of character witnesses and impeaching witnesses.

Of the witness as to his own antecedents and character, see ante § 62.
Redirect examination, see post § 91.
Cross-examination on character, when proper, see also Evidence ¶ 1922.

¶ 501. It was proper to show, upon cross-examination of witnesses, who had testified to good character of accused in a statutory rape case, what the relations between them and respondent were, that they were credulous, and how they would be influenced in their estimate of what was right or wrong, immoral or unchaste, by what respondent had said, and by their estimate of the character he represented; where he was a religious imposter seducing young girls.—People v. Mills, 94 Mich. 630.

¶ 502. It is proper to show, upon cross-examination of a witness called to establish respondent's good character, and who has testified to respondent's purity and loving kindness, that respondent had on one occasion tied his wife's hands and confined her in a back room, because she was violent and rebellious, and that her violence was occasioned by her jealousy of his having other women in the house.—People v. Mills, 94 Mich. 630.

¶ 503. Where a witness for respondent testifies that, during the time respondent worked for her she found him honest and clever in his work, that he always did what was right, and that he did nothing wrong in her presence, she may be cross-examined as to his drinking habits and as to his being drunk and being out late nights, upon divers occasions and times during the time he worked for her and prior to the commission of the alleged murder.—People v. Willett, 105 Mich. 110.

¶ 503a. It is proper cross-examination of a character witness to ask if he has not heard that respondent had attempted suicide.—People v. Frey, 112 Mich. 251.

¶ 504. In a prosecution for larceny it is error to permit cross-examination of respondent's character witness as to individual opinions formed or expressed after the date of the claimed larceny and after things had become known which may have cast suspicion on respondent.—People v. Huff, 173 Mich. 620.

¶ 505. On cross-examination of a character witness in a criminal action, it is improper, though not reversible error, to go into matters subsequent to the time of the act charged.—People v. Snyder, 173 Mich. 616.

¶ 506. In a criminal prosecution where defendant's character witnesses testify as to his good character previous to the transaction charged cross-examination must be confined to acts prior to the act charged.—People v. Huff, 173 Mich. 620.

¶ 507. It is improper for a character witness to be cross-examined by the prosecuting attorney on a criminal trial as to the effect on the witness' opinion of the respondent's good reputation of the commission of the offense charged against him.—People v. Jansma, 181 Mich. 62.

¶ 508. Cross-examination of an impeaching witness to show that he is himself disreputable may be restricted in the discretion of the trial judge, and was properly excluded where the offer was to show that he was a procurer and blackmailer.—Hollywood v. Reed, 57 Mich. 234.

§ 72. Of expert witnesses.

Of medical experts, see post § 73.
Questions as to opinions and standing of other experts, see post § 74.
Use of scientific books, see post § 75.
Of nonexpert witnesses, see post § 76.
Relative scope of direct and cross-examination, see also ante § 7.
Matters admissible as affecting credibility of experts, see Witnesses, VI, D.

¶ 509. Considerable latitude should be allowed in the cross-examination of experts as to their competency; held proper, however, to exclude evidence of a mechanic's having compromised his bill on complaint made of his work.—Andre v. Hardin, 32 Mich. 324.

¶ 510. In a suit for the price of barley it was allowable in cross-examining plaintiff to ask him how long he has speculated in barley in order to test his judgment of qualities.—Duncan v. Seeley, 34 Mich. 369.

¶ 511. It may be shown on cross-examination of an expert that he was paid $25 for his attendance; but it would also be proper for the court to charge that there was noth-

ing discreditable in the fact.—Alford v. Vincent, 53 Mich. 555.

¶ 512. In replevin for logs, where a witness has testified as to the quantity of the logs, it is competent, in order to test his accuracy, to show the quantity he has made in scaling other lands of which plaintiff has the actual scales.—Busch v. Nester, 70 Mich. 525.

¶ 513. In an action for the value of printing done, where there was evidence that the proof was returned so badly marked and interlined that resetting was necessary, it was proper on cross-examination to allow a printer testifying as an expert to state that a price testified by him as proper and less than was charged would be increased if an exceptional amount of change was made necessitating resetting.—Graham v. Myers, 67 Mich. 277.

¶ 514. Expert witnesses who have testified from comparison that disputed signature is genuine may, to test the value of their testimony, be asked on cross-examination to make comparisons between two signatures of a witness in the case—one admitted by him to be genuine, and the other claimed by him to have been written by some one else but by his authority and direction.—Johnston Harvester Co. v. Miller, 72 Mich. 265.

¶ 515. Where an expert witness based his testimony that certain samples of milk furnished him contained a larger per cent of water, and a smaller per cent of fat, than they ought, if unadulterated, upon comparisons and tests made of other samples of milk, he may be examined on cross-examination as to the results of such comparisons and tests.—Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431.

¶ 516. It is proper cross-examination of a consulting engineer, who has testified that "drips" pumped out of gas mains into a tank are explosive, to ask him whether a vent in the tank ought to have been closed and fastened as a precaution against fire from outside, the action being for negligence in leaving the tank open and unguarded whereby plaintiff playing about the tank was injured.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, per McAlvay, C. J., Carpenter, Montgomery and Moore, JJ.

§ 73. ——Medical experts.

Cross-questioning witness as to his expectation of being paid out of damages recovered, see ante § 60.

¶ 517. Where an expert had testified that a certain injury had in his opinion been inflicted with a hard instrument more or less sharp, and that he could not tell what it was, it is not error to exclude questions as to the probability that such an instrument could be used under specified circumstances without injuring other parts of the body.—Ulrich v. People, 39 Mich. 245.

¶ 518. A physician testifying as an expert that he has discovered no traces of an abortion in a certain case may properly be asked on cross-examination whether such traces would exist under certain circumstances, even though no proof of such circumstances has been made, the purpose being to show why no traces may have remained.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 519. A physician testifying for the defense in an action for personal injury swore that when he had examined the plaintiff there was no evidence of any hurt, but on cross-examination admitted that if the injury had happened long before there would not necessarily be any surface indication of it. Held proper to cross-examine him as to what plaintiff had said when, on touching his person, he had asked him if he felt any pain. The fact was part of the res gestæ, and the plaintiff was entitled to show all the facts brought out by the physician's examination of him.—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322.

¶ 520. It is not proper on cross-examination of a physician, who has testified to the nature of injuries sustained by a plaintiff and the prospect of a full recovery, to ask him if he would be able to say from an examination of plaintiff, if he had never seen him, that he was unable to do manual labor, said question being hardly proper for a medical expert.—Lay v. City of Adrian, 75 Mich. 438.

¶ 521. A physician, having testified hypothetically that a delirious person would be incompetent, cannot be properly cross-questioned, it seems, as to whether asking for a person to draft a will would be evidence of delirium on the part of the person asking, then in her last sickness. It would be common knowledge that such was not evidence of delirium but of rationality.—McHugh v. Fitzgerald, 103 Mich. 21.

¶ 522. It is improper cross-examination of a medical witness testifying as to the ordinary consequences of a given injury from a dog's bite to ask what would be the danger of hydrophobia, where there is nothing in plaintiff's pleadings or proofs to show that he ever entertained any fears of hydrophobia as a consequence.—French v. Wilkinson, 93 Mich. 322.

¶ 523. A cross-question requiring a physician who attended a plaintiff suing for personal injuries to state whether he knew at a particular time that plaintiff contemplated a lawsuit against defendant was properly excluded, where he had given no testimony as of such time to exclamations of pain,

or testimony of any other character which would be affected or impaired by the fact that plaintiff contemplated bringing an action.—Heddle v. City Electric R. Co., 112 Mich. 547.

¶ 524. Where there has not been any inquiry as to the nature of the plaintiff's claims upon which the conclusion would be based, and where no statements or exclamations of pain have been introduced in evidence, it is within the court's discretion in avoiding new fields of inquiry to refuse to permit a physician who had attended one who is suing for personal injuries, to be cross-examined as to whether or not plaintiff made pretenses during the last of his visits that her injuries were more severe than they really were.—Heddle v. City Electric R. Co., 112 Mich. 547.

¶ 525. Where a physician had testified to the mental capacity of the testator, evidence on cross-examination that 8 years previous to the execution of the will and 11 years before the codicils he had treated him for urethritis was too remote to be of value.—In re Morse's Estate, 146 Mich. 463.

§ 74. ——Questions as to standing and opinion of others.

Form of the question, see also post ¶ 577.
Admissible matter to affect credibility of experts' testimony, see Witnesses, VI, D.

¶ 526. Notwithstanding the hypothetical question was improper and was excluded, because based on having heard the testimony of physicians who conducted a post mortem examination without pointing out the particular facts on which it called for an opinion, a physician testifying as an expert on a trial for abortion may be asked on cross-examination how he differed from what the doctors who conducted the post-mortem examination had said about the case, since this called on him to relate what they had said and to state wherein he differed.—People v. Aikin, 66 Mich. 460.

¶ 527. In a personal injuries case where the issue was whether or not plaintiff's leg had been broken, and two physicians had testified to the fact that it was, it was improper on cross-examination of a physician of the defendant to ask him whether or not the two physicians called by plaintiff were not reputable physicians.—Weitzel v. Village of Fowler, 143 Mich. 700.

§ 75. ——Use of scientific books.

Reading books in direct examination of expert, see Evidence § 303; Indictment, VIII, B.
Scientific books as evidence, see Evidence § 511; Indictment, VIII, B.

¶ 528. A medical witness may testify from his knowledge of the accepted facts of medical science; but counsel cannot be allowed on cross-examination to place the statements of a medical book before the jury by reading therefrom to the witness after the witness had testified it was good authority, and then asking him whether what had been read stated the facts therein set forth.—Marshall v. Brown, 50 Mich. 148.

¶ 529. It is error to allow counsel on cross-examination of a medical witness, to read from a medical book.—Foley v. Grand Rapids & I. Ry. Co., 157 Mich. 67.

¶ 530. In an action for personal injuries alleged to have resulted from an electric shock, where defendant's expert witnesses had testified that when nerves are affected by a shock, it does not cause any organic or molecular change in them, the trial court's procedure in permitting counsel for plaintiff to cross-examine such witnesses in such manner as to bring references to alleged contrary opinions in medical books before the jury, constituted reversible error.—Sykes v. Village of Portland, 193 Mich. 86.

§ 76. Of nonexpert opinion witnesses.

See also ante ¶ 225.

¶ 531. The opinions of nonexpert witnesses cannot be sustained or attacked by their further opinions based upon hypothetical questions on cross-examination or on redirect which was practically cross-examination.—Hogmire's Appeal, 108 Mich. 410.

§ 77. Of party as witness.

Of party as to circumstances of tort or negligence, see ante ¶ 52.
Of party's wife, see post § 78.
[Note. In numerous cases where the party testified in his own behalf the questions decided as to proper cross-examination by the adversary have been placed under the various sections, ante and post, because they presented nothing distinctive from other witnesses. See generally those sections.]
Matters admissible to impeach or corroborate party testifying, see Witnesses, VI, D.
Refusal to answer as raising unfavorable inference, see Evidence § 63.

¶ 532. Considerable latitude must be allowed in the cross-examination of a party to ascertain whether his testimony is affected by his interest.—Connor v. McRae, 193 Mich. 682.

¶ 533. A plaintiff, on cross-examination, may be examined as to his bias and interest in the case, or any other matter affecting his credibility as a witness.—Mears v. Cornwall, 73 Mich. 78.

¶ 534. A party who testifies in his own behalf is subject to the same rules of cross-examination as any other witness and may

be cross-examined as to his character and antecedents.—Ritchie v. Stenius, 73 Mich. 563.

¶ 534a. Where a plaintiff makes the defendant his witness, and he is sworn and testifies in his behalf, defendant's counsel has the right to cross-examine him upon any material question in the case, including matters not touched upon in plaintiff's direct examination.—Cairbre v. McQuillen, 162 Mich. 679.

§ 78. Of wife of party as witness.

Privileged communications between husband and wife, see Witnesses, V, D.

¶ 535. Respondent's wife, if a witness in his behalf, may be cross-examined by the prosecution as fully as any other witness.—People v. Gosch, 82 Mich. 22.

¶ 536. Where a wife is a competent witness in an action for damages for alienation of affections she may be cross-examined the same as any other witness.—Hendrickson v. Harry, 200 Mich. 41.

§ 79. Of accused as witness.

Respecting other crimes and offenses, see post § 80.

Of accused testifying on grade of crime as to variant testimony given to judge when admitting crime, see ante ¶ 490.

Privilege against self-criminating testimony, see post § 109.

Waiver of privilege against self-crimination, see post § 110.

Contradiction, impeachment and corroboration by others of accused as a witness, see Witnesses, VI, D.

¶ 537. When a respondent takes the witness stand in his own behalf he is subject to the same inquiries upon cross-examination as any other witness.—People v. Howard, 73 Mich. 10; People v. Sutherland, 104 Mich. 468; People v. Klise, 156 Mich. 373; People v. Bryan, 170 Mich. 683; People v. Danenberg, 176 Mich. 337.

¶ 538. A respondent who offers himself as witness and testifies in his own behalf is subject to the same rules as to cross-examination as other witnesses; so held where respondent so offering himself was permitted to make an unsworn statement to the jury.—People v. Robinson, 86 Mich. 415.

¶ 539. A respondent in a criminal case who becomes a witness in his own behalf is subject to all the rules of cross-examination to test veracity, applicable to ordinary witnesses.—People v. Gray, 135 Mich. 542.

¶ 540. A respondent who presents himself as a witness in his own behalf is subject to any cross-examination which goes directly to the merits of the case.—People v. Bussey, 82 Mich. 49.

¶ 541. The respondent in a criminal case, who offers himself as a witness in his own behalf, may be asked upon cross-examination to answer any question calling for material testimony which in the case of any other witness would be legitimate cross-examination.—People v. Fritch, 170 Mich. 258.

¶ 542. Where a defendant to a charge of criminal assault comes forward as his own witness, and contradicts the witnesses for the state, the court may without an abuse of its discretion, permit him to be cross-examined at great length.—People v. Hoffman, 154 Mich. 145.

¶ 543. Where a person accused of a crime committed on his own premises takes the witness stand, it is proper to examine into his conduct in connection with the accusation, and ask him whether he helped the officers investigate.—People v. Wallin, 55 Mich. 497.

¶ 544. Where, in a prosecution for rape, it appears that the victim has a venereal disease, and respondent on his own behalf testifies that he had no such disease at the time the offense was alleged to have been committed, it is proper, on his cross-examination, to inquire as to his physical condition and to ask why he had certain bottles of medicine which he used while in jail shortly after his arrest.—People v. Glover, 71 Mich. 303.

¶ 545. Where one charged with engaging in the liquor business without having paid tax testifies in his own behalf, he may be cross-examined as to his methods of conducting his business.—People v. Hicks, 79 Mich. 457.

¶ 546. It was proper, on the cross-examination of respondent, to go as fully into his antecedents as into those of any other witness in the case.—People v. Sutherland, 104 Mich. 468.

¶ 547. A respondent who testifies in his own behalf is subject to the same rules of cross-examination as any other witness, and a thorough examination into his past life is competent. Accordingly in a trial for murder of a girl claimed to have been pregnant by him, it was held proper to ask him if he had been twice married and twice divorced, and that she was a witness for him in the last divorce case.—People v. Parmelee, 112 Mich. 291.

¶ 548. On a prosecution for abandonment and nonsupport of his wife, it is proper to cross-examine accused by questions tending to controvert his claim that his wife abandoned him and refused to accept support which he offered her at the home of his father, where he went.—People v. Malsch, 119 Mich. 112.

¶ 549. Where a witness had testified in a prosecution for rape, that the prosecutrix had contracted gonorrhea from the respondent; on a trial of such witness for perjury in so testifying it was proper to show that he knew to the contrary, by showing on cross-examination that he knew that such prosecutrix had the disease before, and that he had treated her for it.—People v. Dowdall, 124 Mich. 166.

¶ 550. In a prosecution against defendant for an assault upon his wife with intent to murder, it is error to require respondent to state on cross-examination whether he was jealous of a certain third person, and married his wife upon her request, where both questions related to matters before their marriage and were not connected with the assault.—People v. Rohl, 166 Mich. 315.

¶ 551. Where the defendant in a prosecution for statutory rape has testified on direct examination to the fact that a money settlement had been demanded of him, he may be cross-examined as to all the facts and circumstances relating to such transaction.—People v. Coston, 187 Mich. 538.

¶ 552. An accused person who offers himself as a witness in his own behalf, on cross-examination may be compelled to answer the question whether revolvers found on his premises by the police belonged to him.—People v. Cona, 180 Mich. 641.

¶ 553. Full latitude should be permitted in the examination of the defendant in a prosecution for statutory rape, a man 75 years of age having a weak back and a double hernia, as to whether he had capacity to perform the sexual act against the will of complaining witness.—People v. Coston, 187 Mich. 538.

§ 80. ——Other crimes and arrests or prosecutions.

Privilege against self-crimination, see post § 109.

¶ 554. Where a person on trial for crime voluntarily offers himself as a general witness, it is discretionary with the trial judge to allow him to be cross-examined as to whether he has been arrested before, or has not been in the state prison.—People v. Cummins, 47 Mich. 334.

¶ 555. Where a respondent in a criminal case is examined as a witness on his own behalf it is discretionary with the trial judge to allow him to be cross-examined as to criminal proceedings against him.—People v. Gale, 50 Mich. 237.

¶ 556. Upon a prisoner's cross-examination it may be shown, as affecting his credibility, that he has been arrested for another crime.—People v. Foote, 93 Mich. 38.

¶ 557. Where the respondent in a criminal case is sworn as a witness it is not competent to compel him to answer on cross-examination questions irrelevant to the issue which have a tendency to bring in other charges.—People v. Pinkerton, 79 Mich. 110.

¶ 558. In a prosecution for embezzlement where the question of forgery of a certain receipt is in issue, it is error on cross-examination to require defendant, over objection, to answer the question whether certain other receipts, presented by him on an accounting with the complaining witness and upon which credit was not allowed, were not rejected because complaining witness claimed they were forgeries, since such claim was not material nor was it material that some court had disallowed claims presented by defendant.—People v. Peck, 139 Mich. 680.

¶ 559. Cross-examination of a respondent in a prosecution for assault with intent to commit rape upon a child under sixteen, in relation to his alleged conduct towards another girl and the bringing of suit by her was improper, particularly where although the suit had been long pending it had never been brought to trial.—People v. Dowell, 136 Mich. 306.

¶ 560. On a trial for murder where respondent testified to a difficulty with deceased on the Sunday preceding the shooting, it was permissible for the people on cross-examination to show that the difficulty took place in a saloon though this tended to show a violation of law by respondent.—People v. Farrell, 137 Mich. 127.

¶ 561. Details of former convictions of the accused given by himself and which were within the rule suggested by his own counsel and not objected to are proper on his cross-examination.—People v. Lambert, 144 Mich. 578.

¶ 562. An accused person, who offers himself as a witness in his own behalf, on cross-examination may be interrogated as to former convictions.—People v. Cona, 180 Mich. 641.

§ 81. Calling opposite party or his witnesses for cross-examination.

Right to cross-examine as to matter on which adverse party might have been called as witness in chief, see ante § 36.

Calling witnesses in court to the stand to testify, see Trial, V.

Subpoena to witness to come to court, see Witnesses, I.

Right to cross-examine adversary as class distinction, see Constitutional Law § 222, ¶ 943.

Competency of the party as a witness to the particular matters, see Fitnesses, II-V.

Right to call opposite party for cross-examination, see Jud. Act, chap. XVII, § 66; Comp. L. 1915, § 12554.

Power of court to require party or witnesses to testify in open court, see 1916 C. C. Rule 36, and see Jud. Act, chap. I, § 29; Comp. L. 1915, § 12034.

¶ 563. Where, under a rule authorizing the circuit courts, "at any time and in accordance with and for the furtherance of justice," to call upon all or any of the parties to be sworn, the court made an order that the parties be examined as witnesses, and they were examined accordingly, it was held not error to refuse to permit one of them to be sworn on his own behalf on a second trial, the other not being present.—Lester v. Sutton, 7 Mich. 329.

¶ 564. R. S. 1846, chap. 102, § 102, Comp. L. 1857, § 4342, provided that in trials before justices of the peace, if the claim of the plaintiff should be denied by the defendant, it should be lawful for the plaintiff to require of the defendant to answer on oath to such claim. Held, that the word "claim," though sufficiently comprehensive to embrace actions sounding in tort as well as those founded upon contract, is, in its popular sense, usually applied to a demand founded in agreement or contract; that this popular meaning was the sense in which the word was used in the statute; and that the examination of the parties was only authorized in actions ex contractu.—Carne v. Litchfield, 2 Mich. 340.

¶ 565. Under R. S. 1846, chap. 102, § 100, allowing a party to be called to prove facts which there was no competent witness attainable to prove, it was not allowable to contradict other witnesses, or to swear to facts on which they might be questioned, simply because he would give a different version.—McBride v. Cicotte, 4 Mich. 478.

¶ 566. The "party" allowed by statute on affidavit to be called to prove a fact by examination of the party (How. St. § 4340), which there was no competent witness attainable to prove, was the opposite party.—Hogan v. Sherman, 5 Mich. 60.

¶ 567. Comp. L. 1857, § 3765, How. St., § 6926, providing how parties in justices' courts may be made witnesses and for judgment against them in case they refuse to testify, is repugnant to Laws 1861, Act No. 125, amending Comp. L. 1857, §§ 4339-4342, How. St., subsequently amended, which prescribe the only rule as to the competency and examination of parties.—Gooderich v. Allen, 19 Mich. 250.

¶ 568. Where a plaintiff before filing her suit against the parents of her husband for alienation of affections has commenced a divorce suit, it is error for the trial court to refuse defendants in the alienation suit permission to cross-examine plaintiff as to the divorce suit. Walter v. Walter, 172 Mich. 351.

¶ 569. Under Act No. 307, Pub. Acts of 1909, a plaintiff may call a witness for cross-examination where it appears that at the time of the happening of the transaction out of which the suit grew said witness was an employee or agent of the defendant.—National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co., 168 Mich. 198.

¶ 570. The right to cross-examine a witness of the adverse party under Pub. Acts 1909, No. 307, How. 2nd Ed., § 12865, is not waived because of the failure to make announcement of the claim to examine under the statute before or at the time the witness is put on the stand, especially where the claim is made after only preliminary questions have been asked and the main facts have not been gone into.—Walter v. Detroit, J. & C. Ry., 191 Mich. 181.

¶ 571. Where one of defendant saloon keepers in an action by a wife for unlawfully selling liquors to her husband is called as a witness by the plaintiff under the statute permitting opposite parties to be called and limiting the effect of their testimony, the admission of such testimony is not reversible error where the objection of invasion of constitutional immunity is not made or the claim of such provision raised and where the witness gives no testimony tending to incriminate himself.—Rauhala v. Maki, 172 Mich. 112.

§ 82. ——Scope, latitude and mode of questioning.

Cross-examination in his own behalf or party called on direct by other party, see ante § 77, ¶ 534a.

¶ 572. Where a party sworn as a witness under R. S. 1846, p. 461, § 100, gave an answer clearly evasive and uncandid, it was held that the court should permit the broadest latitude of inquiry necessary to elicit the truth and effectuate the object of the law.—Way v. Billings, 2 Mich. 397.

¶ 573. In an action against a company for wages plaintiff is entitled to cross-examine the president of such company who is being examined by him under the statute, as to all material matters.—Keel v. Wilson Fruit Juice Co., 176 Mich. 345.

¶ 574. Plaintiff in a personal injury suit called a witness in the employ of defendant for a cross-examination under Act No. 307, Public Acts, 1909. Held, it was not error for the court to permit the defendant to cross-examine such witness and ask him leading questions.—Johnson v. Union Carbide Co., 169 Mich. 651.

¶ 575. An employee of a street railroad company who had nothing to do with the operation of a car at the time of an accident may be called to testify as to speed of a car by the adverse party for cross-exam-

ination under Pub. Acts, 1909, No. 307, How. 2nd Ed., § 12865.—Walter v. Detroit, J. & C. Ry. Co., 191 Mich. 667.

§ 83. Form and intendment of cross questions in general.

Misstatements, slurs and assumptions of fact in questions, see post § 84.
Foundation or connection for question or offer to connect, see post § 85.
Refreshing memory of witness, see ante § 20 et seq.

¶ 576. In an action on a promissory note, which the defendant alleges was obtained by fraud, it is proper to ask him on cross-examination where the fraud was; since this does not call upon the witness to draw a conclusion from the facts, but asks him to state what facts operated on his mind and produced the fraud.—Mace v. Kennedy, 68 Mich. 389.

¶ 577. A physician testifying as an expert on a trial for abortion may be asked on cross-examination how he differed from what the doctors who conducted the post-mortem examination had said about the case where this requires him to state what they testified to from which he differs.—People v. Aiken, 66 Mich. 460.

§ 84. ——Misstatements, innuendoes and assumptions in questions.

Necessity of evidence of fact or showing of it before question assuming it to exist, see also post § 85.
Casting innuendoes by questions or arguments on objections as mistrial, see Trial, II, V; Indictment, IX, B.

¶ 578. In case a question put on cross-examination includes a statement as to testimony given by another witness which statement is not strictly correct, it is proper to rule out the question unless the statement be eliminated.—Daniels v. Weeks, 90 Mich. 190.

¶ 579. The following questions put by the prosecuting attorney to respondent's wife—who had testified that she was present when the alleged crime was committed—"is it not a fact that you were not there at all?" "has this been written out?" "is it not a fact that you and your husband have concocted this whole story?" "you have been a witness for your husband in every lawsuit he has had, have you not?" were held improper as reflecting on the character of the witness, and as tending to discredit her by innuendo.—People v. Cahoon, 88 Mich. 456.

¶ 580. It is not prejudicial error to ask defendant questions on cross-examination which are imputations of a want of truthfulness when the stories told by the plaintiff and defendant as to how the accident happened are as divergent as they could be, and both could not be true.—Herbeck v. Germain, 144 Mich. 157.

§ 85. ——Showing of reason, connection or foundation.

Exhibition of paper to witness before questioning upon it, see post § 87.
Reference to former statements, testimony or doings to refresh memory of witness, see ante § 20 et seq.

¶ 581. Upon cross-examination, a question calculated to draw out a fact which may be rendered material by further evidence is competent, and the same rule does not apply as upon direct examination, that if the question can only be shown to be relevant by other evidence intended to be offered, it must be accompanied by an offer to introduce such other evidence.—O'Donnell v. Segar, 25 Mich. 367.

¶ 582. It is erroneous on cross-examination to reject questions which relate to the same subject as the direct examination, even though it be not apparent that the answers would have benefited the party putting the questions, unless it clearly appears affirmatively that such party could not be injured by the rejection; and this error is not cured by allowing such party to go fully into the same matters with his own witnesses.—O'Donnell v. Segar, 25 Mich. 367.

¶ 583. In an action of trespass for defendant's leading a gang of men upon plaintiff's premises to interfere with his workmen, plaintiff's witness cannot be asked on cross-examination what defendant had said to a meeting of men about observing the law, when no testimony of such meeting had been introduced, although another meeting later in the day and what was said there had been touched on.—Webber v. Barry, 66 Mich. 127.

¶ 584. The witness, having testified to all the facts and circumstances of which he had knowledge, was asked, on cross-examination, if respondent, to witness' knowledge, at any time knew what was in the trunks in which the stolen goods were placed. Held, that it was proper for the court to require the witness first to state if he knew whether or not respondent possessed such knowledge.—People v. Considine, 105 Mich. 149.

¶ 585. Cross-examination as to why the witness did not appear in certain proceedings was improper, in the absence of any evidence that he had been requested to appear, or had been subpoenaed.—Spring v. Perkins, 156 Mich. 327.

§ 86. Use and production of documents as basis for cross-examination.

See also ante ¶ 466.
Of memoranda used for refreshing memory, see also ante ¶ 127.
Identifying the paper and submitting it to witness, see post § 87.
Maps and diagrams, see also ante § 18.

Redirect to explain writings used on cross-examination, see post § 101.
Papers and documents on redirect, see post § 102.

¶ 586. A letter is a legitimate part of the cross-examination of a witness who wrote it, and who has denied giving any such advice as it contains. It is important not only as part of the series of transactions, but also to test his veracity or the accuracy of his memory.—Krolik v. Graham, 64 Mich. 226.

¶ 587. The fact that a witness has been confined in a state prison may be inquired of in cross-examining him without producing the record of his conviction.—Wilbur v. Flood, 16 Mich. 40.

¶ 588. Where suit is brought on an account shown to have been charged in plaintiff's books, defendant is entitled to a full cross-examination upon all that the books would show, and to have plaintiff produce them without making him her witness or issuing a subpoena duces tecum.—McCausland v. King, 60 Mich. 70.

¶ 589. In an action for sidewalk injury it is error to exclude cross-examination of the plaintiff as to her statements before the city council unless the entire stenographic record of her statements at that time is introduced.—Zibbell v. City of Grand Rapids, 129 Mich. 659.

¶ 590. A defendant, sued upon an indorsement which he denies to be his, cannot on cross-examination be required to introduce signatures made by him before the instrument in suit.—First National Bank v. Robert, 41 Mich. 709.

§ 87. ——Identification and submission of papers referred to.

Offering prior testimony as minuted or transcribed, see post § 88.
Reading or submission to witness to refresh memory, see ante §§ 25, 26.
Right to withhold answer until paper is shown, see post § 107.
Inadmissibility of paper to impeach witness where it was not shown to him, see also Witnesses, VI, D.

¶ 591. To ask a witness on cross-examination what he knows about a written statement the counsel holds in his hands is not admissible; there being nothing in the case to show the statement had any relevancy.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 592. A witness having testified that he made a written statement of the facts was asked, "Would you recognize a copy of the statement if it was read over to you?" Held incompetent.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 593. The refusal to permit a witness to be asked on cross-examination whether he wrote a letter referred to in another letter, unless the latter was put in evidence, was not error.—Simonds v. Cash, 136 Mich. 558.

¶ 594. In an action on a promissory note where plaintiff claimed that an agreement was made for the exchange of such note for two smaller notes and that such agreement was invalid because made on Sunday, and that he returned such smaller notes to the defendants, and defendants claimed that the agreement was made after midnight, and denied that such smaller notes were returned, and claimed that such smaller notes were subsequently paid, held that plaintiff was properly cross-examined as to whether or not he inclosed such smaller notes in a letter sent by him to defendants without first showing him the letter.—Prussia v. Bailey, 193 Mich. 77.

§ 88. ——Offer and reading of former testimony.

Offering statements made before municipal council, see ante ¶ 589.

¶ 595. It is not necessary for the prosecutor to exhibit to the defendant's counsel notes of testimony taken before the grand jury which he has in his possession and uses in cross-examining the defendant's witnesses.—People v. Salsbury, 134 Mich. 537.

¶ 595a. A witness testifying on his own behalf, and having testified at a former trial on the same subject, cannot be cross-examined for impeachment as to the particulars of his former testimony and interrogated whether it was true or false, before the transcript of the former testimony is before him and the jury.—Dunbar v. McGill, 69 Mich. 297.

¶ 596. The stenographer's minutes of the testimony given on a former trial cannot be offered as original evidence to contradict and impeach the witness; and he may, therefore, be asked on cross-examination whether he gave such testimony as is stated in detached portions of those minutes, without reading to him the whole testimony taken down by the stenographer.—Toohey v. Plummer, 69 Mich. 345.

¶ 597. In a prosecution for manslaughter a question asked of a witness as to her testimony in justice's court, for the purpose of impeachment, may be objected to until the witness' testimony contained in the deposition is read to her.—People v. McArron, 121 Mich. 1.

¶ 598. The testimony of a witness on the contest of a will is properly excluded on cross-examination of such witness in subsequent adjudication upon the final account of the administrator of testator's estate, where a copy of such testimony was not produced or offered in evidence, and no proper founda-

tion was laid for its introduction.—Reed v. Whipple, 140 Mich. 7.

¶ 599. Generally speaking not all the testimony taken by a stenographer need be read to a witness before he can be asked questions as a basis for impeachment.—McDonald v. City Elec. R. Co., 144 Mich. 379.

III. REDIRECT EXAMINATION AND FURTHER EXAMINATIONS.

§ 89. Occasion, right and propriety.

Right to recall witness for re-examination or further examination after leaving stand, see Trial, V, B.

Discretion of court to permit re-examination on matter already gone into, see Trial, V; Indictment, IX, B.

Reopening case after party has rested and reception of further evidence, see Trial, V, B; Indictment, IX, B.

Mode of putting and arguing redirect question in presence of jury as misconduct amounting to error, see Trial, II, V; Indictment, IX.

Re-examination of witnesses in chancery, see also Equity ¶ 730.

¶ 600. The general rule is that after a witness has been examined he may be subjected to further interrogation by the party by whom he is called, in the discretion of the court.—Loud v. Solomon, 188 Mich. 7.

¶ 601. There is no abuse of discretion upon the part of a trial judge in refusing to allow further examination of a witness who has been subjected to a direct examination, a cross-examination, a redirect examination and a recross-examination.—Loud v. Solomon, 188 Mich. 7.

§ 90. Scope and extent in general.

What further examinations are proper, see ante § 89.

Relation of redirect to direct and cross, see post §§ 92-95.

Explaining, meeting or complementing cross-examination, see post §§ 97, 98.

Repeating and pursuing cross-examination, see post § 96.

Showing bias or discrediting, see post § 99.

Corroboration or rebuttal of bad inferences, see post §§ 100, 101.

Use of papers and documents in redirect, see post §§ 102, 103.

Form and construction of redirect questions, see post §§ 104, 105.

Of redirect examination of character witness, see post § 91.

Recross-examination, see ante § 41.

Refreshing memory of witness, see ante § 20 et seq.

Proper scope and subjects of rebuttal, as distinguished from mode of interrogation or form of question, see Evidence, III; Indictment, VIII, B; and see also specific topics treating of the subject of the primary evidence.

¶ 602. An action for damages from fraud was brought against certain persons charged with conspiring to obtain property by a course of fraudulent dealing. Upon the trial one of the defendants was asked how much he had given for certain land which plaintiff claimed he had sold to his confederates at an extravagant price, and he gave the sum. On re-examination he said this was about a year before he sold it. Held, that the exclusion of a further question as to what kind of pay he gave was immaterial.—Daniels v. Dayton, 49 Mich. 137.

§ 91. Of character and impeaching witnesses.

See also post ¶ 652.

Proper questions for direct examination, see ante § 7.

¶ 603. Where a lawyer, called to impeach a witness, had testified against his reputation for truth and veracity, and on cross-examination had testified that he once had occasion to impeach said witness in a suit wherein he was counsel, and was then allowed under objection to answer the question whether the judgment of the court in that case sustained the theory to which the witness had testified, the supreme court declined to hold that the discretion of the circuit judge was exercised improperly or unwisely in admitting the answer.—Arnold v. Nye, 23 Mich. 286.

§ 92. Relation of redirect to direct and cross-examination.

Matters proper for direct rather than rebuttal, see ante § 7.

Scope of redirect and extent allowable, see ante § 90.

Matter improperly brought out on cross-examination or new matter then brought out, see post § 93.

New matter introduced by amendment, see post § 94.

Rebutting or explaining cross-examination, see post §§ 97, 98.

Preceding examinations as affecting proper form of redirect questions, see post § 104.

Recross-examination, see ante § 41.

Admissibility of evidence because of other evidence, see Evidence §§ 91, 92.

¶ 604. A question warranted by cross-examination may be asked on redirect examination.—People v. Hare, 57 Mich. 505.

¶ 605. It is within the discretion of the court to permit any question to be asked on redirect examination which might have been admitted on the examination in chief.—Hemmens v. Bentley, 32 Mich. 89.

¶ 606. Where a witness has been cross-examined as to his motive in taking a mortgage it is not error to permit redirect examination upon the same subject.—Huellmantel v. Vinton, 116 Mich. 621.

¶ 607. Unless withdrawn, matter introduced by the defendant on cross-examination

may be pursued by counsel for the plaintiff on redirect examination.—Smith v. Smith, 185 Mich. 172.

¶ 608. In a passenger's suit for injury, testimony on re-examination from a physician who had once attended the person injured, that he had once thereafter called upon the person in company with a physician sent by the defendant company, was irrelevant and inadmissible.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 609. Where, from the testimony of plaintiff in an action for personal injuries, it may be inferred that a pass-book on which he rode was given him as part of the consideration for his services, it is not error to allow plaintiff, when recalled, to change his testimony by testifying that defendant's foreman said he would give him a job at a certain sum per day, and tickets to go to and from his work.—Eberts v. Detroit, Mt. C. & M. C. Ry., 151 Mich. 260.

§ 93. ——Improper matter opened on cross-examination.

See also post ¶ 629.

¶ 610. A witness for the prosecution is as much the people's witness when under cross-examination as when on his examination in chief, and the fact that on his cross-examination as to a subject entered upon in the direct examination he is permitted, without objection, to detail part of a hearsay story told him, will not authorize the calling out of the rest of it against objection on the redirect examination upon the claim that it is part of the same conversation. Whether this would be so where the defense is by way of confession and avoidance, and the defendants, while cross-examining the witness, have gone into new matters to establish it, and have thus brought out part of a conversation between the witness and a third person, quære.—Wagner v. People, 30 Mich. 384.

¶ 611. Where a claimant against an estate has been asked on cross-examination concerning admissions made by himself about his contract with decedent, a subject into which his direct examination did not enter, he may on his redirect examination explain the matter fully since it was a waiver of his disqualification to testify of a transaction with decedent.—Fox v. Barrett's Estate, 117 Mich. 162.

¶ 612. In a claim against an estate upon a note, where an entry in decedent's memorandum book relating to payment of $20 on the note was offered to avoid the statute of limitations, and the claimant was cross-examined at length as to the other entries to show that money had been borrowed from him, and where upon being asked whether the said $20 might not have been on the loaned money, he answered in the negative, it was proper to ask him on redirect what it did refer to; the cross-examination having opened the door to the inquiry.—Fowles v. Joslyn, 135 Mich. 333.

¶ 613. In a prosecution for violation of the local option law, where a witness testified on cross that he had bought liquor for medicinal purposes, had seen his name registered and had never seen anything out of character at respondent's store, and where on redirect he was asked what difficulty he bought the medicine for and stated that he could not tell and that it was well known that he took daily drinks; the redirect examination could not be complained of, as it was in response to new matter drawn out on cross.—People v. Robinson, 135 Mich. 511.

¶ 614. Where the defendant assaulted and beat the complaining witness in a quarrel which resulted from a trespass by the defendant's horses on complaining witness' land, for which he locked them up and refused to return them until a settlement was made for the trespass, if the defendant tries to show on cross-examination that ill-feeling existed between the parties because of former trespasses, he cannot object if the prosecution also goes into the question on redirect examination.—People v. Mulvaney, 171 Mich. 272.

¶ 615. Where defendant, in cross-examination of plaintiff's witness as to the extent of damages, covers a period subsequent to the starting of the suit, it is not reversible error to permit complainant on redirect examination to cover the same period.—Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78.

§ 94. ——Issues introduced by amendment at trial.

¶ 616. In a suit for breach of contract brought by the sales agent against an automobile company for cancelling an agreement making plaintiff the sales agent of defendant, the contract provided that plaintiff must conduct the sales garage to the satisfaction of defendant. During the course of the trial plaintiff amended his declaration, charging that defendant acted in bad faith in cancelling the contract and was in fact satisfied with plaintiff's work. Thereupon defendant recalled its manager, to whom such bad faith was imputed, as a witness, and asked whether he canceled the contract in good faith or for the purpose of making a more advantageous one with another sales agent. Held, it was reversible error for the trial court to exclude the answer of the witness on the ground that it had not been gone into on his direct examination.—Isbell v. Anderson Carriage Co., 170 Mich. 304.

§ 95. Matters which might have been shown in chief.

¶ 617. It is not necessarily reversible error to admit in rebuttal evidence for the prosecution that should have been offered in chief,

where such evidence could not have prejudiced respondent.—People v. Cox, 70 Mich. 247.

¶ 618. A doctor who took a case on the "no cure, no pay" basis sued for his fee. The patient showed that more than a year after he was treated he was still suffering. Held proper to permit the plaintiff, on rebuttal, to ask a medical witness if he knew whether the patient, when discharged, was suffering from the trouble testified to by his witness. But, also, that it was not clearly error to refuse to permit the question at that stage of the case. The evidence called out by it belonged to the examination-in-chief, as the plaintiff was bound to show that he left defendant cured.—Beebe v. Kostinic, 55 Mich. 604.

¶ 619. In an action for personal injuries where defendant introduces testimony to show that the accident was caused by an agency not within its control, the court may in its discretion allow plaintiff to introduce evidence that such agency did not cause the accident though it is not strictly rebutting. —Kozlowski v. Detroit United Ry., 174 Mich. 412.

§ 96. Repetition or further pursuit of matters already in evidence.

Cross-examination calling for repetition of direct testimony, see ante §§ 39, 40.
To rebut or explain, see post §§ 97, 98.

¶ 620. The admission on redirect examination of evidence of a physician, in a prosecution for manslaughter, as to whether persons die from fright, cannot be objected to where it is a substantial repetition of the testimony brought out on cross-examination. —People v. McArron, 121 Mich. 1.

¶ 621. Where plaintiff's medical witness testifies to a certain fact on cross-examination, an error in permitting him to make substantially the same statements on redirect, is not prejudicial.—Judd v. Township of Caledonia, 150 Mich. 480.

¶ 622. A plaintiff in a suit for personal injuries against defendant automobile owner had previously testified in a criminal prosecution of defendant for speeding on the occasion in question. In the two trials he made conflicting statements as to the relative positions of himself and defendant, and upon cross-examination stated that he did not remember what he testified to at the former trial. Defendant then asked him whether, if he testified on the former trial, that a certain distance was eighty-five feet, his statement was not untrue. Held, the court properly excluded the question.—Scott v. Dow, 162 Mich. 636.

§ 97. Explaining, complementing or meeting cross-examination.

Developing whole conversation or exact words, see post § 98.
Proper evidence to be received in rebuttal, see Evidence § 84 et seq.; Indictment, VIII, B.

¶ 623. Where testimony is brought out on cross-examination the transaction involved may be elucidated and explained on redirect. —Musselman Grocer Co. v. Casler, 138 Mich. 24.

¶ 624. Where defendant by cross-examination draws out a partial statement of facts only, the plaintiff's counsel may re-examine as to the same subject-matter for the purpose of making the facts clear and obtaining such as are material.—Wilcox v. Ney, 47 Mich. 421.

¶ 625. Where, on a second trial, a party has testified to a fact in his own favor, which cross-examination shows that he did not mention on the first trial, held, that on redirect examination he has a right to explain why he had omitted it, and perhaps to state any fact in verification of his explanation.—Ives v. Tregent, 29 Mich. 390.

¶ 626. Where it is brought out on cross-examination of plaintiff that she refrained from doing a certain act, it is competent to show on redirect examination her reasons for so refraining.—Lockard v. Van Alstyne, 155 Mich. 507.

¶ 627. Where a witness for plaintiff in slander had testified to the speaking of the words by defendant, and on cross-examination had stated that she had previously heard the story from others, it is proper, on re-examination, to ask from whom she heard it. If the object was to mitigate damages by showing that defendant had only repeated a common rumor, its prevalence became a proper subject of inquiry, and plaintiff had a right, if possible, to trace it back to defendant.—Burt v. McBain, 29 Mich. 260.

¶ 628. Where a man against whom a heavy award has been made transferred property to his wife, and in a case involving his title to it was cross-examined as to his indebtedness and transfers, a question, upon re-examination, as to whether he "was at all alarmed about that matter"—meaning the award—was permissible.—Hall v. Moriarty, 57 Mich. 345.

¶ 629. Plaintiff in an action for fraud was asked on cross-examination "when he first learned that he had been swindled." He was afterwards asked by his own counsel as to when he first learned of the evidence to support his action, and he answered "Since I commenced this suit." Held, that the latter question was in the line of inquiry opened by the defendant and that the latter could not complain of it.—Daniels v. Dayton, 49 Mich. 137.

¶ 630. The defense having cross-examined the people's witness to show that the wit-

ness had some trouble with respondent subsequent to the alleged larceny, and that he would like to get even with the respondent, it is proper to permit the witness, on his redirect examination, to explain the nature of the trouble.—People v. Hanifan, 98 Mich. 32.

¶ 631. Where defendant sued for slander seeking to mitigate an imputation of larceny has sought by cross-examination of a witness to show that plaintiff fraudulently took ice belonging to his copartners, plaintiff on the redirect examination may bring out the fact that all the partners but defendant consented to the taking.—Ellis v. Whitehead, 95 Mich. 105.

¶ 632. In trover by a wife against a mortgagee of the husband for property which she claimed to have owned, but which she had permitted the husband to use in his business, the husband, who was sworn for the plaintiff, having admitted on cross-examination that he told a former partner that the property belonged to him, was further questioned regarding his motive in deceiving his partner. Held, that the evidence was properly excluded as immaterial.—Little v. Williams, 107 Mich. 652.

¶ 633. A witness, having stated on cross-examination that his paper did not publish a retraction of an alleged libel like other papers had done, and having on re-examination stated that on hearing of the other retractions he had instituted an inquiry as to the true facts, should be allowed to state the result of the inquiry, as it would tend to explain his action and control the inference that he had persisted in a wrong.—Bathrick v. Detroit Post & Tribune Co., 50 Mich. 629.

¶ 634. Plaintiff, having testified that certain accounts assigned as good accounts in pursuance of the sale of an interest in a firm were already collected by a certain person, and having been cross-examined as to his personal knowledge of such fact, was properly questioned on redirect to show that defendant knew of the fact, and talked with plaintiff concerning the collections and accounts owing, and had means of knowing the facts.—Totten v. Burhans, 103 Mich. 6.

¶ 635. Plaintiff in an action for fraud in sale of an interest in a firm, having testified that certain accounts were not collectible though represented to be good and having been cross-examined as to his diligence in trying to collect, may state on redirect that defendant had knowledge of the accounts and their condition, that defendant talked with plaintiff about them and the collection of them, and to whom plaintiff applied for information concerning them when about to try to collect them.—Totten v. Burhans, 103 Mich. 6.

¶ 636. Plaintiff in an action for fraud in selling an interest in a firm to him, having testified that no security for his payment of assumed debts had been taken and no writing given for that purpose (this on cross-examination), and having further testified that defendant was secured by an agreement that defendant's son was to be employed as bookkeeper and that defendant was in a situation to be advised of collections made, and that collections were to be applied to the liquidation of indebtedness, might properly testify on redirect that the son was so employed, and that defendant talked to and counseled with plaintiff about collections and had knowledge of the state of the accounts.—Totten v. Burhans, 103 Mich. 6.

¶ 637. In an action for the conversion of stock of a corporation, it is competent for the plaintiff after being cross-examined as to the property of the company, not equal to par value of stock, and being asked on redirect what, aside from the property, he took into account in fixing the value of the stock, to testify that he took into account the good will of the business; as good will is an element in determining the value of stock in a corporation.—Feige v. Burt, 124 Mich. 565.

¶ 638. In an action by the widow against the estate of her deceased husband on promissory notes executed by the husband payable to the wife, the action of defendant's counsel in proving by the claimant that she signed her husband's name to another promissory note introduced in evidence warrants redirect examination on the circumstances of execution of the note in question.—Taylor v. Taylor's Estate, 138 Mich. 658.

¶ 639. In an action under the Civil Damage Act, cross-examination of plaintiff as to her husband's earnings having increased latterly does not entitle plaintiff to show that she had two children who contributed to the earnings of the family.—Manzer v. Phillips, 139 Mich. 61.

§ 98. ——Developing whole conversation or exact words.

Admissibility of entirety of conversation or transaction, see Evidence, III; Indictment, VIII, B.

¶ 640. A witness who has been allowed to testify as to part of a conversation between himself and a party to the case should generally be allowed, on re-examination, to give the whole conversation as to the matter in evidence.—Passmore v. Passmore, 50 Mich. 626.

¶ 641. A witness on the probate of a will testified on his cross-examination that, some years before, he had a conversation with the deceased; but he gave no part of the conversation and it did not appear to have had any bearing on the case. Held not compe-

tent for the other party, on re-examination, to inquire what was said by the deceased on that occasion.—Beaubien v. Cicotte, 12 Mich. 459.

¶ 642. In an action of trespass for assault and battery after admitting, on cross-examination, use of abusive, insulting, and profane language towards defendant, plaintiff may on redirect examination state the words used.—Kent v. Cole, 84 Mich. 579.

¶ 643. Where plaintiff in suit for labor done on defendant's farm, being asked on cross-examination whether, in a conversation with one N., the latter did not ask him, "Why didn't you do as I did when I left the old man,—settle up with him?" admitted having had a talk with N., but denied that N. asked this, and denied that he said he had reasons for waiting, and also denied that there was such conversation, it was not error to permit plaintiff on redirect examination to state what the conversation was.—Alderton v. Wright, 81 Mich. 294.

¶ 644. A witness asked on cross-examination if she made a certain specific statement to defendant's foreman, in conflict with her testimony, cannot on redirect examination, over objection, be permitted to state the whole conversation had with the foreman, on the ground that defendant's counsel had brought out a part of it.—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

§ 99. Showing bias or matter affecting credit.

Corroborating or rebutting bad inferences developed by cross, see post § 100.

¶ 645. Testimony which touches the bias or interest of a witness can be shown on his cross-examination, and, if denied by him, can be proved on rebuttal, if the proper foundation is laid.—Swift Electric Light Co. v. Grant, 90 Mich. 469.

§ 100. Corroborating the witness or rebutting bad inferences.

Explaining writings used, see post § 101.
Papers and documents to corroborate, see post § 102.
Proper matter for corroboration, see Witnesses, VI, D.
Evidence to rebut discrediting inferences, see Evidence § 86.

¶ 646. Where plaintiff in an action against his father-in-law for enticing away his wife is asked by defendant's counsel if he did not meet his wife at one time when he had another woman in the buggy with him, he may explain, in answer to a question by his own counsel, the circumstances of his riding with the other woman.—Edgell v. Francis, 86 Mich. 232.

¶ 647. Where the plaintiff in an action for personal injuries had testified, on cross-examination, that she went to work soon after the accident, her testimony that the duty of paying her mother's funeral expenses and of meeting other pressing obligations required an early resumption of work was properly received to overcome the presumption against the seriousness of her injuries which otherwise might have arisen.—Burleson v. Reading, 110 Mich. 512.

¶ 648. Where a witness was asked on cross-examination as to certain statements said to have been made by him to the party in whose behalf he was being cross-examined as tending to show the witness' prejudice or bias against such party, held that there was sufficient foundation for testimony by such party in rebuttal as affecting the credibility of such witness.—Snyder v. Mathison, 196 Mich. 378.

¶ 649. Where, in an action for negligence, one of defendants is made a witness for plaintiff, and on cross-examination it is sought to suggest an inference that he had entered into an agreement with plaintiff's counsel in order that he might be relieved at the expense of his codefendants, he may, on redirect examination, be asked whether or not he wanted to settle the case for the purpose of repelling such inference.—Rogers v. Fowler, 151 Mich. 485.

¶ 650. An accomplice testified against defendants in a criminal action. Upon cross-examination he admitted that when confronted by defendants in the presence of an officer he had stated that in his charges against defendants he had lied. Held, it was proper to permit him on redirect examination to explain that he said in the presence of defendants he had lied from fear they would do away with him.—People v. Dumas, 161 Mich. 45.

§ 101. ——Explaining writings used on cross-examination.

¶ 651. Upon a trial for carnally knowing a young girl, the prosecutrix testified on cross-examination that a written statement signed by her had been prepared by the prosecuting attorney, who told her to sign it. Held, that it was competent upon her redirect examination to show that the statement was in her own language, that no inducements or threats were held out to her in connection with its preparation, and that she was not asked to make any statement that was not in fact true.—People v. Mills, 94 Mich. 630.

¶ 652. A respondent on trial for carnally knowing a young girl was the leader of a religious community whereof prosecutrix and another witness were members, and on cross-examination of the latter it was disclosed that they had made respecting respondent's general conduct certain statements inconsistent with their testimony. Held, that it was proper to show by those witnesses, upon their redirect examination, the circumstances

under which the statements were made, that they were made while under respondent's influence, and that they had been taught that submission to his desires involved no wrong. —People v. Mills, 94 Mich. 630.

¶ 653. The grantee in a deed testified in ejectment that the deed was delivered to him the day of its date. Previous to the commencement of the ejectment suit, in his answer to a bill filed to set aside the deed, he had stated that the deed was delivered to him at a date subsequent to the marriage of the grantor to plaintiff, and this statement was introduced in evidence to contradict the witness. On his redirect examination, he testified that he did not know what the word "delivery" meant in law, and was then asked to state what he meant by the use of the word in his answer in the equity suit. Held, that it was proper for him to explain, if he could, what he understood by the term.—Jourdan v. Patterson, 102 Mich. 602.

§ 102. Papers and documents in redirect examination.

Memoranda and documents used for refreshing memory, see ante § 27, ¶ 132.

Minutes of preliminary testimony as bearing on cross-examination had at trial, see post ¶ 659.

General rules as to documentary evidence, see Evidence, IV, VIII; Indictment, VIII, B.

¶ 654. Upon the redirect examination of a witness who has been cross-examined with a view to discredit her testimony as to the dates and items of a money-claim alleged by the other side to be fraudulent, the bank-book and books of account of the witness may be introduced to corroborate her account of the transactions.—Wright v. Towle, 67 Mich. 255.

¶¶ 655, 656. Where the contents of a written statement are called out in detail on cross-examination, the statement may be offered in evidence on redirect examination. —Plowaty v. Sheldon, 167 Mich. 218.

¶ 657. One of the plaintiffs testified on cross-examination that at the time of the purchase he made a memorandum of the contract, in the presence of the defendant, in a book in which he was accustomed to enter such purchases, and at the request of the defendant's counsel he produced the book, and was cross-examined therefrom. Held, that the book was admissible on his redirect examination, not as evidence of the contract, but as bearing upon the weight to be given to the testimony of the witness.—Aulls v. Young, 98 Mich. 231.

¶ 658. The defendant contended that he had paid plaintiffs, and taken a receipt in full. Plaintiffs denied the execution of the receipt, the body of which was in defendant's handwriting. Upon cross-examination, defendant testified that he had frequently drawn receipts for lawyers to sign, but was unable to give an instance where he had done so, other than the one in question. The following day, upon being asked on redirect examination if he could produce any other receipts so drawn and signed, the witness produced several such receipts, and was permitted to testify what attorneys signed them, whereupon his counsel offered the receipts in evidence. Held, that they were properly excluded.—Howell v. Smith, 108 Mich. 350.

§ 103. ——Of minutes or transcript in calling for explanation.

¶ 659. Where it appears that a witness for the prosecution had on his cross-examination materially modified his testimony as given on the preliminary examination the prosecuting attorney may properly read to him his former testimony and examine him upon the material parts thereof.—People v. Tubbs, 147 Mich. 1.

§ 104. Form and construction of redirect questions.

Refreshing memory of witness, see ante § 20 et seq.

¶ 660. The propriety of a question is not necessarily to be settled by considering it as a substantive and independent inquiry, but the preceding course of examination and the surrounding circumstances will be taken into account; and where, upon re-examination, an inquiry must have been understood as resting upon a hypothesis pointed at by the cross-examination, it was so treated, although in putting the question the hypothesis was not restated.—McGinnis v. Kempsey, 27 Mich. 363.

§ 105. Leading questions.

See also ante ¶ 53.

¶ 661. Leading questions to bring out explanation or completion of matters opened on cross-examination are objectionable.—Ives v. Tregent, 29 Mich. 390.

¶ 662. Permitting a witness to explain his testimony on being recalled, and the use of leading questions in so doing, was discretionary.—Webb v. Feather's Estate, 119 Mich. 473.

IV. DUTY AND PRIVILEGES OF WITNESSES.

§ 106. Duty, rights, and compulsion of answer.

Right of witness to explain testimony, see ante § 34.

Duty of witness to attend when subpoenaed, see Witnesses, I.

Duty to submit to physical examination before trial, see Discovery and Inspection, III.

Compulsory exhibition of person to jury as evidence, see Evidence §§ 575, 577.

Disability to compel writing of name for comparison, see ante ¶ 590, Evidence ¶ 2865.
Duty to answer on taking of depositions and compulsion of answers thereat, see Depositions §§ 13, 14.
Contemptuous refusal to answer and commitment and punishment for contempt, see Contempt.

¶ 663. As to compelling testimony of witness summoned before circuit judge under How. St., § 7455 et seq., to testify in suit pending in other state.—Atchison, T. & S. F. R. Co. v. Jennison, 60 Mich. 232.

§ 107. ——Right to inspect paper before answering.

¶ 664. A witness cannot be compelled to answer whether a signature shown to him is his, unless permitted to examine the paper to which it is appended.—North American Fire Ins. Co. v. Throop, 22 Mich. 146.

¶ 665. In an action on promissory notes, a witness who has testified as to the genuineness of the maker's signature may properly refuse to express an opinion as to the genuineness of the signature on other instruments produced by defendant's counsel unless permitted to examine the documents. —Taylor v. Taylor's Estate, 138 Mich. 658.

§ 108. Privileged questions.

Incompetency of person in confidential or professional relation to testify of communications made in the privilege of such relation, see Witnesses, V.
Incompetency of person to testify of matters equally within knowledge of person since deceased or become incompetent, see Witnesses, IV.
Exclusion of affidavits or testimony of jurors to show ground for new trial or to sustain amendment of verdict, see New Trial, III; Verdicts and Findings, V, VI.

¶ 666. A witness has no privilege that excuses him from testifying to relevant facts that show him to be guilty of fraud or dishonesty, if not criminal.—Jennings v. Prentice, 39 Mich. 421.

¶ 667. Attaint upon untrue verdicts being abolished by statute, a juror cannot be questioned concerning his verdict or his motives or reasons for finding the same.—Welch v. Tribune Publishing Co., 83 Mich. 661.

§ 109. Privilege against self-crimination.

Waiver of the privilege, see post § 110.
Degrading but noncriminal self-accusation, see ante § 108.
Calling for incriminating matter as permissible cross-examination, see ante § 42.
Scope and range of cross-examination of accused, see ante §§ 79, 80.
Validity of laws under the constitutional provision against self-crimination, see Constitutional Law § 201.
Immunity of witness from prosecution on testimony given by himself, see Witnesses, I.
Right to counsel before grand jury, see Constitutional Law § 200.
Omissions or evasions of matter which might have been privileged as affecting credibility of testimony of statement of accused given in his own behalf, see Witnesses, VI; Indictment, VIII, A.
Admissibility of self-criminating testimony, see Indictment, VIII, B.
Privilege against self-crimination in accounting suit, see also Accounting Suits ¶ 29.
Impropriety of comment in argument on claim of privilege, see Argument of Counsel § 16; Indictment, IX, E.
Constitutional provision against self-crimination, see Court, Art. II, § 16.
Scope and extent of privilege to decline answer, see Jud. Act, Chap. XVII, §§ 59, 60; Comp. L. 1915, §§ 12547, 12548.

¶ 668. The shield afforded by the provision in the Michigan and Federal constitutions against compelling a man to incriminate himself is personal to the witness and he cannot evoke these provisions to protect others no matter how close the association. —In re Moser, 138 Mich. 302.

¶ 669. Though an accomplice who consents to be used as a witness by the prosecution must testify fully on cross-examination concerning the transaction under investigation, he cannot be compelled to disclose his criminality in other cases.—Pitcher v. People, 16 Mich. 142.

¶ 670. A witness in a seduction case may decline to answer the question whether he ever had sexual intercourse with the prosecutrix, and give no reason for declining.— People v. Brewer, 27 Mich. 134.

¶ 671. It was held no error to refuse to compel a witness in a seduction case to state whether he had not had sexual intercourse with the prosecutrix before the time of the alleged offense, even if prosecution against him for seduction were then barred by statute of limitations, if he had not been complained of. The judge could not know whether a complaint had been made, and, if prosecution for rape were not barred, an affirmative answer might tend to convict him of either offense.—People v. Brewer, 27 Mich. 134.

¶ 672. Where a witness claims the constitutional immunity from answering a self-incriminating question, he cannot be compelled to answer unless the court is able to say, as a matter of law, that any direct answer to the question cannot tend to incriminate the witness.—In re Allison, 156 Mich. 34.

§ 110. ——Waiver of privilege.
Necessity of claim, see also ante ¶ 571.

¶ 673. A witness may waive the personal privilege of refusing to criminate himself. —People v. Arnold, 40 Mich. 710.

¶ 674. One who turns state's evidence and swears to an offense in which he was a party thereby waives his privilege against criminating himself in that matter, and has no right to set it up as to statements made to his counsel, or to refuse answering himself. All privileges are waived by a state's evidence in regard to the facts in controversy. He must disclose fully.—Alderman v. People, 4 Mich. 414; Hamilton v. People, 29 Mich. 173.

¶ 675. When an accomplice consents to be used by the prosecution as a witness, and is examined in chief, he thereby waives his privilege not to testify to facts criminating himself, and must submit to a full cross-examination.—Foster v. People, 18 Mich. 266.

¶ 676. The respondent in a bastardy case who testifies in his own behalf thereby waives his constitutional right to refuse to give testimony on cross-examination, material to the issue, proving him guilty of a rape.—People v. Dupounce, 133 Mich. 1.

¶ 677. Respondent was tried for keeping a place for the sale of intoxicating liquors contrary to the Local Option Act. The state demanded of the respondent the production of a revenue receipt, the court remarking that "unless time is asked it will be presumed that the request is refused." Later, respondent testified fully relative to the matter, giving his reasons for procuring such revenue receipt. Held, respondent's right not to be compelled to be a witness against himself was not violated.—People v. Aldorfer, 164 Mich. 676.

¶ 678. Where one who had been subpoenaed before the grand jury gave, in answer to interrogatories, testimony against himself, and was subsequently indicted, his constitutional privilege against self-crimination cannot be said to have been violated, for if he does not object he is presumed to have testified voluntarily.—People v. Lauder, 82 Mich. 109.

EXAMINED COPIES to EXCHANGE.

Cross-References.

Examined Copies—
Admissibility in evidence, see Evidence, VIII, C, 2; Indictment, VIII, B.
Excavations—
Duty and liability in respect of, see Adjoining Owners; Highways, XII, G; Negligence, II; Landlord and Tenant, IV; Master and Servant, III; Nuisances.
Contracts for excavating, see Building Contracts; and see also Contracts.
Exceeding Authority or Power—
See Agency, II-IV; Corporations, XVII; Partnership, IV.
Ultra vires acts of corporations, see Corporations, XIV; Municipal Corporations, III, IX.
Quo warranto or injunction, see Quo Warranto; Injunctions.
Exceeding Jurisdiction—
Proper remedy, see Certiorari; Prohibition; Mandamus; Injunctions.
Exceptions—
Bill of exceptions on writ of error, see Appeal, VI, XI; Indictment, XVI, C.
Taking and saving the exceptions, see Saving Questions; Indictment, XIV.
To accounts, reports on reference, and the like, see Accounting Suits; Estates of Decedents, XII, C; Reference, V.
In contracts, deeds, wills, statutes and other writings, see Contracts, VI; Deeds, III; Wills, VI; Statutes, V; and see also topics involving the particular statute or writing.
Pleading exceptions and negativing them, see Pleading, I-III; Indictment, I, B.
Excess; Excessiveness—
Of damages, see Damages, IX; Eminent Domain, IV; Death by Wrongful Act §§ 39, 40.
Ground for reversal or new trial, see Harmless Error; New Trial, II, D, E; and see also Appeal, XIII, §§ 485, 524.
Of punishment or sentence for crime, see Crimes, § 30; Indictment, XI; Constitutional Law § 202 et seq.
Of levy or sale under judicial process or proceeding, see Attachment, VI, A; Executions, VI, VII; Judicial Sales; Estates of Decedents, VII; Foreclosure, III, E.
In taxes and assessments, see Taxes, V, VI; Local Improvements, VII; Drains, II, C, G.
In sale by mortgagee under power or by pledgee, see Foreclosure, II, C; Chattel Mortgages, VII; Pledges.
In assertion or defense of rights as tort, see Assault §§ 13, 15-18; Conversion, I; Trespass.
In assertion or defense of rights as crime, see Assault §§ 3, 7; Homicide, V.
Overpayments and recovery of same, see Payment, VI; Implied Contracts, II; Taxes, VIII.
Exchange—
Barter of property, see Exchange of Property.
Brokers' and traders' exchanges, see Exchanges.
Bills of exchange and exchange as charge for same, see Negotiable Instruments; Banking, V, VI.

EXCHANGE OF PROPERTY.

TREATS of contracts for barter of property for property. A contract of sale at a price stated in money but payable in property to be taken on an agreed valuation is strictly a sale and is treated in Sales; Vendors and Purchasers. Property as a medium for payment of a debt by agreement is treated in Payment, I.

Analysis.

§ 1. In general.
§ 2. Remedies and actions.
§ 3. Evidence, instructions and issues for jury.

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§ 1. In general.

Sales of personalty in which consideration is other property received at fixed money valuation, see Sales.

Sales of real property in which consideration is other realty received at a money valuation, see Vendor and Purchaser.

Sufficiency of offer and acceptance to form contract, see Contracts, III.

Necessity and requisites of writing to effect transfer, see Frauds, Statutes of.

Usage to control warranty in exchange, see Customs § 12.

Making exchange as act preventing "sale" of property, see Contracts ¶ 924.

Allotment of dower in exchanged lands, see Dower § 54.

Authority to sell or exchange, see Agency § 38.

Right of broker to double compensation for exchange of property, see Brokers.

Inurement of title afterward coming to party as curing want of title at time of exchange, see Estoppel ¶ 41.

Nonestoppel of party regaining possession by loan to repudiate exchange on ground of fraud, see Estoppel ¶ 170.

Validity of contract for exchange of properties at money valuation subject to specified incumbrances where amount of incumbrances greater than that specified, see Vendor and Purchaser, III.

Exchange of real property by insane person or incompetent, see Jud. Act, Chap. XIX, § 46; Comp. L. 1915, § 12700.

Exchange of state lands, see Comp. L. 1915, §§ 463-467.

¶ 1. In case where an exchange of land has been agreed upon by parol, and one party's deed has been handed to the other party whose own deed is not ready, and whose title afterwards turns out to be defective, the delivery of the deed is not absolute.—Chick v. Sisson, 95 Mich. 412.

¶ 2. The rule that in case of exchange, title to the property of one of the contracting parties may pass before he acquires title to the property for which it was exchanged, applies in a replevin case where plaintiff left the property he agreed to exchange, at the place agreed upon and notified defendant of his action who thereupon refused to comply with the demand.—Pratt v. Wickham, 133 Mich. 356.

¶ 3. A mortgagee who agrees to discharge a mortgage on land received by the complainant in trade and to accept in lieu thereof a mortgage on land conveyed by the complainant to the mortgagor, cannot be compelled to discharge the mortgage until he has received a tender of a mortgage on the land newly acquired by the mortgagor.—Trombley v. Cannon, 134 Mich. 417.

¶ 4. A deed made in an exchange of properties will not be set aside because one of the grantors did not acknowledge, and it had but one witness where the omissions were subsequently remedied and the deed redelivered.—Pirgandi v. Fay, 128 Mich. 630.

§ 2. Remedies and actions.

Rescission of exchange contracts and effect of delay or failure to restore status quo, see Rescission.

Want of knowledge as excusing delay in suing for rescission, see Equity ¶ 205.

Specific enforcement of exchange agreements, see Specific Performance.

Measure of damages on breach of contract of exchange, see Damages § 70.

Liquidated damages for breach, see Damages § 188.

¶ 5. Whether upon a rescission of a contract of exchange for failure of title, and after an offer of restitution such as would place the adverse party in statu quo, the only remedy is an action directly on the contract of exchange counting specially on the warranty, or whether an action will lie for goods sold and delivered, quære. If the latter is permitted it is on the ground that, as the express contract is rescinded, the law will imply one to meet the equities of the parties as they are left by the rescission.—Hunt v. Sackett, 31 Mich. 18.

¶ 6. A party who has been induced to exchange a horse for another by means of a false warranty of the horse received may sue in tort for the deception, and set out in his declaration the false warranty as the means whereby he was injured; and the fact that he sets out a warranty in his declara-

tion and avers its breach does not make his declaration one in assumpsit, provided the essentials of a declaration in case appear.—Carter v. Glass, 44 Mich. 154.

§ 3. Evidence, instructions, and issues for jury.

Admission tending to show that trade was not made, see Evidence ¶ 2061.

Admissibility of parol evidence as to real consideration, see Evidence § 161, ¶ 849.

¶ 7. A man agreed for his wife to exchange property, and she afterwards brought trover for it, the question in issue not being the rescission of the bargain but its existence. Held proper to exclude a question to the plaintiff as to whether she knew the relative value of the property traded when the trade was made; and, if important, this question requires the value of each piece of property to be ascertained and made a basis of the inquiry.—Stansell v. Leavitt, 51 Mich. 536.

¶ 8. In ejectment a deed of exchange offered by defendant and apparently prepared for execution by both parties to complete the exchange, and actually executed by one, but not the one from whom defense was seeking to prove title, is competent evidence in connection with other proofs to show that mutual deeds were given.—Goodell v. Labadie, 19 Mich. 88.

¶ 9. Where in an action to recover the value of machinery exchanged for land, the machinery had been in the defendant's possession for three years and witnesses for the plaintiff testify they had seen it in general use on the defendant's farm, and the defendant testifies it had been used only three or four days in sawing wood, the question of whether his acts amounted to an acceptance is for the jury.—Bowen v. Chandler, 172 Mich. 678.

¶ 10. On a proceeding against an estate for the allowance of a claim consisting of a note given in part payment in the exchange of a blacksmith shop for an automobile, where it appeared that claimant had, two weeks before the consummation of such transaction, made an exchange of certain property for a saloon business and signed a contract for the purchase of the land on which the property was situated including the blacksmith shop, evidence held sufficient to show that the exchange of properties was a single transaction.—In re Cutter's Estate, 194 Mich. 34.

¶ 11. In an action for damages for breach of a contract for the exchange of real estate, held that a supplemental agreement providing that in accordance with the contract, to which it referred, a warranty deed and a certified abstract to plaintiff's premises were tendered, was admissible in evidence.—Frederick v. Hillebrand, 199 Mich. 333.

¶ 12. In an action to recover damages for breach of a contract for the exchange of real estate, plaintiff may testify to the actual value of his farm, as he has the right to show that his contract is a valuable one.—Frederick v. Hillebrand, 199 Mich. 333.

¶ 13. In an action for damages for breach of a contract for the exchange of real estate, held that the jury should have been instructed on the question whether the title tendered by plaintiff to defendant was or was not a marketable one.—Frederick v. Hillebrand, 199 Mich. 333.

EXCHANGES AND BOARDS OF TRADE.

TREATS of associations of persons to conduct stock or business exchanges or trading places and of membership rights and liabilities not common to all corporations or associations. The general law of Associations and that of Corporations is treated in those topics. The law of Brokers and Factors is treated in that topic.

§ 1. In general.

Stock and margin transactions by brokers, see Brokers § 12.

Amendment of articles of corporation, see Corporations § 27.

Estoppel to dispute corporate powers assumed, see Corporations § 96.

Liability of member to creditors, see Corporations § 316.

Nature of dues payable by members, see also Corporations ¶¶ 1168, 1169.

Incorporation of boards of trade and chambers of commerce, see Comp. L. 1915, §§ 8936-8945.

Authority for formation of lumbermen's exchanges, see Comp. L. 1915, §§ 8946-8953.

Incorporation of Michigan business men's association and auxiliary associations, see Comp. L. 1915, §§ 8954-8961.

Incorporation of merchants' and traders' associations, see Comp. L. 1915, §§ 8962-8966.

EXCISE to EXECUTION.

Cross-References.

Excise Laws—
See Intoxicating Liquors.

Excitement—
Condition of mind as factor in negligence, see Negligence; and see also Carriers §§ 204, 205; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV.
Frenzy as factor or evidence of incapacity, see Insane Persons, I; Wills, II; Crimes § 13; Indictment, VIII, B.
Exclamations—
As res gestæ, see Evidence, VII, D; Indictment, VIII, B.
Exclusion—
From corporate meetings, see Corporations § 65.
Of vote at public elections, see Elections, V, VI.
Of member from county board, see Counties § 49.
Of persons and witnesses from trials, see Trial, V, D; Indictment, IX, A.
Of rightful owner or possessor from land, see Adverse Possession; Forcible Entry; Landlord and Tenant, IV.
Exclusionary Rules of Evidence—
See Evidence, IV-VII; Indictment, VIII, B.
Exclusive Agency—
See Agency; Brokers.
Exclusive Contracts—
See Contracts, IV; Combinations.
Exclusive Franchises and Privileges—
See Franchises; Constitutional Law, X.
Exclusive Jurisdiction—
See Courts, V, C; Estates of Decedents, II; Probate Courts, I.
Excommunication—
See Religious Societies, III.
Ex Contractu and Ex Delicto—
See generally Actions § 11; Assumpsit; Trespass; Pleading.
Exculpatory Statements—
Inadmissibility of self-serving statements, see Evidence, VII, E; Indictment, VIII, B.
Excursion Trains—
Duty of carriers respecting, see Carriers, IV.
Excusable Homicide—
See Homicide, V.
Excuses—
For crime in general, see Crimes, I, C.
For delay in performance or for breach of contract, see Contracts, VII, C, and references there collected.
For delay or loss by carrier, see Carriers, II, E.
For contempt or disobedience of court, see Contempt, II.
For nonpresentment of paper, see Negotiable Instruments, VIII, X.
Excusable default, grounds for opening, see Defaults, VI.
Excusable failure to execute process, see Sheriffs, IV.
Excusing Jurors—
See Jury, II, IV.
Executed—
See specific topics treating of thing in question as executed or executory.
Execution—
Process to enforce judgment, see Executions.
Of sentence for crime, see Indictment, XI.
Of contracts, deeds, etc., see Execution of Instruments.
Of trusts, see Trusts.

EXECUTION OF INSTRUMENTS.

TREATS of the acts of signing, sealing, attesting, delivery and acceptance of instruments in writing to effectuate and complete their execution, and of the genuineness of such instruments when questioned between the parties or their privies. It excludes the recordation of instruments (see Notice and Record of Title; Chattel Mortgages, I, C), agreements placing instruments in escrow (see Escrows), the consensus of minds in contract (see Contracts, III), the effect of alterations (see Alteration of Instruments), and forgery or suppression as a crime (see Crimes, II). The execution of wills is exclusively treated in Wills, IV. Delivery of gifts is treated in Gifts, III.

Analysis.

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§ 11. Signing changed or variant instrument.
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§ 21. Name and form of signature in general.
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§ 40. Delivery through mistake or fraud.
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§ 49. ——As to acceptance or rejection.
§ 50. Admissibility of evidence.
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§ 52. ——To show delivery through intermediary.
§ 53. ——To show intentional surrender of possession and control.
§ 54. ——Delivery from one spouse to other.
§ 55. ——Recitals as evidence of delivery.
§ 56. Court and jury questions and instructions.

[Note. Technical escrows, to wit, those wherein the failure of a condition requires the depositary to redeliver or to withhold the instrument so that it shall not become effectual by completing the delivery, are treated in Escrows. See also explanatory note in Escrows on this distinction.]

I. IN GENERAL.

§ 1. Nature and requisites in general.

Signature and marks, see post § 2.
Seals, see post § 3.
Affixing revenue stamps, see post § 4.
Testimonium clause and date, see post § 5.
Attestation of witnesses, see post §§ 6-8.
Condition and readiness of the writing for execution, see post § 9.
Alterations pending administration, see post § 10.
Signing changed instruments and incomplete execution, see post §§ 11, 12.
Spurious writings and questioned executions, see post §§ 13, 14.
Estoppel, evidence, and jury questions, see post §§ 15-20.
Manner of execution by agents, trustees or corporations, see post, II.
Delivery and acceptance of instrument, see post, III.
Nature and requisites of delivery, see post § 29.
[Note. The formation of contracts by offer to contract and acceptance of offer occurs in oral as well as in written contracts and is distinct from execution of the instrument of contract. Offer and acceptance is treated in Contracts, III.]
Execution of wills, see Wills, IV.
Execution of negotiable instruments, see Negotiable Instruments.
Of affidavits, see Affidavits § 3.
Execution of chattel mortgages, see Chattel Mortgages, I, C.
Of assignment of bail bond by sheriff to plaintiff, see Civil Arrest § 61.
Requisites of agreements to submit to arbitration, see Arbitration §§ 3-5.
Awards by arbitrators, see generally Arbitration § 10.
Validity of instrument signed Sunday but delivered on secular day, see Sunday.
Effect of maker's indorsing bond, see also Bonds ¶ 2.
Execution, acknowledgment and sealing of plats for dedication, see Dedication §§ 19, 20.
Sufficiency of executions of instruments affecting homesteads, see Homesteads, VI.
Effect of irregular execution by husband on wife's conveyance of her separate property in which husband joined, see Husband and Wife, IV.
Curative statute for informally or imperfectly executed deeds of conveyance, see Comp. L. 1915, § 11781 et seq.
Execution of deeds in other states or territories or foreign countries, see Comp. L. 1915, §§ 11695, 11697.

§ 2. Signatures and marks.

Name and form of signature, see post §§ 21-23.
Mark by unconscious person, see also post ¶ 45.
Signatures secured by fraud or trick, see post ¶¶ 44, 46.
Mark of attesting witness as signature, see also post ¶ 31.
Sufficiency of evidence to establish signature by mark, see post ¶¶ 62, 69.
Presumption as to genuineness of signatures exactly alike, see post ¶ 55.
Sufficiency of evidence for directed verdict on execution by mark, see post ¶ 86.
Effect of variance between signature and acknowledgment, see Names.
Necessity of notice of countersignature to complete contract, see also Contracts ¶ 151.
Proof of signature of instrument by person by "his mark," see also Evidence ¶ 2662.

¶ 1. An erased signature, or one with a line through it, is the same as no signature unless explained.—Samberg v. American Express Co., 136 Mich. 639.

¶ 2. The maker of a note can authorize another to sign his name to it.—Coy v. Stiner, 53 Mich. 42.

¶ 3. A signature to a note made in the owner's presence and by his direction is sufficient.—Sager v. Tupper, 42 Mich. 605.

¶ 4. Where a party orally directs his name to be attached to a contract, and it is done under his personal supervision, he is bound as if by his own signature.—Eggleston v. Wagner, 46 Mich. 610.

¶ 5. If a person's act in penning another's name to a contract has her free and complete assent or acceptance, the signature is hers in substance and effect.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 6. A signature to a mortgage is binding if made at the proper time and duly acknowledged, whether signed by the person owning the name or by some one else with his consent.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 7. Where one who cannot write directs another person to sign for him, and the latter signs in his presence, the signature is binding, whether the former does or does not attach his mark.—Just v. Township of Wise, 42 Mich. 573.

¶ 8. A mark attached to a signature is evidence of the intention to adopt it; but this may also be done by any other act expressed clearly.—Just v. Township of Wise, 42 Mich. 573.

§ 3. Seals.

Sufficiency of corporate seals, see also post § 21.
Seal on chattel mortgage, see Chattel Mortgages § 24.
Seal as presumptive evidence of consideration, see Contracts § 139.
Necessity of sealed authority to agent to execute attachment bond for principal, see Attachment ¶ 116.

Authority to execute instrument under seal, necessity of seal, see Agency § 5.
Statutory provision as to seals on deeds or other instruments, see Comp. L. 1915, §§ 11740, 11753, 11754.

¶ 9. A seal is of no practical importance except where the statutes require it.—Barton v. Gray, 57 Mich. 622.

¶ 10. The omission of a seal does not in any manner affect the instrument or change its nature in any respect.—McKinney v. Miller, 19 Mich. 142.

¶ 11. Comp. L. 1857, § 4550, How. St., § 7778, which provides that no bond, etc., shall be deemed invalid for want of a seal, was intended to give the unsealed instrument all the force and effect that a sealed one of the same tenor would have.—McKinney v. Miller, 19 Mich. 142.

¶ 12. Comp. L. 1857, § 4550, How. St., § 7778 operates to give a mortgage not under seal all the force that a sealed one would have.—McKinney v. Miller, 19 Mich. 142.

¶ 13. The failure of the grantor in a deed of standing timber to affix a seal to his signature will not invalidate the instrument. —Mee v. Benedict, 98 Mich. 260.

¶ 14. How. St., § 7778, dispensing with formal seals or scrolls, makes the intention of the parties, together with the purpose the instrument was intended to serve, the test of the existence of a deed or specialty.—Jerome v. Ortman, 66 Mich. 668

¶ 15. If a contract is intended as a deed the absence of a seal does not invalidate it.—Fowler v. Hyland, 48 Mich. 179; Lockwood v. Bassett, 49 Mich. 546.

¶ 16. An agreement involving the sale and purchase of lands used throughout the word "covenant," purported to bind the heirs of the respective parties, and was declared to be the "act of the parties, in witness whereof" they thereunto "set their hands and seals." Held operative as a deed, though bearing no actual seal or scroll.—Jerome v. Ortman, 66 Mich. 668.

¶ 17. The absence of a seal, though, under Comp. L. 1871, § 6194, not avoiding a deed, may be significant in determining whether or not an instrument was meant to be a conveyance.—Spicer v. Bonker, 45 Mich. 630.

§ 4. Affixing revenue stamps.

Necessity of affixing revenue stamps to entitle to action on instrument, see Internal Revenue.
Sufficiency of instrument as a stamped instrument where stamped after execution by revenue collector, see Internal Revenue.
Admissibility of instruments lacking internal revenue stamps, see Evidence § 494.

¶ 18. The omission of a revenue stamp from a deed will not make it invalid in the absence of proof of fraudulent intent.—Taft v. Simpson, 125 Mich. 206.

¶ 19. The want of a stamp required by the revenue laws of the United States does not utterly invalidate a contract; and the contract may be enforced in the state courts. Clemens v. Conrad, 19 Mich. 170; Sammons v. Halloway, 21 Mich. 162; Burson v. Huntington, 21 Mich. 415.

¶ 20. A stamp is not essential to the validity of a promissory note, and the want of a stamp does not put an indorsee upon inquiry.—Burson v. Huntington, 21 Mich. 415.

¶ 21. Where an assignment of a policy of insurance is properly stamped as such, the fact that it purports to authorize the assignee to collect the insurance money in case of loss does not make it necessary to stamp it as a power of attorney also.—Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

¶ 22. A person being the holder of a draft drawn in August, 1863, made a gift of it causa mortis to her mother; and after her death her administrator, treating the draft as void for want of a sufficient stamp, brought suit against the drawer upon the original consideration. The drawer, defending in the interest of the donee, produced the draft on the trial and placed the requisite stamp upon it, in pursuance of the act of congress of June 30, 1864. It was held that the draft was thereby made valid from its inception, rendering the gift valid, and defeating the plaintiff's right of recovery.—Gibson v. Hibbard, 13 Mich. 214.

§ 5. Testimonium clause and date.

Presumption as to date of delivery from recordation, see post § 48.
Date of acknowledgment as evidence of date of execution, see also post ¶ 79.
Sufficiency of evidence as to date of execution, see post ¶ 61.
Presumption as to date of execution, see post ¶ 51.

¶ 23. A chattel mortgage filed as soon as delivered is not invalid because dated back. —Johnson v. Stellwagen, 67 Mich. 10.

§ 6. Attestation by witnesses.

Instruments with two or more executing parties, see post § 7.
Number of witnesses requisite, see post § 8.
Presumption as to validity of attestation where subscribing witnesses were not present at acknowledgment, see post ¶ 53.
Omission of attestation as evidence, see post ¶ 239.

Number of witnesses required for acknowledgment, see Acknowledgments § 3.
Effect between parties of unwitnessed deed, see also Acknowledgments ¶ 76.
Presumption that attesting witnesses attested knowingly, see also Evidence § 46, ¶ 243.
Proper witnesses to prove execution of lost instrument as foundation for secondary, see Evidence § 153.
Necessity of proof by attesting witnesses to make document admissible in evidence, see Evidence § 519.
Witnesses required to deeds, see Comp. L. 1915, § 11694.

¶ 24. Under the act of 1820 two witnesses were essential to the validity of a deed executed in 1823.—Crane v. Reeder, 21 Mich. 24.

¶ 25. The statutory requisites of a deed are that it be executed in the presence of two witnesses, who subscribe their names as such (§ 8962, Comp. Laws 1897, How. St., 2nd Ed., § 10824), though unwitnessed deeds are good between the parties.—Agar v. Streeter, 183 Mich. 600.

¶ 26. Comp. L. 1897, § 9035 providing that contracts for the sale of land must be executed before two witnesses does not render an optional contract for the purchase of land void in view of section 9051 providing that conveyances made in good faith and on a valuable consideration shall not be invalidated by reason of any defect in the statutory requisites in the sealing, signing, or attestation.—Mier v. Hadden, 148 Mich. 488.

¶ 27. A deed without witnesses is good in equity as a contract to convey; so held with reference to a deed executed in 1814.—Godfroy v. Disbrow, W. 260.

¶ 28. The proposition that a deed not witnessed is good between the parties is an established rule of property in this state. Comp. L. 1897, § 8962, prescribing the mode and formalities for their execution, does not make witnessing essential.—Fulton v. Priddy, 123 Mich. 298.

¶ 29. A contract for the sale of timber, executed through an attorney by a nonresident trustee but not witnessed, is not void but conveys an equity under How. St. § 5727 which provides that instruments defective as to attestation shall not be void but may be enforced in equity.—Chicago Lumbering Co. v. Powell, 120 Mich. 51.

¶ 30. A mortgage without witnesses is good as between the parties.—Baker v. Clark, 52 Mich. 22.

¶ 31. The mark of an attesting witness is to be recognized as his written signature, except when such construction is inconsistent with the manifest intent of the legislature (Comp. L. 1871, § 2, subd. 17).—Brown v. McCormick, 28 Mich. 215.

§ 7. ——Instruments with two or more executing parties.

¶ 32. Conveyance by two grantors held sufficiently witnessed as to both, where signatures of witnesses as to one grantor preceded and as to the other followed a memorandum of interlineation.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

¶ 33. A defective execution or attestation as to one grantor cannot be aided by a perfect execution and attestation as to other parties.—Hall v. Redson, 10 Mich. 21; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

§ 8. ——Number of witnesses requisite.

Number of witnesses to deed necessary to entitle to registry, see Notice and Record of Title, II, A.

¶ 34. A deed with only one witness is effective to convey property described therein.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 35. Under the amendatory act of April 20, 1839, p. 219, § 19, the act of April 1, 1840, p. 166, and the later statutes, a deed with but one witness, or without witnesses, passed and passes not merely the equitable but the legal title as between the parties.—Dougherty v. Randall, 3 Mich. 581; King v. Carpenter, 37 Mich. 363; Price v. Haynes, 37 Mich. 487.

§ 9. Condition and readiness of the writing for execution.

Incomplete or partial execution, see post § 12.
Insertion of name of grantee after signature, see also post ¶¶ 47, 49.
Filling spaces left blank as alteration, see Alteration of Instruments.
Effect of deeds in blank or partly in blank, see Deeds § 5.

¶ 36. A mortgage executed in blank as to conditions of payment was filled up, after delivery in trust, by the mortgagee. A foreclosure bill was denied because authority from the mortgagor to insert the terms was not made out. It seems that parol authority would not be sufficient.—Stebbins v. Watson, 71 Mich. 467.

¶ 37. A blank deed executed in another state without stating the name of the grantee, the description of the property, or the consideration, but filled out in these particulars in Michigan by some one not shown to have authority from the grantor, conveys no title to any one who has notice of the facts.—Lindsley v. Lamb, 34 Mich. 509.

¶ 38. Where a deed is executed and acknowledged without naming a grantee, but the name is inserted before delivery, and the deed is delivered by the grantor himself

or by his direction, the deed as completed must be regarded as adopted by him.—Lockwood v. Bassett, 49 Mich. 546.

§ 10. Alterations in writing pending execution.

Filling in blank instrument after signature, see ante ¶¶ 36-38.
Altered or erased signature, see ante ¶ 1.
Alteration of instruments after execution, see Alteration of Instruments.
Consent to alteration after execution, see Alteration of Instruments § 2.
Presumption that alteration was made before execution, see Alteration of Instruments § 12.
Visible alteration or interlineation as affecting admissibility of writing in evidence, see Evidence § 495.
Sufficiency of execution of deed not re-executed witnessed or acknowledged after erasure by consent of grantor of recall provision, see Escrows ¶ 8.

¶ 39. Conveyance by two grantors held sufficiently witnessed as to both, where signatures of witnesses as to one grantor preceded, and as to the other followed, a memorandum of interlineation.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

§ 11. Signing changed or variant instrument.

Parol agreements to vary, release or modify written or sealed agreements, see Contracts § 264.

¶ 40. Where the parties had entered into a parol contract for the sale of land which was afterwards reduced to writing by the vendor with some changes and sent to the purchaser who made additional changes before signing there was no meeting of minds and no contract and the vendor is not bound by the writing as changed unless he has ratified it.—Bewick v. Hanika, 142 Mich. 206.

¶ 41. Where a vendor had agreed to sell a lot and loan money to build thereon under a contract that had been changed by the purchaser after he had signed, the vendor does not by the mere signing of the building contract at the request of the contractor ratify the contract as changed, nor is he bound by the terms of the contract that were changed by the purchaser after he had signed.—Bewick v. Hanika, 142 Mich. 206.

§ 12. Incomplete or partial execution.

Consensus of minds in contracts, see Contracts, III.
Binding force of building restrictions although not signed by all the parties, see Buildings § 20, 21.
Sufficiency of appeal bond signed by one for all appellants, see Appeal § 82, ¶ 371.
Validity of mortgage where execution induced by fraud, see Mortgages, III.
Inclusion of claim in incompletely executed trust mortgage as basis of estoppel to enforce by levy, see also Estoppel ¶ 117.

¶ 42. It seems that where parties intend to make a contract in duplicate, so that each shall have in his possession the evidence of his rights and of the obligations of the other, the contract is not complete and duly executed until duplicates at least substantially alike are executed and delivered.—Crane v. Partland, 9 Mich. 493.

¶ 43. A contract of subscription for a share of stock in a telephone company and for the renting of a telephone at a stipulated rental, when signed only by the subscriber and not by the corporation, lacks mutuality, the two portions being dependent and the contract an entirety.—Co-operative Tel. Co. v. Katus, 140 Mich. 367.

§ 13. Spurious writings and questioned execution.

Knowledge, consciousness or volition of party, see post § 14.
Alterations and forgery of negotiable instruments, see Negotiable Instruments, XII.
Forgery or suppression as crime, see Crimes, II.
Fraud implied from nature of execution, see Fraud, II.
Evidence of fraud in procuring signature, see Fraud, III.
Validity in hands of bona fide purchaser of instrument secured through fraud or forgery, see Notice and Record of Title, I.
Crimes of forging, uttering or falsely procuring signature, see Crimes §§ 83-85, 87.
Necessity of equities to sustain rescission suit to cancel imperfectly executed instrument, see Rescission, I.
Criminal forgeries, see Crimes, II; Indictment.

§ 14. ——Knowledge, consciousness or volition of party.

Signing without reading as ratification of clauses inserted without authority of agent, see Agency ¶ 347.
Validity of bill of lading signed without reading, see also Bills of Lading ¶ 2.
Execution of instruments by incompetent, see Incompetents.
Execution of instruments by insane persons, see Insane Persons, IV.
Validity of assent to instrument of contract without reading, see Contracts § 38; Mistake; Fraud.
Binding force of bill of lading signed hastily, see also Carriers ¶ 45.
Attempted ratification of two party instrument without concurrence of other party, see Agency ¶¶ 340, 341.

¶ 44. An attorney induced his client to sign a deed of real estate under the impression that it was a duplicate of a lease that had been read to him. Held a forgery, and void.—McGinn v. Tobey, 62 Mich. 252.

¶ 45. A deed executed by a person who was apparently unconscious, who had been very sick and was confined to his bed, whose eyes were closed, who did not speak, and the deed was not read to him, but a pen put in his hand and the notary talked to him and remarked "We will say he says 'Yes'" and made a cross on the deed cannot be held to be the grantor's conscious, intelligent and free act.—Eggert v. Eggert, 144 Mich. 182.

¶ 46. Where complainants in an action to cancel and restrain the payment of certain promissory notes alleged to have been procured by fraud showed that they had been induced to sign written instruments which were a part of one contract, or were so attached as to appear so, but were afterward separated so as to appear valid promissory notes, they were entitled to show that the procurers of their signatures resorted to representations and devices to prevent the papers being read before signing, and while they were signing arranged to cover the written and printed parts so that the signers could not obtain information therefrom as to what they were signing.—Hulett v. Marine Sav. Bank, 143 Mich. 219.

§ 15. Estoppel to question execution.

Estoppel to deny delivery or acceptance, see post § 43.
Estoppel of draftsman or witness to claim own title in hostility to witnessed instrument, see Estoppel § 34.
Estoppel of corporation to deny due execution, see also Corporations ¶ 363.

¶ 47. Where a deed made by husband and wife as grantors, but drawn without naming a grantee, is placed by the husband in the hands of the wife to be used exclusively for her own advantage and with the purpose of putting the legal title at her disposal as equitable owner, and she inserts the name of a grantee and delivers it in her own interest and afterwards receives a conveyance of her husband's interest, she will be concluded from denying the validity of the deed as if she had held both legal and equitable estates when the deed was delivered.—Lockwood v. Bassett, 49 Mich. 546.

¶ 48. A woman who signs an instrument at the request of her husband without inquiry as to its nature, as she was in the habit of doing when he requested her to sign papers, and thus enabled her husband to obtain money from one who relied upon the paper being what it purported to be. She is estopped from denying the validity of its execution and delivery.—Ehle v. Looker, 182 Mich. 248.

¶ 49. Where a deed from which the grantee's name is omitted is delivered, and the blank is filled after delivery, the grantor, by claiming the benefit of accompanying and related contracts, makes the deed his own and estops himself from objecting that it is invalid.—Lockwood v. Bassett, 49 Mich. 546.

¶ 50. Under evidence introduced tending to show nonexecution the defendant was not estopped from denying the execution of the note because in a certain writing signed by him he wrote "I would like to have you hold the note until fall" when he in the same writing called plaintiff's attention to the failure on its part to perform the contract of which the alleged note was physically a part.—Acme Food Co. v. Tousey, 148 Mich. 697.

§ 16. Presumptions and evidence.

Sufficiency of evidence, see post § 17.
Evidence of genuineness of instrument, see post § 18.
Evidence and presumptions of delivery and acceptance, see post §§ 45-49.
Presumptions arising from acknowledgment, see also post § 19, ¶¶ 75-78.
Admissibility of parol evidence to show what the real and true terms of the writing were, see Evidence § 158.
Admissibility of parol evidence of execution and date, see Evidence § 160.
Preparatory drafts and unsigned instruments as admissive declarations, see Evidence § 397.
Admissibility of parol evidence to show that execution was on condition not embodied in writing, see Evidence § 157.
Parol evidence to disprove existence or legal execution of instrument, see Evidence §§ 156-158.
Opinion or conclusion evidence that one had or had not opportunity to sign, see Evidence ¶ 1258.
Best and secondary rule as to proof of execution, see Evidence, § 119.
Parol evidence to explain variance in name from corporation as named in printed form from corporate name of successor as signed, see Evidence ¶ 1096.
Burden of proof of execution of lost instrument as foundation for secondary evidence of contents, see also Evidence § 148, ¶ 726.
Proof of execution and existence of deed or contract as basis of secondary proof on ground of loss of original, see Evidence §§ 148, 150.
Statement that signing is conditional as res gestæ, see Evidence § 457.
Presumption that person knows nature of instrument executed, see Mistake.
Proper cross-examination as to existence and execution of contracts and transfers, see Examination of Witnesses §§ 49, 50.
Burden of proof of execution of appeal bond by surety, see also Appeal § 574.
Evidence of deception in securing execution of instrument, see Fraud, III.
Form of affidavit under circuit court rules for denial of execution of instrument sued on, see Pleading, IX, A.

¶ 51. A contract will be presumed to have been executed in its entirety on the date it bears.—Weis v. Stein, 187 Mich. 369.

¶ 52. The fact that a mortgage for purchase money, given at the time the conveyance was made, was executed with all proper formality, raises the presumption that the deed (which was unrecorded and lost) was likewise properly executed.—Godfroy v. Disbrow, W. 260.

¶ 53. Proof that neither of two subscribing witnesses was present at the acknowledgment of a deed does not warrant an inference against the validity of their attestation of it, in the absence of any showing that it had not been signed previously.—Watson v. Peters, 26 Mich. 508.

¶ 54. Weight must always be given to the fact of the execution of a contract; and the presumption which exists in favor of written instruments, not unconscionable in their character, but mutually advantageous in their provisions, and executed by parties competent to contract, and between whom no fiduciary relations exist, and in the presence of witnesses who affix their signatures as such, cannot be overcome except upon testimony from which an inference of duress, deception, misrepresentation, substitution, or artifice in clearly deducible.—Sullivan v. Ross's Estate, 98 Mich. 570.

¶ 55. Where two signatures, one admittedly genuine, were precisely alike, and there were indications that one had been copied from the other by the aid of pencil-tracing and outlining, a claim of forgery was sustained largely because the two were too much alike both to be genuine.—Day v. Cole, 65 Mich. 129.

¶ 56. A precise similarity of inks used in executing two different sets of instruments dated differently, but executed by the same persons, was treated, in connection with other facts, as tending to indicate that they were executed at the same time.—Shelden v. Warner, 45 Mich. 638.

¶ 57. Whenever the execution of an instrument is denied by defendant's affidavit under Circuit Court Rule 79 (first rules), the burden of proof is upon plaintiff to show the execution of the instrument, which includes its delivery.—Wilbur v. Stoepel, 82 Mich. 344.

§ 17. ——Sufficiency of evidence.

Sufficiency of evidence of delivery, see post §§ 51-55.

Sufficiency of evidence of genuineness of receipt or other noncontractual writing, see also Evidence § 589.

Mode of execution necessary to make instrument self-proving in evidence, see Evidence §§ 513, 514.

Sufficiency of evidence of incompetency to execute instrument, see Incompetents.

Sufficiency of evidence of insanity at time of execution, see Insane Persons, I.

¶ 58. In an action to foreclose a land contract, evidence held to establish that defendant had previously deeded the entire tract of land mentioned in the contract of purchase to plaintiff, and he executed the contract of purchase.—Balen v. Burgeson, 187 Mich. 621.

¶ 59. On a bill to set aside a deed of real estate on the ground that complainant never signed the deed to bar her dower although signature appears from the fact that she acknowledged the deed as shown by the certificate of a public officer, evidence held to sustain a decree dismissing the bill.—Hall v. Hall, 190 Mich. 100.

¶ 60. Where the genuineness of a paper is in question testimony that so far as witness noticed when he saw it, three years after its apparent date, it was not dirty, and did not seem to be very ancient, is not of sufficient weight to establish its fraudulent character in the face of positive testimony that it is genuine.—Woodhull v. Whittle, 63 Mich. 575.

¶ 61. In an action by one merchant to enjoin another from engaging in the same business in the same locality, evidence held insufficient to show that the contract upon which the rights of the parties were based was not executed in its entirety upon the date it bore.—Weis v. Stein, 187 Mich. 369.

¶ 62. A deed executed by a man on his death bed, where the evidence shows that he was not unduly influenced and that he was still intelligent, though so feeble that he signed by a mark, and where it appeared that he had, before he was fatally injured, explained his intention to leave the land to the grantee in the deed, was held to be the intelligent act of the grantor, and therefore valid.—Blackmore v. Thompson, 149 Mich. 693.

¶ 63. The defense to a foreclosure was that the mortgage was forged. But it appeared that the persons actually and nominally interested as mortgagees were both dead; that the mortgagor and his wife were the only persons living who knew the real facts: that the witnesses to the acknowledgment, one of whom was the acknowledging officer, were reputable and upright men, and that their signatures were genuine; that the signature purporting to be that of the mortgagor and alleged to be forged resembled that attached by him to his answer in the foreclosure suit, and both were in an easy handwriting unlikely to be feigned; that the defendant had tried to misrepresent the spelling of his name, and his explanation of the circumstances of an alleged payment for the mortgaged land were unsatisfactory and were not corroborated, and his manner as a witness was evasive. Held, that in view of the facts and circumstances the defense was not sufficiently made out.—Cameron v. Culkins, 44 Mich. 531.

§ 18. Evidence of genuineness of instrument.

Acknowledgment as evidence of genuineness, see post § 19.

Other forged note as evidence on genuineness, see also Evidence ¶ 553.

Necessity and sufficiency of proof of execution and authenticity of instruments to be admissible in evidence as documents, see Evidence § 515 et seq.

Res gestæ of conversation about note as bearing on genuineness, see Evidence ¶ 2373.

Admission on trial that writing bears genuine signature as limited admission not conceding execution of the writing, see Trial, V, A.

¶ 64. Where the defense to a bill to quiet title is based upon the claim that the deed on which the title was founded is a forgery, the proof thereof must be clear and convincing.—Miller v. Davis, 146 Mich. 719.

¶ 65. Evidence consisting of the testimony of the acknowledging notary and one who saw the deed with other facts, held not sufficient to make out that it was a forgery where it appeared that there was some kind of an instrument executed by his wife to complainant husband, and he testified that it was made without consideration to vest title in him, and there were facts corroborating him.—Miller v. Davis, 146 Mich. 719.

¶ 66. A mortgage was held to have been forged, and foreclosure was denied, where it was shown that the mortgagee was a grasping money lender, unlikely to run risks, that the mortgage was for a large sum on property of little value, contained no release of dower, and had been assigned without any apparent consideration to a nonresident brother of the mortgagee, in whose name the foreclosure was brought.—Matteson v. Morris, 40 Mich. 52.

¶ 67. Proof of the execution of a note is sufficiently shown to permit of its being received in evidence where the payee produces the same in court, and calls a witness who testifies that he has frequently seen the alleged maker write her name, and that, in his opinion, the signature to the note is genuine. —Union Banking Co. v. Martin's Estate, 113 Mich. 521.

¶ 68. The testimony of an aged man that he did not sign certain papers, which purport to have been executed by him ten years before as administrator, is insufficient to show a forgery, where it is so weakened on cross-examination that it amounts to little more than a statement that he has no recollection of signing them, and that, if he did sign them, it must have been when his hands were cold, and it further appears that he had little to do with the business of administrator, and that advanced age has rendered his memory very poor; especially if the papers are such as he would undoubtedly have signed upon request, thus doing away with any motive for a forgery.—Stevenson v. Kurtz, 116 Mich. 95.

¶ 69. A finding that mortgagor's wife never signed it is sustained on evidence that she had refused and that the notary volunteered to go to her house and persuade her to sign, and where though it bears her purported signature by mark witnessed by the notary and another, she denies signing but one instrument, to wit, a deed concededly signed by her at the same time and witnessed by her mother, the mother not having been asked to witness the mortgage, and where on the same day she told her husband that she had not signed the mortgage, in all which she is corroborated, though the notary disputed her testimony not claiming, however, that he explained the nature of the mortgage to her in spite of her known opposition to signing it.—Ann Arbor Sav. Bank v. Ellison, 113 Mich. 557.

¶ 70. On an issue of the genuineness of an alleged fraudulent deed, the fact that such instrument, being a long form warranty deed on paper folding like legal cap, upon examination was found to have been severed at the line of such folding, and the two sheets attached by paper and mucilage, and that the edges of the half sheet were smooth and had no appearance of having been worn like the other folded edges, and the further fact that one of the halves was wider than the other, and the marginal red lines failed to correspond with each other, was conclusive evidence of forgery.—Crawford v. Hoeft, 58 Mich. 1.

¶ 71. Testimony by the trustee that after a mortgage was made out and placed in trust with the member of the mortgagee corporation to secure indebtedness, the mortgagor told the trustee to have the notary who acknowledged it fill blanks left for the conditions of payment, and that it was to cover past as well as future debts, that the wife of mortgagor was not consulted and not present, and testimony of the notary that he filled them in as directed by the trustee, the mortgagors swearing that no authority was given and that the property was a homestead and the mortgage was signed on the condition that it was to secure personal advances only and in case certain expected profits did not equal them, is not sufficient to show that there was any subsequent authority to fill the blanks.—Stebbins v. Watson, 71 Mich. 467.

¶ 72. In an action against an estate on promissory notes alleged to have been made by the deceased and lost by the payee claimant, testimony by a witness of having seen the notes and of an admission of execution by the testator is sufficient to show execution. —Taylor v. Taylor's Estate, 138 Mich. 658.

¶ 73. On a bill to establish a lost deed, where one of the defendants had testified

that she never had executed the deed in question, testimony by a witness that the defendant had told her she had made a deed is not sufficient to establish the execution of the deed, but at most its effect would be to discredit the defendant's testimony as to the nature of the instrument which she did actually execute (having testified that it was a lease).—Hutchins v. Murphy, 146 Mich. 621.

¶ 74. Testimony that an inventory was attached by a pin to a bond at the time of its execution by the principal, that the principal took the bond away with him in that condition for the purpose of obtaining the signature of the surety, and that, when he returned it with the surety's signature, the inventory was still attached to the bond, when taken in connection with the fact that the bond contained a reference to the inventory as "hereto attached," is sufficient to justify a finding that the inventory was attached to the bond when the surety signed it, even though several witnesses testify positively that it was not attached at that time.—Wheeler v. Meyer, 108 Mich. 297.

§ 19. Acknowledgment as evidence of genuineness.

Acknowledgment of deeds, etc., see Acknowledgments.
Signature and seal to certificate of acknowledgment, see Acknowledgments §§ 15, 16.
Requisites and sufficiency of acknowledgments and certificates thereof, see generally Acknowledgments.
Presumptive validity and execution when acknowledged, see Acknowledgments § 20.

¶ 75. An officer taking an acknowledgment is bound to inform himself of the identity of the parties, and a proper certificate of acknowledgment is presumptive evidence of the genuineness of the mortgage to which it is attached.—Cameron v. Culkins, 44 Mich. 531.

¶ 76. While a certificate of the acknowledgment of a mortgage may be overthrown by proof of fraud or duress, yet the bare oath of the mortgagor, opposed by the officer's testimony, cannot overthrow the presumption of validity.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 77. A certificate in proper form of an acknowledgment of a mortgage raises a presumption of the execution of the paper as stated therein that cannot be overcome except by clear and satisfactory evidence.—Shelden v. Freeman, 116 Mich. 646.

¶ 78. On a bill to quiet title to an undivided interest in land and on a cross-bill praying that title be quieted against complainant, evidence consisting in part of grantor's testimony that he did not recollect signing, held insufficient to overcome the presumption that a warranty deed was executed and acknowledged as it purported to be.—Donahue v. Vosper, 189 Mich. 78; affirmed in 243 U. S. 59, 61 L. ed. 592, 37 Sup. Ct. Rep. 350.

¶ 79. The date of the acknowledgment of a deed is not such satisfactory evidence of the time of signing as to affect, in itself, the validity of a witness' attestation.—Watson v. Peters, 26 Mich. 508.

¶ 80. A homestead mortgage executed at the joint solicitation and in the presence of the husband and one of the mortgagees, and acknowledged in their presence—if at all—when the wife could not understand English, and when the officer made merely a formal inquiry of her in that language, he speaking no other, was held invalid.—Fisher v. Meister, 24 Mich. 447.

¶ 81. Even where a mortgage upon the husband's homestead was given in 1871, chancery refused to set it aside for the mere reason that it was acknowledged by the wife in her husband's presence; there being no showing of compulsion or influence, the consideration being sufficient, and the wife having taken no steps to repudiate the security.—Norton v. Nichols, 35 Mich. 148.

¶ 82. A wife sought to avoid a homestead mortgage on the ground that she never knowingly signed or acknowledged it. But the justice who took the acknowledgment testified distinctly to the facts, and there was no doubt of the mortgagee's good faith or of the money's having been borrowed and used to build a house on the premises; and the mortgage was sustained.—Hourtienne v. Schnoor, 33 Mich. 274.

§ 20. Questions for jury and instructions.

Jury questions and instructions as to delivery, see post § 56.
Existence of contract as court or jury question, see also Contracts § 333.

¶ 83. A surety in a bond testified that he signed it upon condition that a person specified (whose name was actually in the bond, but was erased and a new name inserted in place thereof), should also sign. Held, that his understanding and intention, under the circumstances, were for the jury, as they had the right to disbelieve the positive testimony given by him and find the contrary from the circumstances of the case outside of his testimony.—Brand v. Johnrowe, 60 Mich. 210.

¶ 84. Submitting to the jury a note admittedly genuine but claimed to have been altered, does not pass on the jury's province of determining the genuineness when that is disputed.—Hunter v. Parsons, 22 Mich. 96; Willett v. Shepard, 34 Mich. 106.

¶ 85. There was sufficient testimony to go to the jury on the issue of the genuineness

of bills of sale; where one was acknowledged, but the notary testified that it was not signed and had no consideration written in when he took the acknowledgment and the party to be bound denied signing it, the other and accompanying bill having been admittedly regular.—Metropolitan Lumber Co. v. McColeman, 140 Mich. 333.

¶ 86. The deceased, an aged illiterate woman, gave to the claimant, her son, a paper signed by "her mark" on which she stated that she had received $450 from him in 1889, to pay off a mortgage, and $50 in 1904, to pay off taxes on her property, and requested that these sums be repaid to him out of her estate after her death. Oral evidence also was put in to support these claims. Held, in the absence of evidence rebutting this proof or showing a lack of an intelligent execution of the paper by deceased, a verdict should be directed for the claimant on the issue of competency to execute it.—McGregor v. McGregor's Estate, 156 Mich. 487.

¶ 87. In an action on a forged promissory note given as collateral security to a title note given for the purchase price of a horse, which died before suit was brought and before defendants denied the forgery, held that the evidence was sufficient to warrant the submission of the question of estoppel to the jury.—Kole v. Lampen, 191 Mich. 156.

¶ 88. Where the genuineness of a guardian's deed is in question, and the guardian has testified that she did not execute it nor sign the petition for her appointment as guardian, the trial court may properly instruct the jury to take into consideration the fact that she denied her petition and that the record showed she had signed it.—Lynch v. Kirby, 36 Mich. 238.

¶ 89. Where a witness having no interest in the matter has testified to the execution of a deed, and there are no facts or circumstances tending to show any purpose or intention to withhold or destroy the paper and no suspicious circumstances, the court is justified in instructing the jury that the testimony is undisputed and that it established the execution of the paper.—Thomson v. Flint & P. M. R. Co., 131 Mich. 95.

¶ 90. In an action on a promissory note, the defense being that it was obtained by trickery, where the signature was affixed by defendant's wife for him because he could neither read nor write, it is error to give instructions which exclude the defense that the wife was deceived into signing the note supposing it to be some other document, and leaving the impression that if she had authority to sign any paper for him on that occasion, it was immaterial whether the authority included the note in question or not.—Beard v. Hill, 131 Mich. 246.

II. MANNER OF EXECUTION BY AGENTS, TRUSTEES, CORPORATIONS, ETC.

§ 21. Name and form of signature in general.

Addition of descriptive term to signature, see post § 22.
Under power of attorney, see post § 23.
Adoption or ratification of execution by another, see post § 24.
Instruments by corporations, see post § 25.
Instruments by trustees, see post § 26.
Signature as requisite of execution in general, see ante § 2
Individual or official nature of bank officer's act or contract, see also Banking § 60.
Effect of adding individual seals to corporate instrument, see also Corporations § 101.
Sufficiency of rubber stamp signature for corporation by agent, see Corporations ¶ 500.
Construction of agreement as joint or several, see Contracts § 169.
Necessity and sufficiency of seal of corporation, see Corporations §§ 19, 101.
Liability of agent where contract is not made binding on principal, see Agency, III.
Writing or seal to ratify agent's contract of specialty, see Agency § 57.
Deeds and other instruments of transfer by representatives, see Estates of Decedents § 241.
Parol evidence as to character or capacity of signer, see also Evidence § 182.

¶ 91. As a general rule, to bind his principal by a contract in writing, the agent must sign his principal's name to the instrument.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶ 92. Where it distinctly appears in the body of an unsealed agreement, signed by an agent in his own name, without the addition of the name of his principal, that the principal is the contracting party, the agreement will be construed to be that of the principal and not of the agent.—City of Detroit v. Jackson, 1 D. 106.

¶ 93. Where bills are drawn, accepted or indorsed by an agent, if, from the nature of the contract and the terms of the agreement, it clearly appears that the party by whom such bill is drawn, accepted or indorsed is an agent, and that he intended to bind his principal, he will be deemed to have contracted for such principal; but the terms of the instrument must be explicit to repel the inference that the agent intended to bind himself.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶ 94. Where one without written authority from the owner drew contracts for the sale of a parcel of land, both of which were signed by the purchaser, and one of them delivered to him, but they differed in the following particulars: that in the one delivered to the purchaser both the agent and the

owner were named as parties of the first part, but it was signed by the agent alone in his own name; and in the one retained by the agent the owner alone was named as the party of the first part, and his name was signed thereto by the agent, it was held that the contract was not complete so that the purchaser could be sued on the one retained by the agent for the purchase money.—Crane v. Portland, 9 Mich. 493.

¶ 95. It seems that the execution of a submission to arbitration by an agent, not under seal, need not be in the name of the principal.—City of Detroit v. Jackson, 1 D. 106.

§ 22. ——Addition of descriptive term to signature.

Addition of descriptive term to signature of corporation, see post ¶¶ 103-105.

Addition of descriptive term to signature of trustee, see post ¶¶ 106, 107.

Addition of fraction to signatures as indication of signer's liability on bond, see Bonds ¶ 11.

¶ 96. Where, in signing a note, the maker has added "Agt." to his name, it may, as between the original parties, be shown by parol that he executed the paper in a representative capacity, and that the payee so understood.—Keidan v. Winegar, 95 Mich. 430.

¶ 97. The mortgagors of property deeded it, and afterwards gave a new mortgage in place of the former one for the purpose of correcting an error of description. The consent of the grantees to the execution of the later mortgage was attached thereto in writing, but was signed by only one, the name of the other being added "by his attorney in fact." Held, that the giving of consent by the one who signed was equivalent to uniting in the mortgage, and bound his interest and that of any one claiming under him to the extent to which his interest was incumbered by this consent; but that the other's interest was not bound.—Pool v. Horton, 45 Mich. 404.

§ 23. ——Under power of attorney.

¶ 98. To make a valid deed under a power of attorney it is essential that there should be an intention on the part of the attorney to execute the deed under and by virtue of the power; or at least that the contrary intention should not appear.—Davenport v. Parsons, 10 Mich. 42.

¶ 99. Where a deed purported to be made by attorneys under power from the two grantors, and there was some testimony that a joint power had existed, but it was not given in evidence, and only a separate power from one of the grantors was proved, it was held that the execution of this deed could not be referred to the separate power, and the deed sustained as the deed of the grantor who had executed that.—Davenport v. Parsons, 10 Mich. 42.

§ 24. Adoption or ratification of execution by another.

See also ante ¶ 38.

Instructions as to authority of wife to execute instrument for illiterate husband, see also ante ¶ 90.

Agency of husband for wife in execution of instruments, see Husband and Wife, IV, B.

¶ 100. The acceptance by the land owner of the duplicate of a land contract which had been retained by the agent, and the signing of his own name thereto, without the assent or knowledge of the purchaser, will not make it binding upon the latter having the other duplicate which was not legally signed for the owner. To make an act amount to a ratification in such a case, the two instruments must be capable of ratification by the same act.—Crane v. Portland, 9 Mich. 493.

¶ 101. The ratification of a contract by an indorsement of approval upon it does not bind the party so approving it or give the adverse party rights so long as it is not delivered or the indorsement is not made on the latter's duplicate. And the ratification, until then, may be withdrawn or the indorsement erased.—Dickinson v. Wright, 56 Mich. 42.

§ 25. Instruments by corporations.

¶ 102. An officer's title added to his signature does not necessarily make the paper the contract of his corporation, but may be treated as mere descriptio personæ.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 103. The addition "Vestryman, Grace church," to each of the names attached to a promissory note, does not make it anything but the note of the individuals signing it, if it does not purport to bind the corporation.—Tilden v. Barnard, 43 Mich. 376.

¶ 104. A bill of exchange directed to "J. A. W., cashier Farmers' and Mechanics' Bank of Michigan," and accepted across the face thereof, "Accepted, J. A. W., cashier," is drawn upon and accepted by the bank, and not by W. in his individual capacity.—Farmers' and Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶ 105. Where a note is signed "Peninsular Cigar Co. (a corporation), Geo. Moebs, sec. and treas.," and is payable to and indorsed by "Geo. Moebs, sec. and treas.," the note and indorsement are the corporation's, and Moebs is not personally liable.—Falk v. Moebs, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319.

§ 26. Instruments by trustees.

¶ 106. A contract for the construction of parochial buildings, describing the parties of

the first part as the trustees and building committee of the church, and as acting by authority of the bishop of the diocese, whereby they agree, for themselves, their heirs, executors, and administrators, to pay the contract price, signed by them as individuals, except that one adds to his signature the title "president" and another the title "secretary," is binding upon them personally.—Landyskowski v. Lark, 108 Mich. 500.

¶ 107. Where one of two joint trustees of property under the name of the "Henry Howard Estate," who is at the same time executor of the will of the testator who owned the property, entered into a contract with a broker for the sale on commission of certain property of the estate he is personally liable on the contract although he may have signed the correspondence relating to the contract, "Henry Howard Estate, by A. D. Bennett, Trustee," and this liability cannot be avoided by proving that the "Henry Howard Estate" was a partnership of which he was the agent.—McGovern v. Bennett, 146 Mich. 558.

III. DELIVERY AND ACCEPTANCE OF INSTRUMENT.

§ 27. Necessity and office of delivery and acceptance.

To vest title or right, see post § 28.
Requisites and nature of delivery, see post §§ 29-31.
Purpose and intent of parties, see post § 32.
Recording as delivery, see post § 33.
Delivery through third person and conditional delivery, see post §§ 34-39.
Delivery through fraud or mistake and revocation, see post §§ 40, 41.
Acceptance and estoppel to deny, see post §§ 42, 43.
Burden of proof, presumptions, evidence, jury questions and instructions, see post §§ 44-56.
Presumptions as to acceptance, see post § 49.
Necessity of delivery of duplicates where required for completion of contract, see also ante ¶ 42.
Delivery of bond as operative commencement, see also Bonds ¶¶ 19, 20.
Delivery of assignment for creditors as part of requisites, see Assignments for Creditors § 5.

¶ 108. To make a valid delivery of a written contract the one party must deliver it, intending that it should take effect as his contract, and the party receiving it must accept it is a binding contract to take effect on its acceptance.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 109. Where a note is made and indorsed for the purpose of being sold or discounted, it is the delivery of the note to the purchaser which completes the contract as between him and the parties to it.—Kinzie v. Farmers' & Mechanics' Bank of Michigan, 2 D. 105; Vinton v. Peck, 14 Mich. 287.

§ 28. ——To vest title or right.

¶ 110. Title does not vest till delivery of the deed.—Heffron v. Flanigan, 37 Mich. 274.

¶ 111. Delivery of a deed is essential to pass title; its whole object is to indicate the grantor's intent to give effect to the instrument.—Thatcher v. St. Andrew's Church Wardens, etc., of Ann Arbor, 37 Mich. 264.

¶ 112. One of the essential requisites to the validity of a deed, so as to pass title, is delivery.—Pollock v. McCarty, 198 Mich. 66.

¶ 113. A deed is inoperative until delivered by the grantor and accepted by the grantee.—Brown v. Keiser, 182 Mich. 432.

¶ 114. "A necessary essential to the validity of a deed so as to pass title is delivery; not necessarily to the grantee, but it must be surrendered to grantee or to some third person for the grantee. The grantor must intend that there should be a delivery of the deed to make it effective."—Belding Sav. Bank v. Moore, 118 Mich. 150.

§ 29. Requisites and nature of delivery.

Yielding custody and control, see post § 30.
Retaining custody and control, see post § 31.
Delivery in escrow, see Escrows.
Delivery of gifts, see Gifts, III.
Requisites and nature of delivery and issuance of municipal bonds, see Municipal Bonds, II.
Sufficiency of transfers of municipal bonds, see Municipal Bonds, IV.
Delivery of assignment by way of gift of choses assigned, see Gifts, III.
Delivery of instruments by incompetents, see Incompetents.
Delivery of instruments by insane persons, see Insane Persons, IV.
Sufficiency of delivery of benefit certificate of fraternal association to change beneficiary, see Fraternal Associations, IV.

¶ 115. Delivery of a deed takes place when it is either actually or constructively by record placed beyond the control of the grantor.—Gardiner v. Gardiner, 134 Mich. 90.

¶ 116. Delivery in the sense that it is necessary to the complete execution of a contract implies a discretion both as to tender and acceptance.—Brockway v. Petted, 79 Mich. 620.

¶ 117. The delivery of a deed is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him; but it is that act of the grantor, indicated by acts or words, or both, whereby his intention to perfect the transaction is shown by a surrender of the instrument to the grantee or to some third person for his use and benefit.—Thatcher v. St. Andrew's Church Wardens, etc., of Ann Arbor, 37 Mich. 264.

§ 30. ——Yielding custody and control.

See also ante ¶ 117.

Custody of deed given wife by husband for purpose of disposal where deed is blank as to grantee, see also ante ¶ 47.

Weight and sufficiency of evidence to show surrender of possession and control, see post § 53.

¶ 118. Where a husband has executed a deed to his wife, for the purpose of having her exhibit it to his creditors to induce them to grant an extension, and has deposited it with his other papers in the house where she had access to it, to make use of it for the purpose for which it was made, to show ownership in herself, the legal control of it must be regarded as delivered to her, and this constitutes a delivery in law.—Gage v. Gage, 36 Mich. 229.

¶ 119. Delivery of a deed was established where such deed was in the custody of the deceased grantee and, with the consent of the grantor, he claimed to be and handled the property as the owner, and where, when the deed was delivered, it was agreed that it should not be presently recorded, that if the grantor died first, it should then be recorded and that if the grantee died first, it should be destroyed and the title revert to the grantor.—Tabor v. Tabor, 136 Mich. 255.

§ 31. ——Retaining custody or possession.

Presumption from possession of instrument, see post § 46.

Recordation with retaining of possession as delivery, see post ¶ 142.

¶ 120. Delivery of a deed was not shown where the grantor after signing the deed handed it to his daughter for the purpose of placing it among his own papers.—Reason v. Jones, 119 Mich. 672.

¶ 121. A decedent executed certain deeds, at which time she remarked: "When I go dead, then everything is all right." She kept the deeds in her safe with her will until her death. At one time her son, in looking through her safe, ran across them. She told him to put them back and record them after her death. Held, there was no delivery of the deeds.—Stubman v. Modrack, 163 Mich. 667.

¶ 122. A father handed a deed to his son saying he would not like to see it recorded until after his death, and the son handed it back, the father retaining possession of the land and afterwards destroying the deed. Held, that there was no delivery.—Schuffert v. Grote, 88 Mich. 650.

¶ 123. Any deed that is to be maintained after death must have been made operative by some valid delivery by the grantor during his life and if found in his custody at death, there must be proof, or facts amounting to proof, that he had made an effectual delivery, and became thereafter a mere custodian of the instrument.—Taft v. Taft, 59 Mich. 185.

¶ 124. Delivery of a deed to a minor was not shown, where the grantor, after the execution of the deed, declined to act upon the suggestion of the conveyancer to put it in the hands of a third person, but kept it in the drawer of his own bureau in his own room, where it remained in the grantor's possession and control from the time he signed it until after his death, except for a brief interval when it was in possession of the minor's father to be read by himself and his wife.—Bisard v. Sparks, 133 Mich. 587.

¶ 125. A deed executed and acknowledged about one year before the death of grantor, retained in the custody of grantor, who gave directions to his daughter that upon his death such deed, on condition that the grantee should then execute a certain note, which grantor had drawn up and folded with the deed, should be delivered to such grantee, was void, since the delivery was meant to be, and was in fact, posthumous and since such delivery was conditioned upon the execution of such note after grantor's death.—Taft v. Taft, 59 Mich. 185.

§ 32. Purpose and intent of parties.

As to present or future effectiveness, see post § 33.

Intent to make delivery coupled with recordation, see also post ¶ 135.

Necessity of intent to make delivery effective, see also ante ¶ 114.

¶ 126. In determining the fact of delivery of a deed, the purpose of the grantor and the grantee in making the deeds is an important factor.—Gardiner v. Gardiner, 134 Mich. 90.

¶ 127. It is a question of intent whether the delivery of a deed to a third person to be later delivered to the grantee is effective.—Jenkinson v. Brown, 119 Mich. 108.

¶ 128. In deciding whether a deed was delivered at its date or at some other time the material inquiry is when did the minds of the parties meet in regarding it as unconditionally belonging to the grantee.—McCullough v. Day, 45 Mich. 554.

¶ 129. The act of delivery of a deed is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit.—Pollock v. McCarty, 198 Mich. 66.

§ 33. ——As to present or future effectiveness.

Time when effective where delivered through depositary at death of grantor or maker, see post § 38.

¶ 130. The execution and delivery of a deed by the wife to the husband without retaining any control over it, whether it is intended to take effect immediately or not to take effect until after the death of the wife, is a valid and effective conveyance after the death of the wife.—Dyer v. Skadan, 128 Mich. 348.

¶ 131. The test of a conveyance is whether it can be said that the delivery of the deed is such as to convey a present interest in land.—Pollock v. McCarty, 198 Mich. 66.

¶ 132. Deeds from a father dividing his property among his children were formally delivered, two of them on the day of their execution, the others at a later day, grantor being at the pains to figure out the proportions in which he desired the property to go to each of his children, he also stating that he had previously contemplated such a disposition, which, he was told, would be final. Held, that these facts showed the deeds were intended to have present effect.—Nichols v. Nichols, 94 Mich. 569.

¶ 133. Where an old man, unmarried, has his brother and wife live with him on his farm and allows them to keep all the profits on condition that they cultivate and improve the farm and pay the taxes, and the brother subsequently erects a new dwelling, on being told that the title to the premises had been fixed by a deed so that it will pass to him on the grantor's death and the grantor on being subsequently informed by the scrivener that the instrument is invalid for want of delivery has another one drawn which he hands to his brother, the grantee, who returns it to the scrivener who was instructed by the grantor to record the same after his death, such facts constitute a delivery so as to pass a present estate to the grantee.—Luscombe v. Peterson, 173 Mich. 165. (Ostrander, Stone and Bird, JJ., dissenting.)

¶ 134. Where a wife who has joined in a mortgage consents to its delivery in suspense on a condition that her husband should afterward assent to completion of delivery, and recordation and, subsequently he expressly authorized delivery of it, her inchoate right of dower is barred.—Fifth Nat. Bank v. Pierce, 117 Mich. 376.

§ 34. Recording as delivery.

Presumptions arising from recordation, see post § 47.

Insufficiency of recordation to constitute delivery without acceptance, see also post ¶ 186.

Constructive delivery by recordation, see also ante ¶ 115.

Recordation without knowledge of grantor as evidence of delivery, see post ¶ 271.

Delay in recordation as evidence, see post ¶¶ 243, 252, 266.

Admissibility of record of instrument to show its execution and existence without further proof, see Evidence, VIII, C.

Recordation of instruments, see Notice and Record of Title, II.

¶ 135. The recording of a deed with intent to pass title is a sufficient delivery, and in such case actual manual delivery and formal acceptance are not necessary.—Holmes v. McDonald, 119 Mich. 563.

¶ 136. The act of the father in causing a deed to his son, reserving a life interest in the father, to be recorded, held to constitute a sufficient delivery.—Griffin v. Hovey, 179 Mich. 104.

¶ 137. If a grantor who is the register of deeds makes and records a deed with intent to pass title, there is a sufficient delivery.—Fenton v. Miller, 94 Mich. 204.

¶ 138. The recording by a father of a deed in which he grants land to his minor children, reserving a life-estate for himself and their mother, is an effectual delivery and shows that he intended to convey an estate in fee to the grantees; actual manual delivery and formal acceptance are not necessary in such a case.—Compton v. White, 86 Mich. 33.

¶ 139. The execution of a mortgage in payment, or as security for the payment, of a bona fide indebtedness to the mortgagee, and the filing thereof, are, as between the parties, a sufficient delivery, although the mortgagor, instead of filing it himself, hands it to a third person to be filed, and it is filed accordingly.—Field v. Fisher, 65 Mich. 606.

¶ 140. Where a mortgage, executed in the mortgagee's absence and placed upon record by the mortgagor, is permitted to remain of record as a mortgage, and is assumed to be such by all of the parties in interest, want of a manual delivery is of no importance.—Sessions v. Sherwood, 78 Mich. 234.

¶ 141. Where a deed has been recorded and acted upon by the mutual consent of the parties, that amounts to delivery, and the fact that it was originally made without the knowledge of the grantee and not delivered manually to him is of no importance.—Jackson v. Cleveland, 15 Mich. 94.

¶ 142. Where a husband executes a deed to his wife and records it intending to pass title to her as of its date, there is a valid delivery, and title passes to her though the deed remains in his possession.—Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co., 87 Mich. 349.

¶ 143. The recording of an instrument in form a warranty deed, but testamentary in character, by its custodian, contrary to the instructions of its makers, is not a delivery actual or constructive, and cannot be taken as indicative of the grantors' intention to give effect to the instrument.—Leonard v. Leonard, 145 Mich. 563.

§ 35. Delivery through third person.

To one spouse for the other, see post § 36.
Delivery by depositary on grantor's or maker's death, see post § 38.
Weight and sufficiency of evidence to show delivery through intermediary, see post § 52.
Sufficiency of delivery where deed is executed by two of three grantors named and delivered to depositary, see Escrows ¶ 28.

¶ 144. The delivery of a deed to a third person for the benefit of the grantee, in the absence of anything conveying a different intention, is as much a delivery as if made to the grantee himself.—Shumway v. Mason, 189 Mich. 623.

¶ 145. It is sufficient delivery of a deed if the grantor, intending thereby to give it effect, leaves it with the conveyancer to be afterwards delivered; and sufficient acceptance, if grantees, who knew nothing about it when it was drawn, assent to it afterwards.—Thatcher v. St. Andrew's Church Wardens, etc., of Ann Arbor, 37 Mich. 264.

¶ 146. Delivery is not accomplished by placing a conveyance with the common agent of the parties for safe keeping until the contract between the parties is made and consummated.—Connor v. Buhl, 115 Mich. 531.

¶ 147. A delivery of a deed to a third person for the benefit of the grantee is as much a delivery as if made to the grantee himself, unless some other intent is evinced; and when papers show on their face that they are meant to take effect and operate from their execution, their delivery to a third person, to be afterward delivered to the parties, cannot be considered as merely an escrow, and as not to take effect until such subsequent delivery.—Hosley v. Holmes, 27 Mich. 416.

¶ 148. A deed of conveyance in present terms is inconsistent with the retention of a life estate and from the time of its delivery as a conveyance, the whole title goes with it, and the deed becomes irrevocable. Such delivery to a third person, intended to make the conveyance operative, is a legal delivery even where the grantee is ignorant of the transfer.—Taft v. Taft, 59 Mich. 185.

¶ 149. Where a husband executed a deed to his wife and left it in an envelope with his attorney with the indorsement thereon that it was to be delivered in case of his death, and later when the husband and wife were both very ill she asked him for the deed and he said he had attended to the matter and it was with his attorney, and permitted her attorney to go and get the deed which was done and the attorney returned with the deed and read it to the wife and told her the deed was all right, and the husband then acknowledged the execution thereof, and said that that was the property he wished his wife to have, and the wife upon being asked if she wished to keep the deed told her lawyer to keep it and the husband said keep it and "when we are well we will go down to your office and attend to it together" and the lawyer returned the deed to the scrivener, but the wife died within a week of the occurrence and the husband lived ten years, and paid taxes on the land, and interest upon the mortgage, and entered into a contract of sale therefor, there was no delivery of the deed so as to pass title to the wife.—Connor v. Rivard, 144 Mich. 177.

§ 36. ——To one spouse for other.

Weight and sufficiency of evidence of delivery from one spouse to other, see post § 54.

¶ 150. Where, on a purchase of land by a husband, the deed is made to the wife at the husband's direction, delivered to the husband, and recorded by him, such delivery is sufficient to vest title in the wife.—Wipfler v. Wipfler, 153 Mich. 18.

¶ 151. A man deeded to his brother under an arrangement that was afterward abandoned, but the grantor obtained a conveyance back to his wife, which was not delivered to her, but to him. Held, that her heirs could not claim under such a deed without some evidence that she was a party to the delivery.—Watson v. Hillman, 57 Mich. 607.

§ 37. Conditional delivery.

Condition for reversion of title in event of grantee predeceasing grantor, see also ante ¶ 119.
Delivery by depositary contrary to conditions, see Escrows § 10.
Where instructions to depositary are to deliver on condition grantee survive grantor or on fulfillment of condition uncertain, see Escrows § 2.
Other similar arrangements to show that signing was conditional on other signatures, see also Evidence § 95.
Delivery to grantee in escrow, see Escrows § 5, ¶ 12.
Sufficiency of delivery by depositary where conditional on performance of acts by grantee after grantor's death, see Escrows § 4, ¶¶ 10, 11.

¶ 152. A deed is inoperative if its delivery depends upon a condition precedent that can only be performed after the grantor's death.—Taft v. Taft, 59 Mich. 185.

¶ 153. Quære, whether parties to a negotiable paper may agree upon its conditional

delivery to the payee.—Cannon v. McIntyre, 140 Mich. 24.

¶ 153a. There is no delivery of a bond where the agent of the obligee induced the obligor to sign as a surety on condition that the agent would also sign as a surety, which the agent did not do before he turned over the bond to the obligee.—Fidelity Mut. Life Ins. Co. v. Johnson, 152 Mich. 578.

¶ 154. If the circumstances of the manual delivery of a deed are such as to indicate a conditional rather than an absolute delivery, no title passes until the condition is fulfilled; and the character of the delivery must be determined by the acts or words of the parties or by both.—Chick v. Sisson, 95 Mich. 412.

¶ 155. A writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent to its becoming obligatory. In such case it does not become operative until the performance or happening of the condition precedent.—Cleveland Refining Co. v. Dunning, 115 Mich. 238.

¶ 156. A bond to secure past and future indebtedness was sent for approval to the obligee's agent, who was not to deliver it to the obligee except on the condition that the obligor be retained in the obligee's employ. The agent did deliver it but the obligor was not retained. Held, that there was no legal delivery, and the bond was therefore void as an obligation, and would not support an action.—Weed Sewing Machine Co. v. Jeudevine, 39 Mich. 590.

¶ 157. Where, in the execution of a contract of sale, a deed is delivered with the intention that it shall be operative when the grantee approves of the title, he has the right to put such deed on record when he approves of it and tenders the consideration. —Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

¶ 158. In a grantor's suit to set aside deeds to his sons upon the ground that they were delivered conditionally and were not to be recorded until his death, it appeared that after the deeds had been placed with a depositary, the grantor delivered them to the grantees who executed life-leases to him. Held, that it was the intention that the deeds should be recorded upon delivery it appearing that he knew of the recording but made no objection for seven years.—Ayris v. Ayris, 116 Mich. 484.

¶ 159. Complainant prepared deeds of certain lands, running to his wife as grantee, and kept them in his possession for several years; on departing to take a hazardous railway trip he handed the deeds to his wife, telling her to record them if anything of a fatal nature should befall him. She recorded the deeds in violation of the instruction. Held, that this transaction constituted a delivery of the deeds to the grantee, without any express reservation of the right to recall them, and with intent that in a certain contingency they should be effective without any further act on the part of the complainant.—Wipfler v. Wipfler, 153 Mich. 18.

§ 38. Delivery by depositary on grantor's or maker's death.

Time when effective and doctrine of "relation back," see post § 39.
Delivery through third persons in general, see ante § 35.
Present or future effectiveness according to intent of parties, see ante § 33.
Weight and sufficiency of evidence to show delivery through intermediary, see post § 52.

¶ 160. A deed delivered by the grantor to a third person with directions to have it handed over to the grantee immediately after the grantor's death is valid.—Latham v. Udell, 38 Mich. 238.

¶ 161. Delivery of a deed to a third party to be by him delivered to the grantee after the death of the grantor is valid.—Jenkinson v. Brooks, 119 Mich. 108.

¶ 162. Delivery of deeds on the eve of grantor's death to a third party with directions to record them after grantor's death and notify the parties interested, and with no intent to recall the deeds, is effective; although such owner remained in possession of his homestead and instructed that those of the deeds running to his wife should be recorded before his death, and caused the papers to be brought to him for examination. —Jenkinson v. Brooks, 119 Mich. 108.

¶ 163. The delivery of a deed to a third person, to be delivered to the grantee after the grantor's death, and the delivery thereof by such third person before the grantor's death, in breach of the trust reposed in him, is a sufficient delivery to vest title at the death of the grantor.—Wallace v. Harris, 32 Mich. 380.

¶ 164. Where a grantor executed a deed to real estate, making her son the grantee and reserving a life estate, and delivered such deed to the scrivener with instructions to deliver it to the grantee at her death, held that the delivery was valid.—Loomis v. Loomis, 178 Mich. 221.

¶ 165. Delivery of a deed by a grantor before his death to a third person to be delivered to the grantee at her mother's death, is a good delivery.—Brown v. Stutson, 100 Mich. 574.

¶ 166. The delivery of a deed by a grantor to a third person, to be by him delivered to the grantee after the grantor's death, is valid. —Hoagland v. Beckley, 158 Mich. 565.

¶ 167. A grantor executed deeds in the office of one Hopkins, a lawyer, and left them in a sealed envelope, with Hopkins. The following was indorsed, by the grantor on the envelope: "I hereby direct that the within deeds shall be delivered to the parties of the second part therein mentioned at my decease, and as soon as that event shall occur. Betsey Beckley." Held, that this with the other circumstances warranted the circuit judge in finding that there was a valid delivery.—Hoagland v. Beckley, 158 Mich. 565.

¶ 168. A grantor made a deed of property preparatory to committing suicide, placed the same in the hands of a friend shortly after executing it, marked the names of the grantees, his children, on the envelope, and told the friend to give them to the boys when they called for them. Later he wrote a letter asking the friend to record the deeds, which letter was found on his person. Held, there was a valid delivery of the deed.—Cooper v. Cooper, 162 Mich. 304.

¶ 169. A deed delivered by the grantor to a third party to be delivered to the grantee after grantor's death is valid though it contain a clause that "This deed is to be delivered and recorded to the grantee on the death of both the grantors" since this clause evidently refers to the actual delivery to the grantee and does not affect the delivery to the third person.—Meech v. Wilder, 130 Mich. 29.

§ 39. ——Time when effective and doctrine of "relation back."

¶ 170. The fact that a deed is not to be delivered or take effect until after the grantor's death will not prevent its taking effect at that time.—Howard v. Patrick, 38 Mich. 795.

¶ 171. A deed delivered by a grantor to a third person for the benefit of the grantee, when delivered to and accepted by the latter, will, under the doctrine of relation, take effect from the date of the original delivery. —Brown v. Keiser, 182 Mich. 432.

¶ 172. The delivery of a deed by a grantor to a third person for delivery to the grantee after the grantor's death, operates as a conveyance in praesenti with the enjoyment of the gift postponed.—Brown v. Keiser, 182 Mich. 432.

¶ 173. The delivery of a deed by the grantor to a third party to be by him delivered to the grantee after the grantor's death is valid, conveys the fee and operates as a conveyance in praesenti, though the enjoyment is postponed until the grantor's death.—Meech v. Wilder, 130 Mich. 29.

¶ 174. The fiction that a deed delivered to a third person for delivery to the grantee at the grantor's death, at the second delivery relates back to the delivery to the repository, will not be permitted to work a wrong by defeating the grantor's intervening creditors.—Brown v. Keiser, 182 Mich. 432.

§ 40. Delivery through mistake or fraud.

What constitutes fraud and undue influence, see Fraud, I.

Fraud implied from circumstances or nature of delivery, see Fraud, II.

What constitutes mistake, see Mistake.

¶ 175. A deed collusively given in execution of a land contract, possession of which was surreptitiously obtained in the absence of the party holding it, is not absolutely void in law as for fraud, as it passes the legal title to the grantee named, and the contract purchaser cannot cause it to enure to himself except by showing his equitable right and title as against the grantee; and this showing cannot be made in an action of ejectment as an equitable defense.—Harrett v. Kinney, 44 Mich. 457.

¶ 176. The fact that grantor was ill and according to some testimony in another room at the time of the delivery of her deed does not affect the validity of such instrument, where the grantor was in her right mind and understood and comprehended what was done and the fact of a delivery is otherwise not questioned.—Wilbur v. Grover, 140 Mich. 187.

§ 41. Recalling and revocation of delivery.

Sufficiency of evidence as to right to recall instrument, see post ¶ 268.

Necessity of writing to revoke deed, attempt by destruction, see Frauds, Statute of, I.

Destruction of instrument to revoke it, see Rescission and Cancellation, IV.

Rescission or revocation by act of parties after execution is complete, see Rescission, IV.

¶ 177. Until a deed is delivered to the grantee to become presently operative, the grantor may rescind it.—Pennington v. Pennington, 75 Mich. 600; Burk v. Sproat, 96 Mich. 404.

¶ 178. Where a deed had been drawn and placed in the hands of a person subject to the grantor's orders and control, and had been legally recalled by the grantor, and had become inoperative before it was taken by the grantee named therein, it has no effect and should be canceled.—Pennington v. Pennington, 75 Mich. 600; Burk v. Sproat, 96 Mich. 404.

¶ 179. No title passed to property where the grantor deposited the deed with a third party to be delivered on his death and later recalled and destroyed the deed.—Cole v. Cole, 144 Mich. 676.

¶ 180. The grantor in a deed deposited with a third person with instructions to deliver it after his death has a right to recall the deed and destroy it unless at the time of

depositing it he intended to deprive himself of that right.—Cole v. Cole, 144 Mich. 676.

¶ 181. A grantor in a deed deposited with a third person to be delivered after his death may recall and destroy the deed at any time unless he had at the time of depositing it intended to deprive himself of that right, and it is not necessary that the right be expressly reserved, it being sufficient that it was understood that the right was reserved. —Cole v. Cole, 144 Mich. 676.

¶ 182. Where a grantor places a deed in the hands of a third person to be delivered upon his death to the grantee, and does not intend to deprive himself of the right to recall the same, he is entitled to obtain it from said third person and destroy it.—Wagner v. Kirchberg, 166 Mich. 411.

¶ 183. The return of a deed to the grantor to insure that it would not be placed of record, did not in law defeat a delivery once accomplished, where the proofs show a delivery with intention to vest title, in an action to re-establish a deed.—Blackford v. Olmstead, 140 Mich. 583.

§ 42. Acceptance.

Estoppel to deny acceptance, see post § 43.
Discretion as to acceptance, see ¶ 116.
Sufficiency of acceptance, see also ante ¶ 145.
Necessity for acceptance, see ante § 27, ¶ 113.
Presumptions as to acceptance or rejection, see post § 49.
Sufficiency of acceptance where instrument returned to insure its not being recorded, see also ante ¶ 183.
Recordation without knowledge of grantee as delivery of deed, see ante ¶ 141.

¶ 184. A chattel mortgage executed by a debtor to secure a creditor, and retained in the debtor's possession for a time, when it is filed and notice given to the creditor, who accepts the security, but who had no prior knowledge or notice of its execution, or agreement with the debtor therefor, had no legal existence until delivery, which takes place on such acceptance.—Merrill v. Denton, 73 Mich. 628.

¶ 185. Acceptance of a deed may be after the grantor's death where the act of delivery is a continuing one, such as leaving it on deposit to be accepted afterwards if not recalled before.—Thatcher v. St. Andrew's Church Wardens, etc., of Ann Arbor, 37 Mich. 264.

¶ 185a. There is no acceptance of a bond which on its face requires two sureties and which is signed by one only, where on its receipt by the obligee it is returned with the direction that another signature is required. —Fidelity Mut. Life Ins. Co. v. Johnson, 152 Mich. 578.

¶ 186. The making and recording of a deed with intent to pass title is not a good delivery where the infant grantee is ignorant of the fact and unwilling to receive it.—Lowes v. Lowes, 127 Mich. 307.

¶ 187. Acceptance by each of several grantees need not be shown where the instrument has been delivered to one for the benefit of all, and has not been repudiated by any.—Shelden v. Erskine, 78 Mich. 627.

¶ 188. A mortgage in favor of several creditors does not have to be delivered to all, if delivered to one for all and repudiated by none; proof of an acceptance by each is not necessary.—Shelden v. Erskine, 78 Mich. 627.

¶ 189. A mortgagee, on being informed of the execution and filing of the mortgage, which had taken place without her knowledge, but pursuant to the agreement of the mortgagor to give her security, authorized her attorney to take possession of the property in her interest, which he did by a third party, and was in actual possession when the property was attached by creditors of the mortgagor. Held, that there was a sufficient acceptance of the mortgage.—Louden v. Vinton, 108 Mich. 313.

§ 43. Estoppel to deny delivery or acceptance.

Estoppel to question execution, see ante § 15.
Estoppel to deny delivery as barring privies of person, see also Estoppel ¶ 234.
Right to make defense that contract was delivered in breach of condition, where other party's agent lacked authority to make such a contract, see Agency ¶ 300.
Acceptance of deed poll as assent to terms and covenants by grantee, see Contracts § 23.

¶ 190. Where a grantee accepts a deed without its being executed by the wife of the grantor, upon her agreement afterwards to execute it, which she does, he cannot be heard to say that the deed was never delivered to or accepted by him because of his refusal to receive it again after such execution by the wife, whose only interest in the land is an inchoate right of dower.—Dikeman v. Arnold, 78 Mich. 455.

¶ 191. Where the grantee in a deed has bargained for the property and paid down something towards the purchase and executed a mortgage for a part of the purchase price with covenants of warranty, and delivered it to the scriveners who held the deed, and has taken and held possession for some time of the lands conveyed, he is estopped from denying an acceptance and delivery of the deed.—Comstock v. Smith, 26 Mich. 306.

¶ 192. Where, at the solicitation of a third person who is working up the scheme, an agreement to pay to parties named a certain sum for building a creamery is signed "as a starter" upon condition that it is not to be delivered until the subscriber authorizes,

of which the payee's agent has knowledge, the subscriber is not estopped, in suit upon the subscription, from showing the facts and a violation of the condition.—Davis v. Kneale, 97 Mich. 72.

¶ 193. By signing an official bond as surety on a condition not apparent therein, and intrusting it to the principal obligor to be completed and delivered, one makes such obligor his agent, and is estopped by his action in delivering it without complying with a condition of which the obligee had no notice.—McCormick v. Bay City, 23 Mich. 457; Brown v. Kent Probate Judge, 42 Mich. 501.

§ 44. Burden of proof.

Presumptions, see post §§ 45-49.

Burden of proof on plaintiff to show delivery where denied by defendant's affidavit under circuit court rules, see also ante ¶ 57.

Burden to impeach date, see also Contracts ¶ 1227.

Burden of proof as to delivery on Sunday, see Sunday.

Burden of proof to show revocation of instrument by rescission and cancellation, see Rescission and Cancellation, IV.

¶ 194. In an action of ejectment where defendant claimed under a deed from a deceased parent, held that the burden of proving delivery of the deed by a preponderance of evidence rested upon the defendant.—Barras v. Barras, 192 Mich. 584.

¶ 195. Complainant in a bill to remove a cloud from his title by setting aside deeds made by his ancestor, but which he claims were never delivered, has the burden of proof, and must make out his case by preponderance of testimony.—Salisbury v. Salisbury, 49 Mich. 306.

¶ 196. Where the grantee in a deed admitted that it was kept in a locked box in the grantor's house, and that he obtained the key from the grantor (his father) two or three days before his death, unlocked the box, and took the deed out, held that under such circumstances there was no presumption of delivery arising from the deed itself or the record thereof, and that the burden of proof was upon defendants to show its delivery.—Jourdan v. Patterson, 102 Mich. 602.

§ 45. Presumptions.

From possession of instrument, see post § 46.

From recordation, see post §§ 47-49.

Presumptions as to signature and execution of instrument preliminary to delivery, see ante § 16.

¶ 197. It is presumed that the parties to a deed understand that delivery is essential to an operative conveyance.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 198. It is presumed conclusively that one of two joint makers of a note had authority from the other to deliver it, if he does so.—Beman v. Wessels, 53 Mich. 549.

¶ 199. When a grantor makes a manual delivery of a deed to the grantee without qualification, the law assumes that a present conveyance is intended, and will not permit proof of a concealed intent to the contrary.—Barras v. Barras, 192 Mich. 584.

¶ 200. Proof of the delivery of a deed to a stranger without directions raises no presumption that it is delivered for the use of the grantee.—Thomas v. Sullivan, 138 Mich. 265.

¶ 201. The delivery of a deed will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of the title; thus, where a deed had been executed and recorded without the grantee's knowledge, but subsequently, upon the grantor's request, the grantee conveyed to a third party, such recognition by both parties of the transfer of the title was held sufficient evidence that at the time a delivery of the deed had been made.—Gould v. Day, 94 U. S. 405, 24 L. ed. 232.

¶ 202. The possession by the husband of the deceased wife's deed of land to a daughter does not raise a presumption that the delivery to the husband was delivery to the daughter, where the husband's will disposing of the property states that the deed was subject to revocation by him and the witnesses to the deed testify to similar statements made by him at the time of execution.—Thomas v. Sullivan, 138 Mich. 265.

¶ 203. The presumption of delivery of a deed produced by the grantee is overcome by evidence that it was not delivered at the time it was signed, that a companion deed was not produced nor accounted for, and that the grantee, after the grantor's death, had made contradictory statements relative to the claimed delivery and had made statements as to the title wholly inconsistent with his present claim of delivery.—Barron v. Mercure, 132 Mich. 439.

¶ 204. Defendant agreed to quitclaim certain land to be acquired by her to complainant, if complainant would in return quitclaim certain land to defendant. Complainant's deed was dated June 17, 1879. Defendant's deed was dated May 23, 1879, and recorded December 30, 1881. Defendant did not acquire title to the land she purported to quitclaim until June 15, 1879. In a bill to quiet title, defendant contended that nothing passed to complainant by her deed of May 23, 1879, since she had then acquired

no title. Held, that complainant's bill should be sustained on the presumption that defendant's deed of May 23, 1879, was not delivered until after June 15, 1879.—Johnson v. Smith, 154 Mich. 122.

§ 46. ——From possession of instrument.

Retaining custody or possession as affecting delivery, see ante § 31.

¶ 205. Possession of a deed is prima facie evidence of its delivery.—Dawson v. Hall, 2 Mich. 390.

¶ 206. The grantee's possession of a deed is prima facie evidence of a delivery.—Fenton v. Miller, 94 Mich. 204.

¶ 207. The grantee's possession of a deed tends to prove its delivery.—Foster v. Hill, 55 Mich. 540.

¶ 208. The possession of a contract establishes a presumption of its execution and delivery which must prevail until overthrown.—Seligman v. Ten Eyck's Estate, 53 Mich. 285; Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 209. While possession of an instrument is presumptive evidence of delivery, that presumption cannot be entertained where upon the face of the instrument some act remains to be done to make it complete. The instrument to which this rule of presumption applies must be "in form of a simple contract."—Amos-Richia v. Northwestern Mut. Life Ins. Co., 143 Mich. 684.

¶ 210. The possession and production of a deed by a grantee, unexplained, gives rise to a presumption that it was delivered, but such presumption is not conclusive.—Barras v. Barras, 192 Mich. 584.

¶ 211. The delivery of a promissory note by the maker is necessary to a valid inception of the contract. The possession of a promissory note by the payee or indorsee is prima facie evidence of delivery.—Burson v. Huntington, 21 Mich. 415.

¶ 212. The delivery of a deed is presumed from its having been executed, acknowledged and recorded, and from possession by the grantee or beneficiary under it, unless there are facts against the presumption.—Patrick v. Howard, 47 Mich. 40.

¶ 213. The law will presume a delivery from the possession of the deed by the grantee, in the absence of testimony as to such delivery or the alleged nondelivery.—Wilbur v. Grover, 140 Mich. 187.

¶ 214. The nondelivery of a deed signed, acknowledged and recorded is not presumed from the grantor's remaining in possession for several months after it was put on record.—Howard v. Patrick, 38 Mich. 795.

§ 47. ——From recordation.

See also ante ¶ 212.
As to date of delivery, see post § 48.
As to acceptance or rejection, see post § 49.
Recording as delivery, see ante § 34.
Recordation as evidence of delivery, see also post ¶ 250.
Weight and sufficiency of evidence of recordation to prove delivery, see also post ¶ 237.
Record as evidence as to regularly executing and witnessed party only, see also Evidence ¶ 2748.

¶ 215. Recording a deed is presumptively a delivery of it as between grantor and grantee.—Sessions v. Sherwood, 78 Mich. 234.

¶ 216. The presumption of delivery to the grantee which is raised by recording a deed may be rebutted by proof of the intention of the grantor.—Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co., 87 Mich. 349.

¶ 217. The fact of recording a deed as proved by record is not conclusive of delivery of the deed.—Barras v. Barras, 192 Mich. 584.

¶ 218. When the record of a deed has for its object the defrauding, hindering or delaying creditors, recording is considered presumptively a delivery of the deed, as between the grantor and grantee.—Sessions v. Sherwood, 78 Mich. 234.

¶ 219. A husband being poor and somewhat indebted made a deed of his newly gained homestead to M., and caused M. to convey to the homesteader's wife without any consideration passing between the parties. Sometime later, having kept both deeds in his possession, he requested the register of deeds to put the two conveyances on record, but not to deliver them to anyone but himself. Afterwards he retained custody of the deeds. Held, that title did not pass to the wife, for the presumption of delivery arising from the recording was rebutted by the fact that there was no delivery nor intention of delivery.—Stevens v. Castel, 63 Mich. 111.

§ 48. ——As to date of delivery.

¶ 220. In the absence of evidence to the contrary, a deed is presumed to be delivered on the date when acknowledged.—Miller v. Peter, 158 Mich. 336.

¶ 221. It must be assumed that the delivery of a deed takes place at the time of its acknowledgment if nothing shows that it was delivered earlier or later.—Johnson v. Moore, 28 Mich. 3.

¶ 222. It is only a presumption that the date of acknowledgment, if later than that of the deed, is also the true date of delivery; it may be overcome by proof.—Eaton v. Trowbridge, 38 Mich. 454.

¶ 223. Where a deed is acknowledged on a day subsequent to its date, and there is no proof of delivery prior to the acknowledgment, it must be presumed to have been delivered afterwards; such being the usual course and practice in reference to the delivery of deeds and other instruments intended for record.—Blanchard v. Tyler, 12 Mich. 339.

¶ 224. Where a grantee died between the dates of a deed and its acknowledgment, it was presumed that the deed had been delivered in his life-time.—Eaton v. Trowbridge, 38 Mich. 454.

§ 49. ——As to acceptance or rejection.

Acceptance, see ante § 42.

¶ 225. Acceptance of a deed by the beneficiary thereunder is presumed.—Lewis v. Jacobs, 153 Mich. 664.

¶ 226. The acceptance of a beneficial grant is presumed.—Wayne County v. Miller, 31 Mich. 447; Hatch v. Village of St. Joseph, 68 Mich. 220.

¶ 227. There is no presumption that a grant of land for a public use is beneficial to the public, and hence no presumption of acceptance unless it does appear to have been beneficial.—Wayne v. Miller, 31 Mich. 447.

¶ 228. Where a written agreement, drawn to be executed by the party making it and signed by him only, is found among the papers of the other party after the latter's death, it is presumed to have been delivered; and its retention raises a presumption of acceptance, which must be overthrown by proof before it can be avoided.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 229. A voluntary conveyance of real estate, deliberately made by a husband to his wife, is binding on the grantor, and, if the deed is recorded and acted upon by their mutual concurrence, a delivery of the deed and its acceptance may be presumed.—Draper v. Brown, 153 Mich. 120.

¶ 230. Where a mortgage has been left with a firm of attorneys, acting for both parties, to be delivered only upon the consent of both, and there is a conflict of testimony as to whether or not such consent was ever given, the fact that the mortgagee is found in possession of the mortgage, and the mortgagor in possession of an instrument contemporaneously executed by the mortgagee to show what the mortgage was given to secure, the actual delivery of such instrument not being doubtful, raises a presumption that the mortgage also was actually delivered.—Hess v. Final, 32 Mich. 515.

§ 50. Admissibility of evidence.

Admissibility of declarations complementary or explanatory of delivery, see Evidence § 91, ¶ 482.

Admissions by deceased grantor as to terms of delivery, see also Evidence ¶ 2159.

Undelivered instruments as admissions against maker's interest, see Evidence § 384.

Inadmissibility of parol evidence of agreement reducing unqualified to conditional delivery subject to recall, see also Evidence ¶ 937.

Letter by agent of grantor respecting terms of delivery as admission receivable to show delivery, see Evidence ¶ 2257.

Res gestæ of delivery and acceptance, see also Evidence § 457.

Deed record or certified copy of record of conveyance of lands in other counties as evidence of execution and delivery of the deed, see Jud. Act, chap. XVII, § 21: Comp. L. 1915, § 12509.

¶ 231. In an action of ejectment a deed from the husband of plaintiff of a certain other tract of land was incompetent and immaterial on the question of delivery of the deed to the land involved in the action of ejectment, although both deeds were executed at the same time.—Jennings v. Reeson, 200 Mich. 559.

¶ 232. In an action on a promissory note, the defense being that it was obtained by trickery, evidence that the same parties had obtained other notes from people in the neighborhood by trickery, is admissible.—Beard v. Hill, 131 Mich. 246.

¶ 233. Where the fact that negotiations were pending for an exchange of land is not disputed, but the contention of the defendant, who is sued for refusing to execute a deed of his land, is that the delivery of a deed which the plaintiffs claim was made absolutely pursuant to such negotiations, at a meeting of the parties at a given date, was conditional upon the approval by defendant's attorney of the abstract of title to said land to be by him thereafter examined, what had taken place before said meeting of the parties is immaterial and irrelevant upon the issue of such delivery, unless defendant can be shown to have said or done something before going to the place of meeting indicating an intention to accept said deed without such investigation of title.—Dikeman v. Arnold, 78 Mich. 455.

¶ 234. A woman basing a claim against her husband's estate upon a note given by him can show, as bearing upon the fact that she held it before her husband's death, that she had tried to sell it during his life-time.—Passmore v. Passmore, 50 Mich. 626.

¶ 235. It is irrelevant and inadmissible that the intentions of the husband in taking deeds to his wife's property to himself was to vest title in the survivor of them, the deeds having been in fact delivered though not recorded and on the husband's death having been destroyed by her.—Wilbur v. Grover, 140 Mich. 187.

¶ 236. Declarations and acts of grantee in a deed subsequent to the delivery thereof were not admissible as evidence of the grantee's intent at the time of such delivery, since it is not competent to prove that either of the parties to a deed entertained a secret and undisclosed intention that the delivery of the instrument should be ineffectual to transfer title.—Wilbur v. Grover, 140 Mich. 187.

§ 51. Weight and sufficiency of evidence.

To show delivery through intermediary, see post § 52.

To show intentional surrender of possession and control, see post § 53.

Delivery from one spouse to other, see post § 54.

Recitals as evidence of delivery, see post § 55.

Sufficiency of evidence of signature and execution of instrument preliminary to delivery, see ante §§ 17-19.

Necessity and sufficiency of proof of delivery of antenuptial deed before marriage to prevent dower in the land, see Dower § 19.

Sufficiency of evidence of fraud in delivery, see Fraud, III.

Weight and sufficiency of evidence of delivery in suit to establish lost instrument, see Restoration of Papers and Records.

¶ 237. The record of a deed is not conclusive proof of its delivery.—Hendricks v. Rasson, 53 Mich. 575.

¶ 238. Where a deed was ready for delivery at its date, and delivery was practicable, and there is positive evidence that it was delivered, evidence to the contrary, consisting of oral admissions, and the testimony of prejudiced parties, cannot, in a proceeding in equity, be regarded as convincing.—McCullough v. Day, 45 Mich. 554.

¶ 239. Though title may pass without witnesses the omission of attestation is entitled to weight in a doubtful case in determining whether the instrument was intended to cover land.—Price v. Haynes, 37 Mich. 487.

¶ 240. A person negotiating for the purchase of land was to discharge two mortgages which he held against it and pay a balance due on government certificates of sale. The deed and certificates were left with his attorney for examination, and he left a check with him for part of the consideration, but afterwards repudiated the bargain and tried to perfect his mortgage title, and for that purpose, it appears, kept the certificate of sale. Held, that there was evidence tending to show the delivery of the deed.—Martz v. Eggemann, 44 Mich. 430.

¶ 241. The finding of the trial court, who saw the witnesses, that complainant in a bill to remove a cloud created by a recorded deed, had failed to establish the invalidity or want of delivery of the deed, was sustained, where the circumstances and other evidence overcame the grantor's testimony that it was genuine, his testimony being false in some important particulars.—Eighmey v. Thayer, 135 Mich. 682.

¶ 242. On the trial of a suit brought by the mortgagee to recover the value of the property, she was asked as bearing on delivery and acceptance whether she was still satisfied with what her attorney had done in taking the mortgage, and answered that she was "if she got her pay, and not before." Held, that this did not contradict her testimony that, with knowledge of the mortgage, she gave her attorney authority to take possession of the property.—Louden v. Vinton, 108 Mich. 313.

¶ 243. In an action by an executrix to set aside assignments of certain mortgages, made by deceased, on the ground that the assignments were never delivered, the fact that the assignments, though made a month before and alleged to have been delivered just before the death of deceased, were not placed on record until after his death, is of no significance.—Peirson v. McNeil, 137 Mich. 158.

¶ 244. On a bill to foreclose an alleged lien for alimony against real estate, which was claimed by the mother of the former husband of complainant as tenant by the entirety, evidence held insufficient to establish a delivery of a deed to the premises to complainant's former husband by his father.—Fowler v. Blount, 191 Mich. 575.

¶ 245. On a bill against an estate and legatees under a will to compel the restoration to complainant of property, the deed to which complainant alleged was destroyed by testatrix as a result of the fraudulent connivance of the legatees, or the payment of the value of such property to complainant, evidence held insufficient to establish delivery of the deed by testatrix to complainant.—McDaniels v. Crosby, 192 Mich. 18.

¶ 246. In weighing the evidence and determining the existence of a forgery it is proper to consider the relationship of the parties who profit and suffer by it, and the age and mental condition of the latter.—Crawford v. Hoeft, 58 Mich. 1.

¶ 247. On a bill in aid of execution to have a deed from a wife to her husband set aside as fraudulent to creditors, evidence held to sustain a finding that the deed was duly delivered and that it remained unrecorded for nine years because the husband had not until such time completed his payments for the property according to an agreement for withholding the deed from record until full payment was made.—Albert v. Patterson, 188 Mich. 378.

¶ 248. In a case involving the question whether a deed from complainant's husband to his mother, formerly tenants in common of the land, each owning an undivided one-half, was delivered before or after his marriage, it was held upon a review of the testimony that such delivery was made after the death of the husband, and that complainant is entitled to dower in the land; where it appeared that a few days after the death of the husband, defendant placed upon a record a quitclaim deed to her of decedent's one-half interest to the land in question, the consideration of which was expressed as one dollar, and love and affection, that the deed and acknowledgment bore a date two months earlier than date of the marriage of complainant and decedent, complainant claiming that such deed was kept secret from her, and was in fraud of her dower rights; that complainant and her husband did not live much together after their marriage; and where such deed, although demanded by counsel for complainant, was not produced nor its absence explained, and defendant, and her daughter, who took the deed from the register's office, though present in court, did not testify.—Lake v. Nolan, 81 Mich. 112.

¶ 249. Delivery of a deed to a father by his daughter may be found on evidence that the property was originally bought in the name of her mother for $2,400, that when $1,900 was paid the mother took a deed, that the first payment of $400 came from the mother, that on the mother's death the daughter and a son deeded the property to the father, who with the daughter and her mother had earned the balance of the money in business, that pending remarriage he redeeded to the daughter to secure her a $500 interest but his second wife had no knowledge of the deed, and when informed of it was told that the daughter would reconvey, and that the daughter did make such a deed and took it back into her possession, though she testified that it was only done to facilitate a sale by her father.—Hall v. Dobbin, 119 Mich. 106.

¶ 250. On a bill by a father against his daughter to remove a cloud from the title to a house and lot occupied by him as a homestead where the issue was whether a deed issued by the complainant to the defendant had ever been delivered with intent to pass title held, that although the testimony was contradictory, in view of the fact that the deed had been recorded, and complainant had changed the insurance policies in favor of the defendant, and that the deed had been made in contemplation of complainant's approaching remarriage, there had been a sufficient delivery with intent to pass title. —Gilman v. Gilman, 143 Mich. 287.

¶ 251. In a bill by a surviving parent to set aside deeds to sons which had been taken after the death of the mother from the receptacle in the father's room where they had been kept, and recorded by the sons, a statement which had been signed by the parents to the effect that the deeds which they had "made over to" the sons, were not to be recorded until after the death of both parents, and that after paying a stated sum to a daughter, the deeds were to be the sons', did not indicate an understanding that the deeds had been delivered, but rather the contrary. —Roup v. Roup, 136 Mich. 385.

¶ 252. In an action to set aside assignments of certain mortgages made by deceased, a finding that the assignments had been delivered to defendant before the assignor's death, is sustained by the evidence where the sister and mother of the assignee testified that they saw the papers in her custody prior to that time, and of two other persons that the assignor had stated that he had given assignee property to the amount of the mortgages assigned, and that he had assigned the mortgages to her, and it was conclusively shown that the assignor intended the assignee to have these mortgages after his death.—Peirson v. McNeil, 137 Mich. 158.

¶ 253. That certain deeds were not delivered to grantee and were never intended to be delivered by the grantor is shown in an action to quiet title, where it appears that the grantee lived with his father and mother, the grantor, that his mother never had any conversation with grantee about the deeds, that he never paid anything for such conveyances, and did not know of their existence until after the death of his mother; that prior to her death the deeds were in her custody or that of a third person; that they were subsequently placed of record by a third person; that the mother made her will devising the property described in such deeds, to her husband, and that she treated such deeds as of no account.—Lyon v. Lyon, 76 Mich. 610.

¶ 254. An old man desiring to distribute his property and avoid administration had instruments of disposal drawn, including the deeds in question, but left open the disposal of his personalty. Two children took their deeds and the ones in question were put in an envelope and left on the table. Grantor then requested his son, the grantee, to place them with grantor's papers. Ten days later this son took them from their place and into his custody, there being evidence that at this time there was dissatisfaction with the division made. There was evidence that shortly before death of grantor, 15 days later than this, he sent for the deeds but they were not where they had been put. They were taken from the grantee's bureau by another son afterwards on the claim that they were never delivered. Ten witnesses, four disinterested, testified to admissions by grantee that there was no delivery. Held sufficient to show that there was none.—McGee v. McGee, 105 Mich. 602.

¶ 255. That there was a legal delivery of a deed is to be inferred, where, it appears that such deed, being in form a present grant, was in fact in the grantor's presence manually delivered to the grantee, and was by him formally accepted and retained, and that nothing was said or done at that time which in any way tended to qualify the legal effect of the acts and conduct of the parties. —Wilbur v. Grover, 140 Mich. 187.

¶ 256. The delivery of a deed is established by evidence that the grantor father handed it to the grantee sister who took it and handed it to her brother who kept it for her.—Fischer v. Union Trust Co., 138 Mich. 612.

§ 52. ——To show delivery through intermediary.

Delivery through depositary on death of grantor or maker, see ante § 35.
Delivery through third persons, see ante § 35.

¶ 257. Where the evidence pertaining to the delivery of a deed by a grantor to a third person with definite instructions for its delivery to a grantee after the grantor's death, rests in parol, the evidence must be clear, convincing and unequivocal in order to defeat the rights of the grantor's intervening creditors.—Brown v. Kelser, 182 Mich. 432. (Ostrander, Brooke, Kuhn and Bird, JJ., dissenting.)

¶ 258. On a bill to quiet title to a farm and to restore a deed evidence held sufficient to sustain a finding that a deed was delivered to a conveyancer to be delivered to the grantee upon the grantor's death.—Peterson v. Bisbee, 191 Mich. 439.

¶ 259. On a bill by heirs at law of a deceased person to set aside a deed by deceased to defendant, her brother, evidence held sufficient to show an unconditional delivery of the deed and certificates of deposit to the scrivener who prepared the deed, to take effect upon the death of deceased.—Luce v. Luce, 197 Mich. 465.

¶ 260. In an action for the partition of lands which was occupied by two sisters, each of whom owned one-half thereof but divided the aggregate income during their common lifetime, the sister dying first leaving a life estate in her property to the surviving sister, and the latter occupying both tracts until her death, evidence held insufficient to establish that a deed executed by the sister who died last in favor of the other and intrusted to a third person was ever delivered to the grantee.—Shumway v. Mason, 189 Mich. 623.

¶ 261. Evidence held sufficient to show that a representative of the owner of the land, who claimed an interest in his own behalf in the property for advances, would not have delivered a quitclaim deed if he had known that it was intended as a present conveyance of the land.—Conlon v. Irvine, 194 Mich. 165.

§ 53. ——To show intentional surrender of possession and control.

Yielding up custody and possession as requisite of delivery, see ante § 30.

¶ 262. Sufficient delivery is shown where a grantor has executed a deed for a right of way and delivered it to the grantee without any qualification or any intention to withdraw it and it is subsequently signed by other grantors and possession taken by the grantee.—Thomson v. Flint & P. M. R. Co., 131 Mich. 95.

¶ 263. Evidence of possession of a deed several years later by the attorney for the grantee's assigns and proof of the signature of the grantor and of the witness is sufficient to show delivery of the deed.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 264. The evidence was sufficient to show a delivery of a deed where the testimony, though conflicting, was to the effect that the grantee had possession of the deed holding it as security for his liability as indorser of the grantor's obligations and that he recorded it after a delay of thirteen months following his enforced payment of the debts of the grantor.—Jordan v. De Golia, 91 Mich. 370.

¶ 265. A bill filed by a daughter against her mother to obtain the benefit of a deed from the latter was dismissed, and on appeal the dismissal was affirmed, but without costs of the supreme court against either party, where, though the proofs were strong, they did not sufficiently preponderate for complainant to show that the mother's deed to the daughter had ever been fully delivered so as to place the property beyond the mother's control.—Devaney v. Koyne, 54 Mich. 116.

¶ 266. A grantor who had executed to his son a deed of land which the latter occupied promised to record and send it to him, but kept it in his possession unrecorded till his own death, nearly four years later. The evidence was conflicting as to whether he really meant to record it or not. Held, by a majority of the court, that it fell short of showing a delivery.—Burnett v. Burnett, 40 Mich. 361.

¶ 267. Testimony of a son who claims a delivery of certain deeds to him by his father, in which he states that his father directed him to take care of a box containing the deeds in question together with other papers, is to be preferred to confused testimony of his wife, who stated on cross-examination that the deceased father told the son to take the box home and that the papers in it were his; and such preferred testimony fails to show a present delivery of the deeds to the son.—Gleason v. Stonehouse, 149 Mich. 611.

¶ 268. On an issue as to whether a deed was delivered absolutely or was subject to recall, evidence that when the deed was executed before the notary, it was left with him,

and that he afterwards recorded it, together with his testimony that it was delivered absolutely without any right of recall, was sufficient to sustain a finding of an absolute delivery against testimony of two other witnesses, one being interested, that the grantor delivered the deed to the notary with instructions to take care of it for him.—Young v. Young, 157 Mich. 80.

¶ 269. In a suit by the heir to set aside a deed, evidence that the grantor and the grantees signed and acknowledged the deed in a notary's office and at the same time executed a lease for life to the grantor, testimony by one witness that the grantor never delivered the deed and by another that after delivery the grantor requested possession, and evidence that the lease for life was recorded only as a sort of protective measure after the grantor learned that the deed was recorded is held to support a decree for the complainant.—Merchant v. Guilds, 129 Mich. 168.

¶ 270. Evidence was sufficient to establish a delivery of a quitclaim deed where complainant's testimony was that the deed was executed by defendants and sent to complainant grantee with an indorsement of recordation on it and shortly afterwards at the request of the defendants the complainant grantee returned the deed to the defendant grantors for safe keeping; and there was no direct testimony contradicting that of complainant.—Nolan v. Garrison, 151 Mich. 138.

¶ 271. Delivery of deeds from parents to their sons was not established, where after the execution of the deeds the mother stated in the presence and without dissent on the part of the father "Here boys, are your deeds"; but where the deeds were put in a receptacle in the father's room and remained there until the mother's death when they disappeared and without the knowledge of the father were recorded; and where the parents lived on and retained complete control of the property and made improvements and executed a mortgage on the land and where the father claimed that the sons were not to have had the deeds, if at all, until after the death of both himself and his wife.—Roup v. Roup, 136 Mich. 385.

¶ 272. The testimony of the grantor of an instrument in form a warranty deed, but in character a will, that she told the person, to whom she had intrusted the instrument as custodian, not to put the same on record, will be taken as true, even though such testimony is directly contradicted by such custodian and his wife, where, the record shows that there was some feeling between these parties and such grantor, and their inclination on cross-examination to evade answering material questions upon this matter, and that they had made statements on another occasion in conflict with their testimony, and where such instruction of grantor is in accordance with the terms on which she first intrusted such instrument with a custodian, as established by the testimony of all the witnesses.—Leonard v. Leonard, 145 Mich. 563.

§ 54. ——Delivery from one spouse to other.

Validity and sufficiency of delivery to one spouse for other, see ante § 36.

¶ 273. Evidence consisting of inferences drawn from various conveyances and admissions, held, insufficient, after a great lapse of time, to show a delivery of a conveyance by a husband to his wife.—Draper v. Brown, 153 Mich. 120.

¶ 274. The delivery of a deed by a husband to his wife is not conclusively shown by the fact that the grantor obtained a reconveyance by quitclaim deed from the wife's heir.—Draper v. Brown, 153 Mich. 120.

¶ 275. Under Comp. Laws 1897, §§ 8933, 8934, where a prospective husband and wife enter into an ante-nuptial agreement by which she is to give up all right, title and interest to his property in return for a note and mortgage for $2,000, and this agreement is drawn before marriage and retained by the attorney at their request until the marriage is executed and then handed over to the parties, there is sufficient to show delivery of the agreement "before marriage."—Koch v. Koch, 126 Mich. 187.

¶ 276. Testimony by a conveyancer that a husband and wife came to his office and stated that they wanted deeds drawn so that the survivor should get the property, that he drew deeds from each to the other and they took them away, does not of necessity show delivery at that time.—Gardiner v. Gardiner, 134 Mich. 90.

§ 55. ——Recitals as evidence of delivery.

¶ 277. A recital in a deed that it was signed, sealed and delivered in the presence of named witnesses, was some evidence of the delivery of the deed.—Dennis v. Dennis, 119 Mich. 380.

¶ 278. The statement "signed, sealed and delivered in the presence of" above the signatures of the witnesses to a deed does not necessarily imply an actual delivery.—Gardiner v. Gardiner, 134 Mich. 90.

§ 56. Court and jury questions and instructions.

Jury questions and instructions as to execution, see ante § 20.

¶ 279. Where the person claiming under a deed which remained under the control of the grantor, conditioned that delivery should be withheld during the latter's lifetime, fails to establish delivery by competent evidence,

a verdict should be directed against him.—Broffee v. Le Fils, 183 Mich. 100.

¶ 280. Upon testimony admitted by plaintiffs to be true that subscription contracts for the building of a creamery were not to be binding until delivered over by a committee, which was to hold them until an investigation was made and the price ascertained to be as low as such a creamery could be purchased for, and that the project was dropped after an investigation and adverse conclusion by the committee, it was proper to direct a verdict for the subscriber for want of delivery, though the promisee had possession of the paper by some means not appearing.—Davis v. Kneale, 103 Mich. 323.

¶ 281. In an action of ejectment where defendant claimed under deed from deceased parent an instruction that burden was on plaintiff to show by preponderance of evidence that the deed from the parent to defendant had not been delivered, held erroneous.—Barras v. Barras, 192 Mich. 584.

¶ 282. Where the execution of a deed was testified to by the grantor and by the officer before whom it was acknowledged, a charge that there was no evidence of a conveyance from the alleged grantor to the grantee was properly refused.—Goodell v. Labadie, 19 Mich. 88.

¶ 283. Where a contract in duplicate was left by the parties with a third person, and the evidence as to the arrangement for its subsequent delivery, and the terms upon which it was to become operative, was conflicting, it was held that the question of the terms and conditions upon which the contract was to become operative was one of fact for the jury, depending upon the intention of the parties to be gathered from the whole transaction; and that the court was right in refusing to charge that delivery in a particular mode was essential.—Jaquith v. Hudson, 5 Mich. 123.

¶ 284. The question of delivery of a deed should not be submitted as a question of fact to the jury, although not witnessed or acknowledged, where the grantor executed the deed and delivered same to the grantee before the former's death, and it was in the possession of the grantee and in his safety deposit box at his bank at the time of the grantor's death.—Jennings v. Reeson, 200 Mich. 559.

EXECUTIONS.

TREATS of final process against property for the enforcement of judgments by subjecting such property to satisfaction of the judgment, excluding process for possession of the property (see Assistance, Writ of; Ejectment, V; Replevin, IV) in actions for possession or decrees carrying the right to possession, and capias ad satisfaciendum to coerce the person (see Civil Arrest and Bail). The original and mesne process of Attachment and Garnishment is treated in those topics.

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I. NATURE AND FUNCTIONS.

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Procedure on execution as improper matter in bill of exceptions, see Appeal § 102.
Reviewableness of sheriff's proceedings with the judgment, see Appeal ¶ 1295.
Occasion for property executions or executions against the person, see Jud. Act, chap. XXIII, §§ 3, 4; Comp. L. 1915, §§ 12818, 12819, and see statute references in topic Civil Arrest in this digest.
Other statutory modes of enforcing judgments and decrees than execution, see Jud. Act, chap. XXIV; Comp. L. 1915, § 12966 et seq.

¶ 1. In Comp. L. 1857, § 5300, How. St., § 8644, providing that "execution may issue on any judgment that may be recovered," etc., the word execution must be understood to refer to the writ by which damages or costs, or both, are collected.—People ex rel. Williams v. Cicott, 15 Mich. 326.

II. RIGHT AND PROPRIETY OF WRIT; ISSUANCE, RECALL AND STAY OF EXECUTION.

§ 2. In general; character of provisions of the judgment or decree.

On judgments before justices of the peace, see Justices of the Peace, IV, H.
Execution procedure peculiar to attachment and garnishment, see Attachment, XII; Garnishment, VI.
Execution in action against estate, see Estates of Decedents § 212.
Issuance of execution on judgment for value of premises abandoned by plaintiff to defendant in ejectment, see Ejectment ¶ 300.
Execution and levy to enforce costs, see Costs § 147.
Executions to enforce alimony decrees, see Divorce §§ 186, 187.
Restrictions on right to execution as law impairing contracts, see Constitutional Law § 181.
Judgment debt as basis for fraudulent debtor proceedings, see Civil Arrest, II.
[Note. There are a great many provisions of statute enacting when and by or for whom, or on what judgments execution may issue. No attempt is made to refer to all of these statutes because they pertain to other subjects rather than to the general topic Executions. As to them consult the various specific topics besides the references which follow.]
Statutory occasion for execution, see Jud. Act, chap. XXIII, § 1; Comp. L. 1915, § 12816.
Provision for use of executions in chancery to enforce its decrees, see Jud. Act, chap. XXIII, § 150; Comp. L. 1915, § 12965.
Executions in attachment cases, see Jud. Act, chap. XXVI, § 25 et seq.; Comp. L. 1915, § 13052 et seq.
Execution in garnishment cases, see Jud. Act, chap. XXVIII, §§ 20, 22, 23, 34-36; Comp. L. 1915, §§ 13141, 13143, 13144, 13155-13157.
Execution on judgment entered on award in arbitration, see Jud. Act, chap. XLV, § 16; Comp. L. 1915, § 13661.
Execution in ejectment for costs or for value of land or improvements as alternative relief, see Jud. Act, chap. XXIX, §§ 28, 46; Comp. L. 1915, §§ 13195, 13213.
Execution in quo warranto cases, see Jud. Act, chap. XXXVIII, §§ 11, 22; Comp. L. 1915, §§ 13534, 13545.
Executions in judgments on forfeited recognizances, see Jud. Act, chap. XXXV, §§ 31, 44; Comp. L. 1915, §§ 13423, 13436.
Right to execution for costs, see Costs § 147; and see specific topics such as Ejectment; Forcible Entry; Replevin.
Execution from probate court to adjust contribution, see Jud. Act, chap. LII, § 29; Comp. L. 1915, § 13801.

¶ 2. Where the original decree rendered in a cause authorized the issue of execution, express authority was unnecessary in an amended decree in the same cause, the former being, of necessity, part of the latter.—Reynolds v. Reynolds, 115 Mich. 378.

¶ 3. The fact that a decree in chancery fails to contain an order for an execution does not determine the complainant's rights in that respect; for if by law he is entitled to an execution on such a decree, application for a modification of the decree may be made.—Mast v. Washtenaw Circuit Judge, 154 Mich. 485.

§ 3. Stage or condition of the judgment.

Pending writ or error or appeal, see post § 4.
Stay or supersedeas of judgment, see post § 5.
Bar of judgment by time, see post § 6.
Stay to move for new trial or to settle bill, see post § 11.
Order for execution before enrollment but issuance thereafter, see post ¶ 17.
Taking out execution after death and before revivor, see Abatement ¶ 88.

¶ 4. Under 1 Comp. Laws 1897, § 468, execution cannot issue prior to the enrollment of the decree on which it is based, although an application for execution may be filed before the decree is enrolled.—Dewey v. Dewey, 151 Mich. 586.

¶ 5. An execution may issue at once upon a judgment rendered near the close of the term, unless a motion for a new trial or in arrest of judgment is made.—People ex rel. Gibson v. Bay County Circuit Court Clerk, 14 Mich. 169.

¶ 6. Where the plaintiff in ejectment, after verdict, elects, under Comp. L. 1897, § 10097, How. St., 2nd Ed., § 13197, to

abandon the premises to the defendant at the value of an undivided interest fixed by the jury, and judgment is entered for such value, an execution is issuable immediately upon entry of the judgment, notwithstanding the provisions of section 10981 (How. St., 2nd Ed., § 10181), providing for a new trial within three years after judgment, on application therefor.—Rich v. Victoria Copper Mining Co., 163 Fed. 207.

§ 4. Pending writ of error or appeal.

Remand with directions as to execution, see Appeal § 516.

¶ 7. Mere intention to take out a writ of error does not preclude the prevailing party from taking out an execution.—Castor v. Allegan Circuit Judge, 54 Mich. 318.

¶ 8. A judgment creditor may proceed to collect his judgment notwithstanding the allowance of a writ of error, if his opponent has filed no bond to stay the proceedings; and under Comp. L. 1871, §§ 6189, 6190, if he does not exhaust this remedy he cannot take out a ca. sa. after three months from the return day of the execution.—Douglass v. Manistee Circuit Judge, 42 Mich. 495.

¶ 9. Upon the filing of a bond under How. St., § 7621c et seq., in stay of execution, and the issue of a writ of error, the circuit court loses jurisdiction, and has no power to make any further order in the cause until the same is properly transmitted to that court from the supreme court. In such case, therefore, an execution does not become "legally issuable" out of the circuit court, within the meaning of How. St., § 7029, which forbids a levy upon the property of a surety on an appeal bond unless the execution is issued within thirty days from the time when it shall be legally issuable, until the filing of a remittitur from the supreme court.—Wright v. King, 107 Mich. 660.

§ 5. Stay or supersedeas of judgment.

Effect of supersedeas or stay, see Stay, II.

¶ 10. An execution issued by the clerk and delivered to the attorney of the judgment creditor on the last of the twenty days during which proceedings were stayed, and by said attorney delivered to the sheriff on the following day, is a valid writ when delivered to the sheriff.—Peterson v. Wayne Circuit Judge, 108 Mich. 608.

§ 6. Bar of judgment or other laches or delay.

¶ 11. Execution cannot issue upon a judgment, action whereon is barred by the statute of limitations.—Jerome v. Williams, 13 Mich. 521; Parsons v. Wayne Circuit Judge, 37 Mich. 287.

¶ 12. Execution cannot issue nor can levy be made after action on the judgment is outlawed.—Ludeman v. Hirth, 96 Mich. 17.

¶ 13. An execution to enforce a deficiency after foreclosure of a land contract cannot issue after the statute of limitations has run against the original decree.—Albert v. Patterson, 167 Mich. 162.

¶ 14. An execution issued on June, 1904, on a decree filed in November, 1888, is invalid as barred by lapse of time and may properly be vacated on petition.—Quinnin v. Quinnin, 144 Mich. 232.

§ 7. Pendency of other process or action.

Outstanding capias as bar to property execution, see Civil Arrest § 38.

Outstanding body execution as bar to right, see Jud. Act, chap. XXIII, § 28 et seq.; Comp. L. 1915, § 12843 et seq.

§ 8. Attachment lien as basis for execution.

Waiver of irregularities in attachment proceedings in favor of execution purchaser, see post § 95.

Defective affidavit as invalidating execution sale, see also post ¶ 238.

Nature and duration of attachment lien, see Attachment, VIII.

Procedure for execution and sale on judgment in attachment, see Attachment § 138.

¶ 15. A lien having been acquired by attachment during the debtor's lifetime, the plaintiff may have execution to enforce it after the debtor's death, whether commissioners to audit claims against his estate have been appointed or not.—Smith v. Jones, 15 Mich. 281.

§ 9. Allowance and issuance.

Of alias writs, see post § 10.

Stage or condition of judgment for issuance, see ante §§ 3-6.

Delivery after time of stay of writ issued on last day of stay, see ante ¶ 10.

Indorsement of time of receipt by officer, see post § 13.

Single sale under simultaneous writs, see post § 66.

Two simultaneous writs to different counties, see also post ¶ 230.

Want of notice of application for execution on alimony decree as ground for setting aside sale, see post ¶ 267.

Revivor nunc pro tunc to cure prematurely issued writ, see post ¶ 300.

Transcript and docketing judgment of justice in circuit court records, see Justices of the Peace, IV, H.

Judgment and execution against sureties on appeal or for costs as part of judgment against principal, see Appeal § 573; Security for Costs, III.

Procedure for execution for deficiency on foreclosure, see Foreclosure, VI.

Matters reviewable on certiorari, see Certiorari § 11.

Authority of attorney after judgment, see Attorneys § 23.

Issuance of several writs at one time to different sheriffs, see Jud. Act, chap. XXIII, § 10; Comp. L. 1915, § 12825.

¶ 16. A circuit court commissioner may issue execution for collection of costs in proceedings against fraudulent debtors.—Watson v. Randall, 44 Mich. 514.

¶ 17. An execution is not void because the order allowing it to issue was made before the enrollment of the decree, if the execution itself did not issue until after enrollment.—Taylor v. Gladwin, 40 Mich. 232.

¶ 18. An execution is not issued until it is placed in the hands of an officer who can do some efficient act under it.—First Nat. Bank v. Dwight, 83 Mich. 189.

¶ 19. An execution cannot be considered as issued until it is placed in the hands of the sheriff, or other proper officer, for service.—Peterson v. Wayne Circuit Judge, 108 Mich. 608.

§ 10. Alias writs.

See also post ¶ 82.

New writ to cure defective sale, see post § 97.

Taking out new writ to complete sale after return day, see also post ¶ 160.

Objections to alias writs and revived writs, see post § 116.

Original writ as sufficient authority to sheriff to sell after term in completing levy during term, see Sheriffs, II.

Provisions for alias executions, see Jud. Act, chap. XXIII, § 1; Comp. L. 1915, § 12816.

¶ 20. Where an execution that has been levied on mortgaged chattels is returned unsatisfied with a statement showing that the levy had been unlawfully defeated by seizure of the chattels, a further execution may issue.—Nelson v. Ferris, 30 Mich. 497.

¶ 21. A second execution cannot issue where there is an existing levy undischarged.—Friyer v. McNaughton, 110 Mich. 22.

¶ 22. Execution was issued under a judgment in attachment proceedings against defendant, and the sheriff levied upon and sold thereunder a large amount of personal property and returned the fieri facias wholly satisfied. Subsequently defendant's general assignee obtained in the superior court a judgment in an action of trover against the sheriff for the value of the property levied upon and sold, and the judgment was affirmed by the supreme court on appeal. Plaintiff afterwards made a motion in the superior court for an order setting aside the return of the former execution and for an alias execution under Comp. Laws 1871, § 6118 (2 How. Stat., § 7703), for the full amount of judgment and costs. Held, that the return to the first execution should be set aside and that an alias execution should issue for the amount of judgment and costs, save those of the attachment and sale.—Omaha White Lead Co. v. Worcester, How. N. P. 274.

§ 11. Recall or stay of execution.

Stay on appeal or error, see Stay, II.

Stay of execution on ground of bankruptcy of debtor pending error to judgment, see Bankruptcy ¶ 46.

Jurisdiction to recall execution to permit of appeal or error, see Appeal § 138, ¶ 607.

¶ 23. Pub. Acts 1915, chap. XXII, § 23, providing that no stay of proceedings upon any verdict or judgment shall be granted for the purpose of moving for a new trial or settling a bill of exceptions for a longer period than 20 days unless a bond is executed to the adverse party, is unambiguous, and a party is not entitled to have an execution recalled where he does not file the bond within the required time.—Hatch v. Washtenaw Circuit Judge, 200 Mich. 1.

III. CONTENTS, FORM AND COMMAND OF WRIT.

§ 12. In general.

Issuance and delivery to officer, see ante § 9.

Time for and requisites of return, see post, IX.

Objections to writ, see post, X.

Effect of improper recital in general writ that it is on mechanic's lien judgment, see post ¶ 297.

Improper command to take fees as immaterial defect, see post ¶ 298.

Executions by justices, see Justices of the Peace, IV, H.

Sufficiency of writ as justification of levying officer, see Sheriffs, IV, A.

Combining body and property execution in one writ, see also Civil Arrest § 39.

Amount of net balance as amount commanded on execution after appeal with costs offsetting judgment, see Jud. Act, chap. XXIII, § 14; Comp. L. 1915, § 12829.

Provision for adding fees and expenses in amount to be made on the writ, see Jud. Act, chap. XXIII, § 123; Comp. L. 1915, § 12938.

Command of writ for levy and sale of real estate, see Jud. Act, chap. XXIII, § 12; Comp. L. 1915, § 12827.

Form to be used against partnership associations, see Jud. Act, chap. XXIII, § 13; Comp. L. 1915, § 12828.

Provision for inclusion of execution for costs or damages in writ of possession, see Jud. Act, chap. XXXIII, § 15; Comp. L. 1915, § 13372.

Executions in attachment cases, see Jud. Act, chap. XXVI, §§ 25-27; Comp. L. 1915, §§ 13052-13054.

Money executions in replevin actions, see Jud. Act, chap. XXVII, § 30; Comp. L. 1915, § 13109.

Executions in actions for recovery of penalties and fines, see Jud. Act, chap. XXXV, §§ 4, 41-43; Comp. L. 1915, §§ 13396, 13433-13435.

¶ 24. Want of seal does not avoid an execution. It may be supplied on motion to amend. It is not, therefore, a valid objection to a certified transcript of the judgment and the proceedings thereon, that it does not show that an execution issued upon the judgment was under seal.—Arnold v. Nye, 23 Mich. 286.

¶ 25. An execution is not made void by the accidental omission of the plaintiff's name if it appears in the indorsement, which for purposes of identification forms part of the process.—McGuire v. Galligan, 53 Mich. 453.

¶ 26. The fees for an execution are now included in the taxed costs (Comp. L. 1857, § 3790; How. St., § 6951), but an execution commanding the officer to collect twenty-five cents for the execution, in addition to the costs as taxed, does not avoid the writ, but is mere surplusage.—Hollister v. Giddings, 24 Mich. 501.

§ 13, Indorsements on writ.

Indorsing the levy on the writ, see post § 42.
Indorsement aiding omission of name from writ, see also ante ¶ 25.
Indorsement amounting to abandonment of levy, see post ¶ 154.
Right to rebut indorsement of directions by plaintiff for return, see post ¶ 291.
Indorsement of time of receipt, see Jud. Act, chap. XXIII, § 5; Comp. L. 1915, § 12820.
Indorsement of names of joint debtors not served, see Jud. Act, chap. XXIII, § 19; Comp. L. 1915, § 12834.
Indorsement of description of mortgaged premises on writ issuing on judgment for mortgage debt, with direction not to levy thereon, see Jud. Act, chap. XXIII, § 125; Comp. L. 1915, § 12940.

¶ 27. The failure of the attorney for an attaching creditor, in a case where defendant was not served and did not appear, to indorse on the execution issued in the cause a description of the property attached, with a direction to the officer as required by How. St., §§ 8008, 8009, cannot be taken advantage of on writ of error.—Hitchcock v. Hahn, 60 Mich. 459.

¶ 28. The court may permit the indorsement by the sheriff of the date of its receipt on an execution after the return thereof, when inadvertently admitted.—Forsythe v. Washtenaw Circuit Judge, 180 Mich. 633.

¶ 29. Where a sheriff fails to indorse on an execution the date he received same, as required by 3 Comp. Laws 1897, § 10309, the defect is not fatal where he testifies orally that he received the writ the same day on which he filed a notice of the levy on the land.—Shepard v. Schrutt, 163 Mich. 485.

IV. PROPERTY SUBJECT TO EXECUTION.

§ 14. In general; situs or ownership.

Estoppel to question ownership superior to debtor, see post § 121.
Title acquired by sale, see post § 69.
Fraudulently transferred lands, see post § 25; and see Fraudulent Conveyances, V, A.
Judgment against person having special or representative ownership, right to have execution, see ante § 2.
Leviability as depending on real or chattel nature of the property and particular leviable interests, see post §§ 15-28.
Ownership of buyer or seller and bona fide claimants under them, see Sales, XI.
Property subject to conditional sale reserving title, see Sales, XII.
Chattel mortgaged property, see Chattel Mortgages.
On writ from justice, see Justices of the Peace, IV, H.
Property subject to attachment, see Attachment, III.
Property subject to creditors' suits or bills in aid, see Creditors' Suits §§ 5-7.
Property transferred in hindrance or fraud of creditors, see Fraudulent Conveyances.
Disability of equity to subject exempt cemetery lands to judgment, see Cemeteries ¶ 4.
Interest of execution debtor's ancestor in land contract, see also Descent ¶ 11.
Sale of corporate franchises on execution against corporation, see Corporations §§ 198, 199.
Right to exemption in general, see Exemptions, I; Homesteads.
Property exempt, amount and items, see Exemptions, II; Homesteads.
Nonexemption from levy for purchase price, see Exemptions.
Validity of levy on property not of exempt class but like it in kind where sold by debtor after levy, see Exemptions ¶ 118.
Nature of interests and ownerships in general, see specific topics treating of the various estates and interests, e. g., Chattel Mortgages; Mortgages; Trusts; Pledges; Life Estates; Tenants in Common; Husband and Wife, II; etc.
Statute of exemptions, see Jud. Act, chap. XXIII, § 43 et seq.; Comp. L. 1915, § 12858 et seq.
Provisions as to homesteads, see Jud. Act, chap. XXIII, § 73 et seq.; Comp. L. 1915, § 12888 et seq.

¶ 30. The right of seizure on execution is not confined to property within the state at the time of suit or of judgment.—Ralston v. Chapin, 49 Mich. 274.

¶ 31. Where one who buys from an attachment debtor after the attachment is sued out, but before it is actually levied, promises that he will pay the attaching creditor's claim, the promise does not render the property liable to execution even if it places the purchaser under a personal obligation to the

debtor; the creditor is a stranger to it and cannot take the property.—Hunt v. Strew, 39 Mich. 368.

§ 15. Personal chattels and properties in general.

What is personal and what real, see post § 37.
Interests existing under mortgage, pledge or sale, see post §§ 16, 17.
Growing crops, see post § 18.
Choses in action, bills, notes, and orders for payment, see post § 19.
Corporate stocks and partnership interests, see post § 20.
Mode of sale of personalty, see post § 61.
Assets of estate as property subject to execution, see also Estates of Decedents § 212, ¶¶ 663, 664.
Leviable chattels generally, common-law rules, see Jud. Act, chap. XXIII, § 42; Comp. L. 1915, § 12857.
Abstract books and records, leviable by statute, see Jud. Act, chap. XXIII, § 37; Comp. L. 1915, § 12852.
Coin, currency and evidences of debt as leviable property, see Jud. Act, chap. XXIII, §§ 38, 39; Comp. L. 1915, §§ 12853, 12854.

¶ 32. Unpublished manuscripts—as here, a set of books of abstracts of title—are not subject to levy.—Dart v. Woodhouse, 40 Mich. 399.

§ 16. ——Mortgagor's or mortgagee's or pledge interests in chattels.

Under conditional sales, see post § 17.
Mode of sale, see post § 65.
Rights of possession under levy and custody and keeping, see post § 51.
Levy and sale of property subject to pledge or mortgage, see Jud. Act, chap. XXIII, § 40; Comp. L. 1915, § 12855.

¶ 33. Prior to the statute of 1861 (see How. St., § 7682) mortgaged goods and chattels were not subject to seizure and sale on execution against the mortgagor, except during the time he was entitled to retain the property by special agreement with the mortgagee.—Tannahill v. Tuttle, 3 Mich. 104; Eggleston v. Mundy, 4 Mich. 295; Bacon v. Kimmel, 14 Mich. 201; Haynes v. Leppig, 40 Mich. 602.

¶ 34. Under statute execution may be levied upon the mortgagor's interest in mortgaged chattels at any time before actual foreclosure.—Cary v. Hewitt, 26 Mich. 228; Macomber v. Saxton, 28 Mich. 516; Nelson v. Ferris, 30 Mich. 497; Haynes v. Leppig, 40 Mich. 602; Smith v. Menominee Circuit Judge, 53 Mich. 560; Daggett v. McClintock, 56 Mich. 51.

¶ 35. Where a vendee claims under a bill of sale given as security, the sheriff under How. St., § 7682, has a right to levy upon the goods at the suit of the vendor's creditors subject to the vendee's mortgage interest.—Mueller v. Provo, 80 Mich. 475.

§ 17. ——Buyer's or seller's rights, goods sold reserving title.

¶ 36. A contract purchaser can waive his claim to a specific lot of merchandise by consenting that it be sold to some other person, or pledged or mortgaged to a creditor as the vendor's property, to revert to the vendor; and if he does so, his ownership ceases, and the merchandise must be regarded as the property of the vendor, and liable to execution against him, subject to the rights of the later purchaser or pledgee.—Anderson v. Brenneman, 44 Mich. 198.

¶ 37. Goods bought by A. with funds furnished him by B. for the purpose of setting him up in business do not belong to B., and are not subject to execution in favor of B.'s creditors.—Kintner v. Pickard, 67 Mich. 125.

¶ 38. Property sold on condition is not subject to execution by vendee's creditors when title remains in vendor.—Dewes Brewery Co. v. Merritt, 82 Mich. 198.

§ 18. Growing crops.

Crops as personalty for purpose of levy, see post § 37.
Necessity of sale in view of property, see post § 61.

¶ 39. Comp. L. 1871, § 4667; How. St., § 6147, forbids selling the equity of redemption when execution is levied on premises mortgaged for the debt; but it does not prevent a sale of a growing crop under such execution.—Preston v. Ryan, 45 Mich. 174.

§ 19. Choses in action, notes, bills, and orders for payment.

Corporate stocks and shares and partnership interests, see post § 20.

¶ 40. At common law a chose in action cannot be reached by or made subject to a levy of execution.—Feige v. Burt, 118 Mich. 243.

¶ 41. In the absence of express statutory authority choses in actions, bonds and promissory notes are not the subject of seizure and sale under execution.—Jensen v. Oceana Circuit Judge, 194 Mich. 405.

¶ 42. An order for the payment of money, or a promissory note, or any other similar chose in action, is not the subject of levy on execution.—People ex rel. Martin v. Wayne County Auditors, 5 Mich. 223.

¶ 43. A warrant drawn by a board of auditors upon the county treasurer for an account allowed by the board is not leviable.—People ex rel. Martin v. Wayne County Auditors, 5 Mich. 223.

§ 20. Corporate stocks and partnership interests.

Mode of levying, see post § 38.
Injunction against levy on share of partner, see also post ¶ 295.
Improper levy as conversion, see post § 122.
Executions and attachment against corporations, see Corporations, XX.
Execution and levy on stock as against holders, see Corporations §§ 287, 288.
What corporations are within statute making stocks subject to levy, see Corporations § 287.

¶ 44. Executions cannot be levied on shares of corporation stock if the debtor is not himself the legal possessor of the interest, or where he has only an equitable right or has regularly assigned his interest. —Van Norman v. Jackson Circuit Judge, 45 Mich. 204; Gypsum Plaster & Stucco Co. v. Kent Circuit Judge, 97 Mich. 631.

¶ 45. Stock issued by an association organized under How. St., ch. 188, for "yachting, hunting, fishing, boating, rowing, and other lawful sporting purposes," is not subject to levy and sale on execution under How. St., § 7697, authorizing levy upon a sale of shares of stock of a bank, insurance company, or any other joint-stock company; since it was not within the contemplation of such statute under which such association was organized, that it should carry on a business for profit, although allowed to hold a limited amount of property for the purpose for which it was organized.—Lyon v. Denison, 80 Mich. 371.

¶ 46. An execution upon a judgment against one partner cannot be validly levied upon the undivided half of such partner in a portion of the partnership property.—Hutchinson v. Dubois, 45 Mich. 143; Kunze v. Cox, 113 Mich. 546; Ernest v. Woodworth, 124 Mich. 1; Krupp v. Adams, 124 Mich. 215.

§ 21. Lands and interests in lands.

Crops growing on land, see ante § 18.
Cotenants' undivided interests, see post § 22.
Interest of holder of certificate of involuntary sale, see post § 23.
Interest in mortgaged lands and lands transferred for security, see post § 24.
Lands transferred in fraud of creditors and lands standing in others' names, see post § 25.
Trust estates and interests, see post § 27.
Property affected with a public interest, see post § 28.
Franchises and their incidents, see post § 26.
What is real and what personal, see also post § 37.
Interests in land regarded as real estates, see Real Property.
Lands exempted as homestead or part thereof, see Homesteads, III.
Provisions as to levy on leaseholds, see Jud. Act, chap. XXIII, §§ 141, 142; Comp. L. 1915, §§ 12956, 12957.

¶ 47. A debtor's title to lands which he has contracted to convey is subject to sale and execution against him; and the execution purchaser will take subject to the performance of the debtor's obligation to convey when the contract is complied with.—Doak v. Runyan, 33 Mich. 75.

¶ 48. Where a surrender of possession and of his contract is made in good faith by a vendee because of forfeiture for default in payment, a subsequent levy of execution on his interest in the land bought by him must fail.—Welsh v. Richards, 41 Mich. 593.

¶ 49. Where a judgment-debtor has sold land on a contract subsequent to taking out of execution, his legal title may nevertheless be reached by a sale of the land on the execution.—Rohrbacher v. Walsh, 170 Mich. 59.

¶ 50. Where a verbal agreement is entered into between heirs whereby one heir agrees to stay upon the premises to take care of same and also to take care of the mother and sisters during their lives, in consideration of the deeding of the interest of the other heir to such heir occupying the premises, the interest of the heir agreeing to make such conveyance is subject to levy by execution.—Schmidt v. Steinbach, 193 Mich. 640.

§ 22. ——Undivided and common interests.

See also ante ¶ 50.
Nonliability of wife's lands for husband's debts, see Husband and Wife, IV, D.

¶ 51. The individual interest of one of two joint tenants in land is subject to levy and sale upon execution against such tenant. —Midgley v. Walker, 101 Mich. 583.

¶ 52. Whether the interest of one tenant in common in a part only of the lands held in common can be sold on execution against him, quære.—Campau v. Godfrey, 18 Mich. 27.

¶ 53. Execution cannot be levied on a husband's undivided life interest in real estate which he occupied jointly with his wife, especially if it be their homestead.—Vinton v. Beamer, 55 Mich. 559.

¶ 54. The interest of a husband as tenant in common in land conveyed by him to himself and wife is subject to levy and sale upon execution under Comp. L. 1897, § 9167, How. St., 2nd ed., § 11321.—Michigan State Bank of Eaton Rapids v. Kern, 189 Mich. 467.

¶ 55. Where a husband purchased a part-paid certificate issued at state sale and assigned a half interest to his wife, and upon payment by the wife of the balance due, a patent issued to the husband and wife in entirety, the undivided half interest of the husband will be subject to execution upon a decree obtained against him enforc-

ing liability as a stockholder in a bank which became insolvent prior to the issuance of the patent; although it is claimed that when the assignment was made the husband owed no debts and that the patent accomplished only what was intended to be accomplished by the assignment.—Foster v. Whelpley, 123 Mich. 350.

§ 23. ——Interests represented by certificates of purchase.

Undivided interests in certificate, see ante ¶ 55.

Nature of interest of purchaser under certificate, see post § 69 et seq.; Public Lands; Taxes, XII, A.

¶ 56. Since Laws 1851, pp. 84, 85 (How. St., § 5269), the interest of any purchaser of primary school lands is liable to levy and sale under execution.—Kercheval v. Wood, 3 Mich. 509.

¶ 57. A levy of execution on certificates of sale of land for delinquent taxes is good.—Welch v. Rogers, How. N. P. 255.

§ 24. ——Lands mortgaged or transferred for security.

Rights acquired by the levy, see post § 49.

Statutory exemption of equity of redemption from levy for mortgage debt, leviability of crops, see ante ¶ 39.

Nonsalability of equity of redemption on judgment for mortgage debt, see Jud. Act, chap. XXIII, § 124; Comp. L. 1915, § 12939.

Right to redeem from execution sale or from mortgages as leviable real estate, see Jud. Act, chap. XXIII, § 121; Comp. L. 1915, § 12936.

¶ 58. An equity of redemption in mortgaged premises, being a legal estate, is subject to execution against the mortgagor.—Gorham v. Arnold, 22 Mich. 247.

¶ 59. The grantor of a deed absolute to land, given as a mortgage, has a legal title to such land which may be levied upon and sold under execution as against such grantor.—Flynn v. Holmes, 145 Mich. 606.

¶ 60. A judgment may be satisfied from property conveyed by a judgment debtor by an absolute deed intended as a mortgage, after the satisfaction of the amount thereby secured.—Fassbender v. Donohue, 184 Mich. 52.

§ 25. ——Fraudulent transfers and titles taken in another's name.

What transfers are deemed fraudulent as to creditors, see Fraudulent Conveyances, I.

Creditors entitled to treat transfer as fraudulent and levy on the land, see Fraudulent Conveyances, II.

Remedy of creditors to levy on land and sue to set aside transfer, see Fraudulent Conveyances, V, A.

¶ 61. Lands which a judgment debtor has purchased and caused to be conveyed by the vendor directly to a third person are not subject to execution.—Trask v. Green, 9 Mich. 358; Maynard v. Hoskins, 9 Mich. 485.

§ 26. Franchises and appurtenances.

Priority of levy on and mortgage of franchises, see post § 32.

Levy on corporate franchises, see also Corporations §§ 198, 199.

Leviability of franchises of toll taking corporations, see Jud. Act, chap. XXIII, § 65; Comp. L. 1915, § 12880.

¶ 62. At the common law the franchises of a corporation were not subject to seizure and sale upon execution, but could only be reached by proceedings in equity.—James v. Pontiac & G. Plank Road Co., 8 Mich. 91.

¶ 63. Levy cannot be made upon the track or roadbed of a railway, but, aside from the goods and chattels, must be upon the franchise of earning tolls, as provided by the corporation laws.—Hackley v. Mack, 60 Mich. 591.

§ 27. Trust property and interests in trusts.

¶ 64. Trust estates are not liable to levy and sale on execution.—Gorham v. Wing, 10 Mich. 486; Gorham v. Arnold, 22 Mich. 247.

¶ 65. A resulting trust in real estate existing as such prior to R. S. 1846 is not subject to attachment or execution.—Trask v. Green, 9 Mich. 358.

¶ 66. An execution cannot be levied on land to which the debtor has no right except as a trustee in good faith. So held where, without fraud, the debtor had sold his interest in his own contract to buy the land and had agreed to assign it when the purchase price was fully paid him, and had afterwards assigned his interest in this latter agreement to his wife for a bona fide previous indebtedness to her.—Loomis v. Smith, 37 Mich. 595.

¶ 67. The contingent right to a reconveyance is not a legal interest but a mere equity, and at common law it could not be levied upon. If subject at all to attachment and execution it could only be on compliance with Comp. L. 1871, § 4628, How. St., § 6108, which provides for supplementing levies by proceedings to determine the interest seized. Whether a bankruptcy proceeding would be sufficient to do this, quære.—Grover v. Fox, 36 Mich. 453.

¶ 68. While other creditors may have an interest in the surplus under a trust to sell lands for the benefit of specified creditors,

they cannot reach it by attachment levy since such levy would hinder the sale.—Geer v. Traders' Bank of Canada, 132 Mich. 215.

¶ 69. The estate of a cestui que trust is not subject to execution.—Feldman v. Preston, 194 Mich. 352.

¶ 70. Contrary to the rule applying to real estate, execution may be levied to reach personal property of the debtor where the title was taken in the name of another, and parol testimony is admissible on behalf of a defendant in replevin to show by whom the property was really purchased.—French v. Newberry, 124 Mich. 147.

§ 28. Property affected by public interest.

Impropriety of execution to enforce judgments against municipalities, see Counties § 56; Municipal Corporations XVI, A; Townships, VIII; Municipal Bonds, VI.

¶ 71. The interest of a corporation in an electric plant, erected for the use of a city under a contract which has been declared void in a suit by taxpayers of the city for an accounting as to the moneys received thereunder, is not exempt from sale on execution issued upon the decree obtained in such suit, on the ground that such plant is devoted to public use.—Campbell v. Western Electric Co., 113 Mich. 333, 337.

V. LIEN AND PRIORITIES; DIVERSE WRITS AND JUDGMENTS.

§ 29. In general.

Of attachment liens, see Attachment, VIII.
Justices' writs and levies, see Justices of the Peace, IV, H.
General law of liens, see Liens.
Lien of judgments, see Judgments, VIII; Creditors' Suits §§ 31, 32.
Effect on lien of dissolution of another's attachment, see Attachment ¶ 362.
Levy as commencement of lien, see Jud. Act, chap. XXIII, § 6; Comp. L. 1915, § 12821.

¶ 72. An execution levy relates back to the levy of an attachment so as to hold the interest then owned by the defendant.—Avery v. Stephens, 48 Mich. 246.

§ 30. Lien of levy on land.

Duration of lien, see post § 31.

¶ 73. By Act No. 227, Pub. Acts 1889 (3 Comp. Laws 1897, § 9224), the former rule was changed, so that now, upon the filing of notice of a levy with the register of deeds, such levy becomes a lien upon the property levied on, and the lien thus obtained is, from the filing of said notice, valid as against all grantees and mortgagees of whose claims the party interested has not actual or constructive notice.—First Nat. Bank of Durand v. Phillpotts, 155 Mich. 331.

§ 31. ——Duration of lien.

Effect of failure to give notice of levy on crop, see post ¶ 114.
Duration of lien of levy on real estate, see Jud. Act, chap. XXIII, § 84; Comp. L. 1915, § 12899.

¶ 74. A lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to sale, where fraudulent purpose on the execution creditor's part is not shown.—Ludeman v. Hirth, 96 Mich. 17.

¶ 75. Under Comp. L. 1897, § 9233, a levy by execution remains a lien on real estate for only five years, and a deed made by an execution debtor subsequent to a levy cannot be defeated by a sale made under a levy after the period of five years.—Bliss v. Slater, 144 Mich. 648.

¶ 76. Under Comp. Laws 1897, § 9751, How. 2nd ed., § 14158, providing that every action upon a judgment shall be brought within ten years after the entry thereof, and Comp. Laws 1897, § 10312, How. 2nd ed., § 13015, providing that an execution shall be binding upon the property levied upon from the time of levy, and Comp. Laws 1897, § 9224, How. 2nd ed., § 11386, relating to the filing of a notice of levy of execution in the office of the register of deeds and providing that such levy shall be a lien from the time of deposit of the levy, and Comp. Laws 1897, § 9233, How. 2nd ed., § 11387, providing that every levy by execution on real estate shall cease to be a lien at the end of five years from the time of making the levy unless the real estate is sooner sold thereon, a valid execution may be issued at any time during the lifetime of the judgment and it remains valid and enforceable for the five-year period, regardless of the expiration of the judgment.—Mosher v. Borden, 201 Mich. 106.

§ 32. Priorities between levy and transfers or mortgages.

Between diverse or successive levies, see post § 33.
Property or right taken by levy, see post § 49.
Conclusiveness of return as to facts controlling priority, see post § 111.
Priorities of mortgages and other incumbrances and transfers, see Mortgages, V: Notice and Record of Title.
Priority of levy on corporate property pending suit for receiver but before title vests in receiver, see Corporations § 241, ¶ 895.

¶ 77. A levy will prevail over subsequent transactions, but it cannot invalidate prior dispositions in favor of honest creditors.—People v. Bristol, 35 Mich. 28.

¶ 78. Where an instrument in the form of a deed and recorded as such, and not as a mortgage, was in reality given as security,

it is subordinate to an execution levy by a creditor of the vendor who did not have actual notice thereof.—Johnson v. Cook, 179 Mich. 117.

¶ 79. A levy of execution on the franchises and property of a street railway company was given priority to a mortgage dated a year and a half earlier and given to secure bonds which were only meant to be sold in the market, but which, without corporate authority or ratification, had been turned over to the mortgagee, who knew they had never been sold, as collateral security for the private debts of the company's treasurer, who had a controlling interest in its property. —McKee v. Grand Rapids & R. L. St. R. Co., 41 Mich. 274.

§ 33. ——Diverse, successive and conflicting levies and sales.

Relation of execution levy back to levy of attachment, see ante § 29.
Effect of junior levy subject to senior levy, see also post § 49, ¶ 136.
Sale in gross under several writs, see post § 66.
Relative rights of redemption, see post § 83.
Set-off of one writ against another, see post § 106.
Duty of prior attaching officer to expose property to officer desiring to levy junior execution thereon, see Sheriffs, II.
Levy and sale of property in custody of law as contempt, see Contempt § 5.
Priority between attachment levy and other levies, see Attachment § 98.
Priority in levy as determining priority of conflicting attachment judgments, see Attachment § 98.
Priorities among levies and liens on creditor's bill, see Creditors' Suits, §§ 31, 32.
Statutory provisions for priority among diverse writs, see Jud. Act, chap. XXIII, §§ 7-9; Comp. L. 1915, §§ 12822-12824.

¶ 80. The rule which protects property in the hands of the United States marshal from being seized on state process does not prevent the marshal from surrendering an illegal levy voluntarily; and where upon a levy by the sheriff it does not appear that the marshal notified him that he claimed the property officially, or objected on that account to giving it up, there is no clashing of process.—Weber v. Henry, 16 Mich. 399.

¶ 81. Under different execution sales A. and B. successively acquired claims upon the same land interest belonging to C. There was no redemption from A.'s sale within the statutory period, but the amount of A.'s bid, with interest, was deposited with the register of deeds, and he paid it to A., who indorsed upon his certificate of sale a receipt in full of the amount of the certificate, and five years later quitclaimed to C., to whom, as A.'s assignee, the sheriff executed a deed; but only a few weeks after the payment to A. a sheriff's deed was issued to B., whose assignees conveyed to D. C. ignored the sale to B., however, and made partition of the lands; E. was one of the partitioners, and F. his tenant. D. brought ejectment against them to recover his interest in the land which they occupy. Whether these proceedings under A.'s execution operated to defeat the force of the sale and deed under the later execution, so as to be a legitimate defense to the action of ejectment, quære; the court being equally divided.—Whiting v. Butler, 29 Mich. 122.

¶ 82. Where an execution sale and deed were void because made without leave of court after the appointment of a receiver, for defendant corporation, the return of the officer was equally void for want of sufficient authority to make it, and therefore a later levy did not have priority as a lien based on such return.—Campau v. Detroit Driving Club, 135 Mich. 575.

¶ 83. Land was levied upon and sold by a judgment creditor, and at the time one who was in possession of the premises held a deed from the debtor of all his interest in the land. Subsequently another execution was issued and levied. In the meantime the deed had been set aside as a fraudulent conveyance, and the first execution held to be of no force on account of notice of possession. Held, that the last execution is a lien upon the debtor's interest to the extent of the judgment against him, irrespective of the amounts bid at the sale on execution.—Barbo v. Jeru, 155 Mich. 353.

§ 34. ——Filing notice of levy or visible possession as notice of priority.

See also ante ¶¶ 73, 76.
Later lien let into priority by notice vitiating earlier levy, see ante ¶ 83.
Notice of levy on land as part of the levy, see post § 44.
Filing certificate of purchase, see post § 77.
Priorities under the Recording Acts and by equitable doctrine as to bona fide takers for value and without notice, see Notice and Record of Title.
Provisions for notice of levy on real estate and for protection of bona fide takers, see Jud. Act, chap. XXIII, § 83; Comp. L. 1915, § 12898.
Notice of levy on leasehold, and effect of filing same, see Jud. Act, chap. XXIII, § 142; Comp. L. 1915, § 12957.

¶ 84. To be notice to subsequent purchasers, notice of levy filed must be certain. —Davis Sewing Machine Co. v. Whitney, 61 Mich. 518.

¶ 85. Under How. St., § 6173, providing that no levy by execution on real estate shall be valid against bona fide conveyances made subsequent to such levy until notice thereof shall have been filed with the register of deeds, but that such levy shall, from the time

of filing said notice, be a lien upon the premises, which shall be valid against all prior grantees of whose claims the party interested shall not have actual or constructive notice, a lien thus obtained will not take priority over the rights of one in actual possession under an unrecorded contract of purchase from the execution debtor, since such possession is constructive notice of his rights; nor will the filing of such notice of levy operate as notice to the vendee so as to invalidate payments thereafter made by him. —Corey v. Smalley, 106 Mich. 257.

¶ 86. After A. had sold land to B. on contract, and assigned his interest under such contract to C., neither the contract nor the assignment being of record, an execution against A. was levied upon the premises, of which B.'s tenant was in possession, proper notice of the levy being filed with the register of deeds. B. afterwards assigned to complainant, who, in ignorance of the levy, paid the balance of the purchase price to C., took an assignment from him, and obtained a deed from A. Held, that a sale under the levy was properly enjoined, even though the assignment from A. to C. may have been made with fraudulent intent, because the possession was actual notice to the levying creditor.—Corey v. Smalley, 106 Mich. 257.

¶ 87. A judgment creditor levying an execution on land, is, under § 9224, Comp. Laws 1897, § 11386, How. St., 2nd ed., affected by actual or constructive notice of the previous conveyance by the judgment debtor, under an unrecorded deed, of the land levied upon. —Lachelt v. McInerney, 185 Mich. 413.

¶ 88. After the recording of notice of levy of an execution on land, as required by § 9224, Comp. Laws 1897, § 11386, How. St., 2nd ed., a judgment creditor is not affected by subsequently acquired constructive notice of an unrecorded conveyance of the land by the judgment debtor previous to the levy of the execution.—Lachelt v. McInerney, 185 Mich. 413.

¶ 89. By virtue of Comp. L. 1897, § 9224, a levy followed by execution sale gives the purchaser thereunder priority over the vendee under a deed not recorded until after the notice of the levy was filed.—First Nat. Bank of Cooperstown v. State Savings Bank of Ionia, 130 Mich. 332.

¶ 90. Under Comp. L. 1897, § 9224, governing notice of levy of execution and providing that from the filing of notice the lien shall "be valid against all prior grantees and mortgages (mortgagees) of whose claims the party interested shall not have actual or constructive notice," the purchaser at an execution sale takes priority over a bona fide grantee whose deed was not recorded until after notice of the levy was filed, though executed prior thereto, the owner of the execution having no notice.—Gardner v. Mason, 130 Mich. 436.

¶ 91. Under Pub. Acts of 1889, No. 227, How. 2nd ed., § 11386, a levy under execution is given the same priority as is accorded to a conveyance duly recorded.—Schmidt v. Steinbach, 193 Mich. 640.

¶ 92. Where a debtor, holding the legal title to property which his wife claimed to have paid for and allowed a conveyance to be made to the husband, deeds the property to his son and his son's wife for the purpose of a reconveyance by them to the mother, execution creditors of the husband who make and perfect levies upon the property before the latter deed is recorded and without knowledge of its existence have the rights of bona fide purchasers under Comp. Laws 1897, § 9224, How. 2nd ed., § 11386, and whatever rights the wife has are inferior to the rights of such creditors.—Atkinson v. Akin, 197 Mich. 289.

¶ 93. An unrecorded deed is good as against an execution levy in the absence of fraud.—Otis v. Sprague, 118 Mich. 61.

¶ 94. The rights of a judgment creditor whose notice is first recorded as required by § 9224, Comp. Laws 1897, § 11386, How. St., 2nd ed., are presumed superior to one holding under an unrecorded conveyance.— Lachelt v. McInerney, 185 Mich. 413.

¶ 95. A lien acquired by levy on land while it was in the name of one legally entitled thereto, but holding under a void parol trust, is not affected by the execution defendant's conveyance thereafter to the persons to whom he made the promise, though they were in possession under him by his consent.—Barnes v. Munro, 95 Mich. 612.

¶ 96. Comp. L. 1897, § 9224, providing that the lien of an execution levy shall after the filing of notice with the register of deeds, be valid as against all prior grantees of whose claims the party interested had neither actual nor constructive notice, did not apply where title to land was taken in the name of a debtor without authority from the real purchaser, and the recording of the deed to such purchaser was delayed until after the filing of said notice; as the execution creditor lost nothing in the circumstances and in addition such purchaser was entitled to the benefit of Comp. L. 1897, § 8837, providing that a trust shall result in favor of the person furnishing the consideration for a deed, where the alienee takes title to himself without the knowledge or consent of such person.—Uhl v. Welden, 122 Mich. 638.

VI. LEVY AND APPRAISAL, PROPERTY AFFECTED, AND CUSTODY, LOSS OR RELEASE OF SAME.

§ 35. Searching for and taking property.

Taking wrong property or property of stranger as tort, see post § 122.

Duty of sheriff to levy and sell, see Sheriffs, II, IV.
Right of sheriff to indemnity bond from execution creditor, see Sheriffs, IV, A.
Bills in aid of execution, see generally Creditors' Suits.
Criminal concealment to defeat levy, see Crimes § 88.

¶ 97. A sheriff serving an execution is not bound to search for personal property beyond his own bailiwick.—Atwood v. Bearss, 45 Mich. 469.

¶ 98. A levy effected by committing a trespass is bad.—Bailey v. Wright, 39 Mich. 96.

§ 36. Mode and sufficiency of the taking or levy.

Real or personal nature of property as test, what regarded as real, see post § 37.
On partner's or other undivided share, see post § 38.
Separation and selection of property, see post § 39.
Mode and procedure of levying on land, see post §§ 41-44.
Amount to be taken, see post § 40.
Keeping and custody, keepers, and delivery to receiptors, see post §§ 50-52.
Placing keeper in charge as keeping possession, see post ¶ 139.
Levy accomplished by trespass, see ante ¶ 98.
Making and sufficiency of return, see post, IX.
Completion by original officer after term expires, see Sheriffs, II.
Mode and sufficiency of attachment levy, see Attachment, VI, A, B.
Levy under writ from justice, see Justices of the Peace, IV, H.
Necessity of compliance with statute in levying on stocks, see Corporations § 287.
How levied against corporations, see Jud. Act, chap. XXIII, § 41; Comp. L. 1915, § 12856.
Statutory mode of levying on corporate shares, see Jud. Act, chap. XXIII, §§ 58-63; Comp. L. 1915, §§ 12873-12878.

¶ 99. A levy of execution must be so made as to identify or give means of identifying the property levied on so as to make it chargeable to the officer; and property not levied on cannot be afterwards claimed. There must be manual seizure, or such assertion of control as may be made effectual, if necessary, in order to bring and keep the property within the dominion of the law for sale on execution only. An intention to allow it to be disposed of by the execution debtor is not the intention required.—Quackenbush v. Henry, 42 Mich. 75.

¶ 100. Where mortgaged goods are levied on under an execution against the mortgagor, it is not illegal, when necessary, to take possession of distinct articles separately.—Harvey v. McAdams, 32 Mich. 472.

§ 37. ——As dependent on real or personal character of property.

Manner of selling chattel interests in land, see post § 63.

¶ 101. The estate of a tenant for years is not realty within the meaning of the statute relating to the levy and sale of lands on execution.—Buhl v. Kenyon, 11 Mich. 249.

¶ 102. If a right of possession is subject to seizure on execution it is as a chattel interest and not as real estate; and an execution levied on it as real estate will not bind it.—Grover v. Fox, 36 Mich. 453.

¶ 103. Growing crops, though part of the realty, are treated as personalty for the purposes of levy and sale on execution.—Preston v. Ryan, 45 Mich. 174.

§ 38. ——On partner's or other undivided interest in property.

Nonleviability of partner's share, see ante § 20.

¶ 104. A sheriff cannot levy on specific articles of partnership stock to satisfy an execution against only one of the partners. The levy, if it can be made at all, should be on the partner's interest in the whole stock.—Sirrine v. Briggs, 31 Mich. 443; Hutchinson v. Davis, 45 Mich. 143.

¶ 105. While an execution creditor of an individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners; and, therefore, a levy upon the interest of one partner in a specific pile of partnership lumber that does not include all the partnership property, is invalid.—Kunze v. Cox, 113 Mich. 546.

§ 39. ——Separation and selection of goods.

¶ 106. Where goods subject to execution are admixed with others which are not, the levying officer is bound to separate the former from the latter if possible.—McCausey v. Hoek, 159 Mich. 570.

§ 40. Amount to be taken.

¶ 107. In levying execution an officer has no right to seize and hold the whole of a debtor's property to satisfy a debt, which, even if all exemptions were allowed, would be more than secured by the remainder; and if he thereby preclude the debtor from engaging in his customary business, and even from keeping house, his action is oppressive and unjustifiable.—Handy v. Clippert, 50 Mich. 355.

§ 41. Procedure to levy on land.

Indorsing the levy on the writ, see post § 42.

Certifying the levy and description in certificate, see post § 43.
Notice of the levy, see post § 44.
Time for levy, see post §§ 45, 46.
Setting out homesteads, see post §§ 47, 48.
Completion by succeeding officer, see Sheriffs, II.

¶ 108. The method of making a levy on real estate, and the statutes referring to the subject, considered.—Campau v. Barnard, 25 Mich. 381.

¶ 109. A judgment creditor who levies, under How. St., § 6108, on lands conveyed by his debtor, must strictly follow the statute and must take steps to ascertain the interest retained by the debtor in the land.—Jenison v. Rankin, 57 Mich. 49.

§ 42. ——Indorsements on writ.

Effect of omission to indorse levy, see also post ¶ 299.
Addition of indorsements by amendment, see post § 113.

¶ 110. The question whether an officer has levied upon a complete title or only an incumbered interest is one of intent, as to which the officer need make no statement beyond the indorsement on his writ, which is the evidence of his final action, whatever his intent may have been.—Wallen v. Rossman, 45 Mich. 333.

§ 43. ——Certificates of levy and description of land.

Certificates of sale, see post § 76.

¶ 111. A certificate of levy on "lot 7 of the subdivision of lots 12, 13 and 14 of the Labrosse and Baker farms in Detroit" is not sufficient to charge a purchaser with notice that it is intended to cover "lot 7 of John Gibson's subdivision of lots 12, 13, 14 and 18 of the Labrosse and Baker farms, situated on the south side of Pine street, between Sixth and Seventh streets, according to the recorded plat of the same in the register's office of Wayne county." Suggestions given for description in levies.—Burrowes v. Gibson, 42 Mich. 121.

¶ 112. Where an execution levy described the land "as the undivided one-half of the following described land, to wit: the S.E. ¼ of the N.W. ¼ and the S.W. ¼ of the N.E. ¼," while the description in subsequent proceedings was "the undivided one-half of the" same description, the descriptions were identical and could not mislead.—Hoffman v. Buschman, 95 Mich. 538.

¶ 113. It seems that a levy on property misdescribed therein is no better than a conveyance or mortgage which misdescribes it.—Beyschlag v. Van Wagoner, 46 Mich. 91.

§ 44. Notice of levy on land or crop.

Omission of description as invalidating sale of omitted portions, see post ¶ 239.
Filing notice to give priority, see ante § 34.
Attachment of lien by levy and filing of notice, see ante § 30.
Notice of sale, see post §§ 56, 57.
Notice of levy on crops, provisions of statute, see Jud. Act, chap. XXIII, § 55; Comp. L. 1915, § 12870.

¶ 114. The provision of How. St., § 7685, that an officer levying upon a growing crop shall file a notice thereof in the office of the clerk of the township where such crop is at the time of the levy, and that such notice shall be constructive notice of the interest of plaintiff in execution, is for the benefit of third persons, and a failure to file such notice does not, as between the parties, limit the life of the execution to the return day thereof.—Friyer v. McNaughton, 110 Mich. 22.

§ 45. Time for levy.

See also post ¶ 161.
At what hours of the day, see post § 46.
Effect of delay to release rights, see also post ¶ 153.
Time for sale, see post §§ 59, 60.
Time to charge defendant when under arrest or at large on bail, see Jud. Act, chap. XXIII, § 23 et seq.; Comp. L. 1915, § 12838 et seq.

¶ 115. A levy of execution is not valid unless made before the writ is returnable.—Quackenbush v. Henry, 42 Mich. 75.

¶ 116. Levy of execution after return day is void.—Evans v. Calman, 92 Mich. 427.

§ 46. ——Hour of making.

¶ 117. A levy of executions at eight-thirty o'clock in the evening upon a stock of goods in a store adjoining a dwelling house is not invalid, the goods being subject to levy.—Vanosdall v. Hamilton, 118 Mich. 533.

¶ 118. A levy of execution upon a large quantity of goods in a store made at about eight-thirty o'clock in the evening is not improper, where the officer took possession of the stock until the next morning when he proposed to make his inventory and allow the owner to select exemptions.—Vanosdall v. Hamilton, 118 Mich. 533.

§ 47. Inventory, appraisal, and setting out of exemptions or homestead.

Appraisal as evidence, see post § 112.
Showing in return, see post § 110.
Presumptions as to regularity, see post § 94.
Inventory and appraisal provisions, see Jud. Act, chap. XXIII, § 46 et seq.; Comp. L. 1915, § 12861 et seq.

¶ 119. Where execution is levied upon a class of property that is exempt from execution to a specified amount or value the officer should make an inventory of the whole of such property belonging to the debtor with-

in his bailiwick, and cause the same to be appraised, and allow the debtor to make his exemption therefrom, or, if he neglects to do so, to make the selection for him.—Elliott v. Whitmore, 5 Mich. 532; Wyckoff v. Wyllis, 8 Mich. 48; Ostrander v. Packer, 35 Mich. 430; Sheldon v. Rounds, 40 Mich. 425; Vanderhorst v. Bacon, 38 Mich. 669; McCoy v. Brennan, 61 Mich. 362.

¶ 120. It is not necessary to the validity of execution proceedings in one county that the whole of the debtor's property of an exempted class, wherever else it lies, should be inventoried and appraised in order that the portion to be left to him out of the mass may be selected.—Alvord v. Lent, 23 Mich. 369.

¶ 121. The appraisal provided for by How. St., § 7687, is expressly limited to cases where a levy is made upon property of a class or species which is exempt from execution "to a specified amount or value."—Murphy v. Mulvena, 108 Mich. 347.

¶ 122. The appraisal of goods which an officer levying execution is required to make must be made where the goods are found; they cannot be removed for the purpose, when the appraisal can be made as well where they are.—Vanderhorst v. Bacon, 38 Mich. 669.

¶ 123. If the officer fails to make inventory and appraisal, and to give the debtor an opportunity for selection, the levy will be invalid to the amount of the statutory exemptions.—Town v. Elmore, 38 Mich. 305.

¶ 124. The debtor can have no advantage from the officer's failure to inventory and appraise the property, unless his status is such as to entitle him to an exemption, notwithstanding the property belongs to what is usually known as the exempt class.—Ferguson v. Washer, 49 Mich. 390.

¶ 125. It is the duty of an officer, who levies under an execution upon property which is exempt up to a certain value, to make an inventory, and allow the defendant in execution to select his exemptions; and, not having done so, he is liable in trover for the part that he sells.—Parker v. Canfield, 116 Mich. 94.

¶ 126. The "act to provide for the transfer of real estate on execution, and for other purposes," approved February 17, 1842 (S. L. 1842, p. 135), did not authorize an appraisal and set-off of mortgaged premises, in satisfaction of the mortgage, without previous proceedings to foreclose, either in equity or by advertisement.—Buck v. Sherman, 2 D. 176.

§ 48. ——Selection and qualifications of appraisers.

¶ 127. Appraisers should be disinterested; an attorney conducting attachment proceedings should not act as appraiser under an execution in force at the same time against the same defendant.—Bayne v. Patterson, 40 Mich. 658.

¶ 128. An appraisal of homestead on execution sale is not invalid though one of the appraisers was past 60 years old, and though Comp. L. 1897, § 10369, provides that they shall have the qualifications of jurors; since the exemption for age is one that only the juror can claim, and he was not disqualified.—Flynn v. Kalamazoo Circuit Judge, 136 Mich. 23.

§ 49. Property or right affected or acquired by levy.

Authority to change levy, see post § 53.
Property or right taken by the levy, see ante § 49.
Rights of sheriff under the levy, see Sheriffs, IV, G.
Effect of levy to satisfy judgment, see Judgments, XI.
Rights under levy on mortgaged chattels, see also Chattel Mortgages § 77.
Titles and rights taken by purchase, see post, VII, C.
Void and ineffective levy as defense to contempt to enforce payment of alimony decree, see Contempt § 22, ¶ 73.

¶ 129. Where one who has purchased chattels subject to a levy seizes them while under the levy, such seizure is a trespass.—Nelson v. Ferris, 30 Mich. 497.

¶ 130. Judgment creditors levying upon land that has been previously conveyed in good faith on both sides obtain by their levy no better title than is held by the debtor.—First Nat. Bank v. McAllister, 46 Mich. 397.

¶ 131. Levy of execution can never of itself place title in the judgment debtor by estoppel or otherwise.—Michigan Paneling Machine & Manufacturing Co. v. Parsell, 38 Mich. 475.

¶ 132. The mere levy of execution does not give an attachment creditor any rights analogous to those of a bona fide purchaser.—French v. De Bow, 38 Mich. 708.

¶ 133. A levy on the interest in lands of an owner who is under contract to convey upon future payment takes the legal title in full, and the beneficiary interest subject to the liability of conveying on complete performance of the contract.—Doak v. Runyan, 33 Mich. 75.

¶ 134. A levy on mortgaged property is only a levy on the right of redemption.—Bayne v. Patterson, 40 Mich. 658.

¶ 135. An execution levy does not prevent the enforcement of a prior mortgage, and it falls with the foreclosure thereof.—Connerton v. Millar, 41 Mich. 608; German American Seminary v. Saenger, 66 Mich. 249.

¶ 136. The levy of a junior execution creditor upon land sold to a senior execution creditor is upon lands of the execution debtor and not upon the latter's right to redeem.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

¶ 137. A lessee's creditor levying upon leased personalty gains no greater right than the lessee has.—Warren v. Gutches, 71 Mich. 407.

§ 50. Custody and keeping of property taken.

Of mortgaged chattels, see post § 51.
Delivery to receiptor, see post § 52.
Separation of levy from mass or from other articles, see ante § 39.
Necessity of sale in view of property, see post § 61.
Possessory and property rights of sheriff under writ, see Sheriffs, IV, G.
Custody and control by carrier of goods levied on in transit, see Carriers § 25.
Custody and keeping of attached goods, see Attachment, VI, C.
Keeping of replevied goods when subject to prior levy, see Jud. Act, chap. XXVII, § 34; Comp. L. 1915, § 13113.

¶ 138. The proper means of protecting property levied upon is to put a keeper in charge, and unless violence is apprehended, this is a sufficient precaution.—Stilson v. Gibbs, 46 Mich. 215.

¶ 139. An officer levying upon goods in the evening may properly put a keeper in charge and this is a sufficient precaution to preserve possession under the levy.—Vanosdall v. Hamilton, 118 Mich. 533.

¶ 140. An officer has no authority for threshing wheat he has levied upon in the mow before selling it.—Stilson v. Gibbs, 40 Mich. 42.

¶ 141. A constable has no authority to work animals which he has taken on an execution to pay the expense of keeping them.—Bushey v. Raths, 45 Mich. 181.

§ 51. ——Of chattels subject to prior mortgage.

¶ 142. The officer levying an execution upon the mortgagor's interest in mortgaged chattels may take possession of them from the mortgagor and detain them in safe and convenient custody as against even the mortgagee, for the time prescribed by law for bringing them to sale on the execution, notwithstanding the mortgage, is past due.—Cary v. Hewitt, 26 Mich. 228; Macomber v. Saxton, 28 Mich. 516.

¶ 143. Temporary possession can be taken of mortgaged chattels for the purpose of a levy though they are in the mortgagee's hands. But the levy must be subordinate to the mortgagee's right.—Smith v. Menominee Circuit Judge, 53 Mich. 560; Daggett v. McClintock, 56 Mich. 51.

¶ 144. Concurrent possession of mortgaged chattels before foreclosure can be held by the mortgagee and by an officer levying execution; but the mortgagee holds only as the mortgagor's bailee, with a special interest, and for the sole purpose of storing them apart from property in daily use; and the officer must not interfere with the mortgagee's right of sale, but can retain the chattels in his custody until sale is made, and has a right to know the amount and conditions of it. And when the mortgagee proceeds to sell he can protect the rights of the officer as well as his own.—Haynes v. Leppig, 40 Mich. 602.

¶ 145. Mortgaged chattels cannot lawfully be taken by the mortgagee from the possession of the sheriff while he holds under a levy on the equity of redemption and is proceeding to sale.—Nelson v. Ferris, 30 Mich. 497.

¶ 146. A chattel mortgagee whose claim has not yet fallen due is not entitled to possession of the chattels as against an officer who has levied execution thereon, until the time has passed for making execution sale; and this is so though the levy and the debt on which it is based be subsequent to the mortgage debt. But the sheriff may, in his discretion, turn the property over to the mortgagee's custody if the latter demands it for the purpose of making foreclosure sale.—Wilson v. Montague, 57 Mich. 638.

¶ 147. In case of an execution on the equity of redemption under a chattel mortgage the levying officer may detain the chattels long enough to bring the equity of redemption to sale under the writ.—Wilson v. Montague, 57 Mich. 638.

¶ 148. An officer levying execution upon the mortgagor's interest in mortgaged chattels may take possession of such chattels and detain the same as against the mortgagee for the time required to bring them to sale under his execution.—First Nat. Bank v. Summers, 75 Mich. 107.

§ 52. ——Delivery to receiptor, and sufficiency of receipt.

Surrender of mortgaged chattels to mortgagee or mortgagor, see ante § 51.
Rights of the sheriff as against receiptor, see Sheriffs, IV, G.
Liability of sheriff for injury to property in hands of receiptor, see Sheriffs, IV, D.

¶ 149. Receipts to the sheriff for property seized on execution need not set forth in detail and describe minutely the parties, court and other facts appearing in full from the execution, or describe everything with technical accuracy. Where a receipt for wheat misstated the township in which the

wheat was growing, there being no question, however, as to the identity of the property, it was held that the receiptor, who had bound himself to give up the wheat to the sheriff on demand, could not refuse on the ground of misdescription.—Burk v. Webb, 32 Mich. 173.

¶ 150. Where a receipt for wheat taken on an execution in favor of the First National Bank of Ann Arbor sets out the name of the plaintiff as "the First National Bank" simply, the variance is held not fatal in an action of trover brought against the receiptor for its conversion, where it is found that the wheat in question was levied on by virtue of this execution, and that in order to prevent a sale of the wheat under it this receipt was given; the finding sufficiently indicates that the receipt was given in the case in which the execution issued.—Burk v. Webb, 32 Mich. 173.

§ 53. Change, release or avoidance of levy.

See also ante ¶ 81.
Effect of delay, see also post ¶ 162.
Effect of lapse of judgment term on lien of levy already attached, see ante § 31, ¶ 76.
Effect of setting aside sale, see post § 104.
Effect of dissolution of prior lien to let in later one, see also ante ¶ 83.
Estoppel to question release, see post ¶ 306.
New sale or writ to cure defective or abandoned one, see post § 97.
Amendments and cure of defects, see post § 119.
Release of levy by filing bond for supersedeas or stay, see Stay, II.
Avoidance of levy by subsequent bankruptcy, see Bankruptcy § 9.
Failure of consideration for note, release of levy for which maker was not liable, see Contracts ¶ 570.

¶ 151. An officer who levies subject to a mortgage can afterwards change the levy.—Wallen v. Rossman, 45 Mich. 333.

¶ 152. A sheriff's lien and right of custody under an execution cannot be disturbed by the order of a circuit court commissioner, on dissolving an attachment on the property, to return it to the defendant.—State Bank of Fenton v. Whittle, 41 Mich. 365.

¶ 153. Delay of two months in levying execution did not release levy.—Geiges v. Greiner, 68 Mich. 153.

¶ 154. Abandonment of a levy is not necessarily implied by the sheriff's indorsing on the writ of execution the fact of his levy and the words: "I hereby return the within execution to the clerk of the court for the county of Kalamazoo, as I am commanded by Seth D. Thompson, plaintiff."—Vroman v. Thompson, 51 Mich. 452.

§ 54. Proceedings in aid of or for protection of levy or property.

See also ante ¶ 67.
Procedure to cause completion of levy by sale, see post § 58.
Amendments and cure, see post § 119.
Statutory creditors' bill in aid of execution against corporation, see Corporations § 200.
Right of levying creditor subject to mortgage to enforce proper foreclosure, see Chattel Mortgages § 139.
Proceedings at law in aid of execution or to discover and subject assets, see Creditors' Suits, I, D.
Existing lien of levy as predicate for bill in aid, see Creditors' Suits § 15.
Pleading conspiracy to prevent execution, see Conspiracy ¶ 14.
Levy and lien essential to support bill in aid, see Creditors' Suits § 15.
Bill in aid of execution on corporate stock, see Creditors' Suits § 6.
Actions by sheriff as special owner of the property taken, see Sheriffs, VI.
Bills in aid of execution, see Creditors' Suits.
For procedure before sale by bill in aid, see Creditors' Suits.
Procedure after sale, see post § 100; and see Fraudulent Conveyances, V.
Provision for order restraining commission of waste on lands, see Jud. Act, chap. XXIII, § 149; Comp. L. 1915, § 12964.

¶ 155. A sheriff cannot file a bill or cross-bill in aid of his execution or to enforce a claim; it must be filed by the creditor or by some person legally authorized to do so in his behalf.—Hackley v. Mack, 60 Mich. 591.

VII. SALE.

A. NOTICE AND OTHER PRELIMINARIES.

§ 55. Conditions precedent in general.

Preliminary procedure, issuance of writ and levy, see ante II-VI.
Effect of lack of notice, see also post ¶ 227.
Statutory preliminaries to sale of real estate, see Jud. Act, chap. XXIII, § 85 et seq.; Comp. L. 1915, § 12900 et seq.

¶ 156. It is not a condition precedent to the sale on execution of property mortgaged by the defendant therein that the execution creditor should have paid off the mortgage and thus acquired the mortgagor's interest.—King v. Hubbell, 42 Mich. 597.

§ 56. Form and sufficiency of notice.

Proof of notice, see post § 57.
Showing in return, see post § 110.
Notice of sale under justice's execution, see Justices of the Peace, IV, H.
Penal liability for sale without notice, see Sheriffs, IV, B.
Provisions as to notice of sale, see Jud. Act, chap. XXIII, § 51; Comp. L. 1915, § 12866.

Provisions for notice and publication of notice for sale of real estate, see Jud. Act, chap. XXIII, §§ 85, 86, 88-90; Comp. L. 1915, §§ 12900, 12901, 12903-12905.

¶ 157. The description "lot 5, block Q, Mitchell's Revised Plat of Cummer & Gerrish's Addition to the Village of Clam Lake," instead of "lot 5, block Q of Mitchell's Revised Plat of the Village of Clam Lake," in a notice of levy and sale under an execution and in the certificate of sale is fatally defective.—Savidge v. Seager, 175 Mich. 47.

§ 57. Proof of notice of sale.

¶ 158. Publication of notice of execution sale is provable by the publisher's affidavit (Comp. L. 1871, § 5925; How. St., § 7498). Whether it is provable by the affidavits of those who posted the notices, quære.—Vroman v. Thompson, 51 Mich. 452.

§ 58. Remedy and procedure to carry out levy by sale.

Remedy to obtain deed, see post § 98.
Remedy to compel payment of proceeds into court, see post § 107.

¶ 159. Delay in giving notice of an execution sale is prejudicial to the execution debtor if to any one, and may be such as to entitle him to apply for mandamus to compel the officer to proceed.—Baldwin v. Talbot, 46 Mich. 19.

¶ 160. Where the return day has passed, it is not customary to resort to the writ of venditioni exponas; it is usual to proceed on the old execution or take out another.—Vroman v. Thompson, 51 Mich. 452.

B. TIME, PLACE, CONDUCT AND MANNER, AND AMOUNT.

§ 59. Time for sale.

Hours of the day for sale, see post § 60.
Effect of delay after levy upon lien, see ante ¶ 74.
On justice's execution, see Justices of the Peace, IV, H.
Time for sale of growing crops levied on, see Jud. Act, chap. XXIII, § 55; Comp. L. 1915, § 12870.
Provisions as to postponements of sale, see Jud. Act, chap. XXIII, § 53; Comp. L. 1915, § 12868.

¶ 161. An execution may be levied at any time on the return day, and the execution of the writ may be completed by a sale of the property after that day.—Smith v. Thompson, W. 1.

¶ 162. Where notice of a levy on real estate is filed under Laws 1875, Act No. 5, p. 3, How. St., § 6173, a delay of five years in making sale does not avoid the levy if the judgment creditor has acted in good faith; and a levy and sale made meanwhile cannot affect it.—Ward v. Citizens' Bank, 46 Mich. 332.

¶ 163. Since prior to How. St., § 6173a, passed in 1889, there was no limitation against acquiring a lien on land by levy, except that it must have been made before the judgment became extinct by limitations, where land has been levied upon and advertised for sale under execution prior to the expiration of the ten years within which the judgment is suable (How. St., § 8736), a sale after the ten years is valid.—Ludeman v. Hirth, 96 Mich. 17.

§ 60. ——Hour of sale.

¶ 164. An execution sale of shares of stock of a building and savings association, made between nine and ten o'clock at night, in the hall of the association when nearly all the members had left, is void, at least as to persons having knowledge of the facts.—McNaughton v. McLean, 73 Mich. 250.

§ 61. Place of sale and view of property.

Exposure of personalty to view in selling, see Jud. Act, chap. XXIII, § 52; Comp. L. 1915, § 12867.

¶ 165. An officer cannot sell personal property which is neither within view of the bidders nor within the county.—Baker v. Casey, 19 Mich. 220.

¶ 166. An execution sale of an interest in a growing corn crop, if made half a mile away from the field and out of sight of the corn, is invalid under Comp. L. 1871, § 6106, How. St., § 7691.—Winfield v. Adams, 34 Mich. 437.

¶ 167. A constable's sale of standing wheat, made within sight of the wheat and of the road corners where it was advertised to take place, but 30 or 35 rods therefrom, is substantially at the place appointed.—Perkins v. Spaulding, 2 Mich. 157.

¶ 168. Whether an execution sale of corn growing in separate fields on different sections, and though in view of the fields, yet from 30 to 100 rods distant from them, is valid, quære.—Winfield v. Adams, 34 Mich. 437.

§ 62. Manner, conduct and terms of sale.

Manner and mode of levy, see ante §§ 36-48.
Time and place for sale and view of property at sale, see ante §§ 59-61.
Sale in parcels or in gross, see post § 64.
Frauds or misconduct by sheriff equivalent thereto as affecting validity of sale, see post § 92.
General law of public auctions, see Auctions.
Invalidity of agreements to suppress competition in bidding, see Contracts § 87.
Manner and place and time for sale of real estate and penalty for selling otherwise, see Jud. Act, chap. XXIII, §§ 87, 88; Comp. L. 1915, §§ 12902, 12903.

Time, place and manner of selling peaches, berries and other perishable property, see Jud. Act, chap. XXIII, §§ 56, 57; Comp. L. 1915, §§ 12871, 12872.
Provisions against sheriff or deputies being purchasers or interested in purchase of real estate, see Jud. Act, chap. XXIII, § 91; Comp. L. 1915, § 12906.

§ 63. ——Chattel interest in lands.

¶ 169. Chattel interests in lands are to be sold on execution as personal estate. A sale of an estate for years in lands, made in accordance with the statutory provisions for the sale of real estate, is void.—Buhl v. Kenyon, 11 Mich. 249.

§ 64. Sale in parcels or separately.

Sale of mortgaged chattels, see post § 65.
One sale under several writs, see post § 66.
Effect on title of improper sale in gross, see post § 91.
Offer of personalty in lots and parcels, see Jud. Act, chap. XXIII, § 52; Comp. L. 1915, § 12867.
Provisions for selling real estate in lots or parcels, see Jud. Act, chap. XXIII, § 92; Comp. L. 1915, § 12907.

¶ 170. It is the duty of a constable to sell property in such lots or parcels as to command the highest price; and if he wilfully sacrifices the property by disregarding his duty he is liable to the party injured; but he has a large discretion. Where three parcels of wheat, separated only by fences, containing twenty-five acres in all, were sold together, and there was no reason to suppose they would have sold better separately, the sale was held valid.—Perkins v. Spaulding, 2 Mich. 157.

¶ 171. Where a man owning two lots has put up a single building covering one of them and a small part of the other, the premises so covered should be sold on execution as one parcel.—Geney v. Maynard, 44 Mich. 578.

¶ 172. When lands are put up in distinct parcels and not sold for want of bidders, the whole may be sold together.—Weed v. Terry, 2 D. 344.

¶ 173. Where an execution has been levied on a large number of detached parcels of land, the sale of the whole in one lot for one bid, after an offer in parcels failed to bring bidders, is not allowable; the owner cannot thus be deprived of his statutory right of redeeming any parcel by itself.—Udell v. Kahn, 31 Mich. 195.

¶ 174. How. St., § 6116, which provides that when real estate offered for sale on execution consists of several known lots, tracts, or parcels of land, such lots, tracts, or parcels shall be separately exposed for sale, contemplates a sale by lot or government subdivisions.—Wolf v. Holton, 117 Mich. 321.

§ 65. ——Mortgaged chattels.

¶ 175. If sale is made of the debtor's interest in chattels mortgaged by him, it must be in gross, subject to the mortgagee's lien, unless the mortgage is first paid.—Worthington v. Hanna, 23 Mich. 530; Harvey v. McAdams, 32 Mich. 472; Haynes v. Leppig, 40 Mich. 602; King v. Hubbell, 42 Mich. 597; Smith v. Menominee Circuit Judge, 53 Mich. 560; Daggett v. McClintock, 56 Mich. 51; Ganong v. Green, 71 Mich. 1.

§ 66. One sale under several writs.

Where several writs are outstanding to different sheriffs, see Jud. Act, chap. XXIII, § 11; Comp. L. 1915, § 12826.

¶ 176. Where several judgments against the same person are taken at the same time, and are issued, delivered for service and levied at the same time, the sheriff, unless directed otherwise, may offer the premises on which he has levied, to be sold together under all the writs.—Geney v. Maynard, 44 Mich. 578.

§ 67. Amount or interest to be sold.

Quantity of real estate that may be sold, see Jud. Act, chap. XXIII, § 92; Comp. L. 1915, § 12907.
Mode of sale of franchise of toll taking corporation, see Jud. Act, chap. XXIII, § 66 et seq.; Comp. L. 1915, § 12881 et seq.

¶ 177. A sheriff has no right to continue to sell goods on which he has levied after the execution is satisfied.—Allen v. Kinyon, 41 Mich. 281.

C. RIGHTS AND LIABILITIES OF PURCHASER, PLAINTIFF AND DEFENDANT.

§ 68. Equities generally, contribution, exoneration and reimbursement.

Equities of creditor purchasing, see post § 70.
Equities against mortgagees, see post § 71.
General law of indemnity, contribution and exoneration among persons jointly or successively liable, see Indemnity.
General law of subrogation, see Subrogation; Mortgages, VIII.
Statutory rights of contribution among lands and their owners sold in inequitable proportions, see Jud. Act, chap. XXIII, §§ 131-135; Comp. L. 1915, §§ 12946-12950.
Damages or loss on resale on refusal of bidder to accept and pay for property, see Jud. Act, chap. XXIII, § 54; Comp. L. 1915, § 12869.

§ 69. Title and property rights in general.

Rights as against debtor's transferees, see also ante § 34.
Purchase by the creditor, see post § 70.
Rights as against lienors and mortgagees, see post § 71.

Inferiority of purchaser to resulting trust in favor of third person, see ante ¶ 96.
Under alternative judgment in ejectment, see post § 72.
Completion of title by expiration of redemption period, see post § 73.
Relation of deed back to time of sale, see post § 81.
Office of the certificate of sale, see post ¶ 197.
Effect of setting aside sale, see post § 104.
Effect of grant of new trial, vacation or reversal, see post § 124.
Estoppel to assert or deny paramount title, see post § 121.
Wrongful execution and liability for it, see post §§ 122, 123.
Rule as to inurement of after-acquired title, see post § 81; and see Estoppel, II.
Under judicial sales in general, see Judicial Sales, III; Foreclosure, IV; Estates of Decedents, VII; Partition, IV.
Right and title of execution purchaser of corporate stock, see Corporations § 288.
Attorney buying in as trustee for client, see Attorneys § 32.
Attorney bidding in and selling back to execution debtor as guilty of fraud, see Attorneys ¶ 234.
Vesting of title, time of vesting, see Jud. Act, chap. XXIII, § 113; Comp. L. 1915, § 12928; and see also Jud. Act, chap. XXIII, § 111; Comp. L. 1915, § 12926.
Of purchaser subject to mortgage or pledge of chattels, see Jud. Act, chap. XXIII, § 40; Comp. L. 1915, § 12855.
Dividends on corporate stock as incident passing with the stock, see Jud. Act, chap. XXIII, § 63; Comp. L. 1915, § 12878.
Rights acquired by purchase of leasehold, see Jud. Act, chap. XXIII, §§ 142, 143; Comp. L. 1915, §§ 12957, 12958.
On sale of franchises of toll taking corporation, see Jud. Act, chap. XXIII, §§ 68-71; Comp. L. 1915, §§ 12883-12886.

¶ 178. An execution purchaser can get no better right than the judgment debtor had at the time of the levy.—Clark v. Stilson, 36 Mich. 482.

¶ 179. A judgment creditor gets no title by levy and sale under execution upon land where defendant had parted with his interest, whether by deed or only by contract before plaintiff became his creditor, and where, after several transfers, the property has been purchased by defendant's wife.—Sorenson v. Sorenson, 69 Mich. 351.

¶ 180. Where there are no words of devise to invest executors with any estate, a sale on execution against them cannot convey title to premises devised.—Crooks v. Whitford, 47 Mich. 283.

¶ 181. A levy under execution and sale of an heir's interest in land under contract of sale by his ancestor conveys no interest in the land and is a cloud on title subject to removal by bill in equity.—Bowen v. Lansing, 129 Mich. 117.

¶ 182. Where it is not possible to grant specific performance of a verbal agreement for the conveyance of land between heirs because the condition for such conveyance has not been fully met, a levy of execution on the interest of the heir agreeing to make such conveyance is subject to the contract rights of the other heir.—Schmidt v. Steinbach, 193 Mich. 640.

¶ 183. A sheriff in making levy and sale merely exercises a power in the interest of a party whose writ is delivered to him for execution; and a purchaser at the execution sale does not stand in the sheriff's right, but is the privy of the party under whose execution the sale was made.—McKay v. Kilburn, 42 Mich. 614.

§ 70. Creditor as purchaser.

See also ante ¶ 137.
Right of execution creditor to redeem from chattel mortgage, see Chattel Mortgages § 113.

¶ 184. An execution creditor, on making sale and becoming the purchaser, may acquire new equities; but until then he stands in the rights of his debtor, and his levy may be defeated by equities which the debtor cannot resist.—French v. De Bow, 38 Mich. 708.

¶ 185. A creditor has a right to assume that land conveyed to members of a firm by deed, which does not indicate that it is deeded to them as partners, is held by them as tenants in common, in the absence of actual notice that it is partnership property.—First Nat. Bank of Cooperstown v. State Sav. Bank of Ionia, 130 Mich. 332.

¶ 186. A purchase of mortgaged lands by a judgment creditor at execution sale covers only the equity of redemption; and if he proposes to contest the mortgage on the ground of fraud, he must make that fact known to the other bidders. Bidders at judicial sales must stand on an equal footing.—Messmore v. Huggard, 46 Mich. 558.

§ 71. Rights between purchaser and lienors or mortgage parties.

Relative and successive rights of redemption, see post § 83.
Estoppel to question title of mortgagee as superior, see also post ¶ 248.
Mode of selling mortgaged chattels, see ante § 65.
Priorities of lien of levy, see ante §§ 32-34.
Filing notice to give priority and effect of actual notice, see ante § 34.
Sale of property in which the dower interest of wife exists, see Dower § 23.
Lien of attorney as affecting land bid off by attorney, see Attorneys ¶ 175.

¶ 187. Where persons have in good faith acquired a lien upon property prior to a levy upon it, there is no such privity between them and the execution debtor at the time of the levy as can in any respect make his rights the measure of theirs as between them and a purchaser under the execution. —Nail v. Granger, 8 Mich. 450.

¶ 188. An execution purchaser who buys land subject to a mortgage can have no equities against the mortgage, and it does not concern him how the owner disposes of it.—Youmans v. Loxley, 56 Mich. 197.

¶ 189. A purchaser at execution sale purchases with constructive notice of a mortgage then on record, and has no greater rights to attack the mortgage than had the mortgagor.—Ismon v. Loder, 135 Mich. 345.

¶ 190. The purchaser at a sheriff's sale of the interest of a grantor of a deed absolute of land, given as a mortgage, need not file a bill in aid of the execution under Comp. L. 1897, § 9167, to determine the equities of the parties, but takes a legal title, subject only to the outstanding mortgage.—Flynn v. Holmes, 145 Mich. 606.

§ 72. Title under alternative judgment in ejectment.

¶ 191. The purchaser at an execution sale, under a judgment in ejectment, takes title with notice that under How. St., § 7822, the judgment may be vacated on the motion of the losing party, as a matter of right, within three years after its rendition, even though the time for redemption has expired.—Cook v. Kent Circuit Judge, 70 Mich. 94.

§ 73. Rights pending redemption or deed; possession.

Right to ore severed from soil, see post § 74.
Possessory rights under the levy, see ante §§ 50-52; and see Sheriffs, IV, G.
Right to accounting or rents and profits, see post § 99.
Right to compensation for use and occupation, see post ¶ 211.
Possessory right under certificate, see also post ¶ 199.

¶ 192. An execution purchaser's legal title or right of possession is not perfected until the time for redemption from the sheriff's sale is over, and he has obtained his deed from the sheriff.—Ryerson v. Eldred, 18 Mich. 490; Cook v. Knowles, 38 Mich. 316.

¶ 193. After sale of mining lands on execution, the debtor, during the fifteen months he is allowed to remain in possession, has no less rights than a tenant for years; he may not open new mines, but the old ones he may work in the customary and reasonable way, and may sell the ore produced.—Ward v. Carp River Iron Co., 47 Mich. 65; Ward v. Carp River Iron Co., 50 Mich. 522.

¶ 194. Where execution is levied on a mine, and sale is made, the judgment debtor is entitled, during the period allowed for redemption, to continue working it in a reasonably prudent manner as measured by the customary working before the execution sale; and he can dispose of the product. But improper, excessive or wasteful mining can be restrained, and the person responsible for it be held liable in damages.—Ward v. Carp River Iron Co., 47 Mich. 65; Ward v. Carp River Iron Co., 50 Mich. 522.

§ 74. ——Timber, crops or rents and profits.

Rights in mines, see ante § 73.
Right to maintain replevin for timber or crops, see Replevin, I.
Necessity of allegation in trover by execution purchaser pending time for redemption that taking minerals was injurious to the freehold, see Conversion ¶ 103.
Actions for waste or trespass by purchaser or creditor during period of redemption, see Jud. Act, chap. XXIII, §§ 114, 115; Comp. L. 1915, §§ 12929, 12930.

¶ 195. Execution purchasers may, under Comp. L. 1871, §§ 4657, 4658 (How. St., §§ 6137, 6138), sue, as if absolute owners, for wood and timber wrongfully severed from the freehold.—Marquette, H. & O. R. Co. v. Atkinson, 44 Mich. 166.

¶ 196. Where an iron mine has been sold on execution, one who buys from the execution debtor ore taken out during the period in which such debtor is allowed to hold possession after sale is not liable in trover to the execution purchaser unless the removal of such ore was an injury to the freehold, and unless he was connected with the injury by having taken part in some act of wrong, or was chargeable with notice of facts that would have divested the execution defendant of his prima facie right to sell.—Ward v. Carp River Iron Co., 47 Mich. 65; Ward v. Carp River Iron Co., 50 Mich. 522.

§ 75. Fees and expenses.

Inclusion in taxed costs commanded to be made by writ, see ante ¶ 26.
Improper retention from proceeds as conversion, see post ¶ 318.
Sheriff's fees and sheriff's right to them, see Sheriffs, III.
Execution fees as taxable costs, see Costs § 62.
Statute fixing the various fees, see Jud. Act, chaps. XLVIII, XLIX; Comp. L. 1915, §§ 13719 et seq., 13725 et seq.

D. CERTIFICATE AND DEED.

§ 76. Certificate of sale.

Certificate of levy on lands, see ante § 43.
Immaterial errors in dates and descriptions, see also post ¶ 229.
Rights and title under the certificate, see ante, VII, C.

Statutory necessity, requisites and sufficiency of certificate of sale of real estate, see Jud. Act, chap. XXIII, § 93; Comp. L. 1915, § 12908.

¶ 197. It is not the purpose of the certificate to pass the title to the land sold. It is necessary as written evidence to satisfy the statute of frauds, as well as to preserve the evidence which is to entitle the purchaser to a deed when the time for redemption shall have expired.—Gorham v. Wing, 10 Mich. 486.

¶ 198. The rights of an execution purchaser of real estate who has received a sheriff's certificate of sale are inchoate before receipt of sheriff's deed.—Pike v. Halpin, 188 Mich. 447.

¶ 199. The purchase of real estate, at a sheriff's sale, and the receipt of a sheriff's certificate of purchase, do not confer any right to possession or beneficial use of the premises.—Pike v. Halpin, 188 Mich. 447.

¶ 200. A sheriff's certificate of sale of real estate is void where the period of redemption expires before the date Pub. Acts 1901, No. 63, How. St., 2nd ed., § 13066, takes effect and the holder fails to obtain deed within five years from date the act takes effect.—Pike v. Halpin, 188 Mich. 447.

§ 77. Filing certificate and notice thereby.

Provisions as to filing and record of certificate of sale of real estate, see Jud. Act, chap. XXIII, §§ 94, 95; Comp. L. 1915, §§ 12909, 12910.

¶ 201. In absence of a statute a sheriff's certificate of sale on execution was not constructive notice to prior mortgagees, though regularly filed in the register's office.—Woods v. Love, 27 Mich. 308.

¶ 202. Since the passing of Laws 1875, Act No. 123, a properly recorded certificate gives the same record privileges as a conveyance, and operates as constructive notice to subsequent purchasers until the execution purchaser receives his deed.—Atwood v. Bearss, 45 Mich. 469.

¶ 203. An unrecorded certificate of execution sale does not give priority. Whether How. St., § 6119, as amended in 1875, applies to previous execution sales, quære.—Drake v. McLean, 47 Mich. 102.

¶ 204. The sheriff's neglect to file the certificate of an execution sale within the statutory period (Comp. L. 1871, § 4638, How. St., § 6118) cannot affect the purchaser's title unless the execution debtor or innocent third parties have been misled by it to their prejudice.—Taylor v. Gladwin, 40 Mich. 232.

§ 78. Assignment of certificate.

Rights under quitclaim deed from purchaser, see also post ¶ 216.

Assignment to redeeming creditor, see also post ¶ 222.

¶ 205. Where an execution sale was invalid, it was held that an assignment of the certificate of sale carried no interest in the judgment.—McGoren v. Avery, 37 Mich. 120.

§ 79. Deed and its contents.

Time for making deed, see also ante ¶ 200.

Proper grantor or grantee, see post § 80.

Remedy to obtain deed, see post § 98.

General law of deeds, see Deeds.

Certificate of sale and its office and effect, see ante § 76.

Statutory time for deed, see Jud. Act, chap. XXIII, § 116; Comp. L. 1915, § 12931.

Bar of right to deed by lapse of ten-year period after time for redemption, see Jud. Act, chap. XXIII, § 119; Comp. L. 1915, § 12934.

Conveyance of leasehold interest sold under levy, see Jud. Act, chap. XXIII, § 144; Comp. L. 1915, § 12959.

¶ 206. Under R. S. 1838, a sale of lands on execution did not divest the title of the judgment debtor until consummated by deed. And a deed given before the time of redemption expired was void.—Gorham v. Wing, 10 Mich. 486.

¶ 207. As to the nature of the right of an execution purchaser to demand and receive a sheriff's deed after the period for redemption has expired, see Whiting v. Butler, 29 Mich. 122.

¶ 208. A recital that the sheriff who made the levy personally discharged his duty in first seeking to make the money of goods and chattels is not required in a deed of land sold on execution.—Johnson v. Crispell, 39 Mich. 82.

¶ 209. The deed on an execution running against two persons is not made fatally defective by the use of the singular number in a recital; as by stating that "because sufficient goods and chattels of the said last-named person in the said writ could not be found," the real estate was seized.—Johnson v. Crispell, 39 Mich. 82.

§ 80. ——By or to whom made.

To whom deed shall be made after death of person holding certificate or entitled to conveyance, see Jud. Act, chap. XXIII, § 117; Comp. L. 1915, § 12932.

Necessity of recording assignments to entitle assignee to deed, see Jud. Act, chap. XXIII, § 127; Comp. L. 1915, § 12942.

¶ 210. Under the Act of 1851 (Sess. Laws 1851, p. 68, amending R. S. 1846, chap. 79,

How. St., § 6140) one who had, previous to the passage of the act, become equitably vested with the title which the purchasers at an execution sale acquired by the expiration of the time to redeem, is entitled in equity to a conveyance of the property from the successor of the officer who made the sale.—Whipple v. Farrar, 3 Mich. 436.

§ 81. Construction and effect of deed.

General rule for construction of involuntary deeds, see Deeds § 25.

Effect of deeds as estoppels and doctrine of inurement of after-acquired titles to grantee in general, see Estoppel, II.

¶ 211. The officer's deed relates back to the time of the sale, for the purpose of protecting possession under the title purchased, or for the purpose of supporting a conveyance made by the purchaser or his assignee; but not to give the purchaser or his assignee compensation for the use and occupation of the premises before his own title is perfected. —Whipple v. Farrar, 3 Mich. 436.

¶ 212. An execution defendant's after-acquired title or interest does not pass by virtue of the execution sale and deed.—McArthur v. Oliver, 60 Mich. 605.

E. REDEMPTION FROM SALE AND PURCHASE BY CREDITORS, LIENORS AND OTHER INTERESTED PERSONS.

§ 82. Right in general.

Rights of creditors and lienors to redeem, see post § 83.

Period and computation of time for redemption, see post §§ 84, 85.

Application, showing of right, and payment, see post § 86.

Waiver of redemption right, see post § 87.

Chancery bills to redeem, see post § 88.

Effect of redemption, see post § 89.

Effect of delay in making deed, see also ante ¶ 200.

Statutory provisions for redemption, see Jud. Act, chap. XXIII, § 96 et seq.; Comp. L. 1915, § 12911 et seq.

Persons entitled to redeem, see Jud. Act, chap. XXIII, § 97; Comp. L. 1915, § 12912.

Debtor's heir, devisee or cotenant as person entitled, see Jud. Act, chap. XXIII, §§ 97-99; Comp. L. 1915, §§ 12912-12914.

Provisions for redemption of leasehold interests having three or more years to run, see Jud. Act, chap. XXIII, §§ 145, 146; Comp. L. 1915, §§ 12960, 12961.

By toll-taking corporation whose franchise has been sold, see Jud. Act, chap. XXIII, § 72; Comp. L. 1915, § 12887.

¶ 213. The right to redeem from execution sales is a creature of statute.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

§ 83. Right of creditors and lienors to redeem.

Waiver by senior creditor, see post § 87.

Right of creditors and junior lienors to redeem on failure of persons having prior right to do so, and right of creditors lower in rank to purchase from those higher in rank who have redeemed or purchased, see Jud. Act, chap. XXIII, § 102 et seq.; Comp. L. 1915, § 12917 et seq.; and see also Jud. Act, chap. XXIII, § 136; Comp. L. 1915, § 12951.

¶ 214. A purchaser of land is not such a creditor as to enable her to redeem the land sold on execution levied prior to the recording of her deed.—Spring v. Raymond, 134 Mich. 84.

¶ 215. Where a senior levy of execution is discharged after the period of 1 year from the execution sale and within the 15-month period by the acceptance of payment from the execution debtor, all rights of subrogations to the rights of the senior execution creditor by a junior execution creditor are barred.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648 (Ostrander, J., dissenting).

¶ 216. After the levy of an execution, the judgment debtor conveyed the land levied upon, and his wife, to whom the grantee executed mortgages upon the land to secure part of the purchase money, joined with her husband in a bond to the grantee conditioned for the payment of the judgment. More than a year but less than fifteen months after the sale of the land on the execution, the obligors in the bond having failed to perform its conditions, the grantee raised upon her indorsed note the money necessary to redeem the land, and paid the same to the purchaser at the execution sale, who, in order to secure the indorser on said note, executed to him a quitclaim deed of the land. Held, that the quitclaim deed conveyed only the rights of the purchaser under the sheriff's certificate of sale, and that the arrangement operated to protect the mortgage interest of the wife of the judgment debtor, and to give her the right to pay, prior to the execution of the sheriff's deed, the amount due on the certificate of sale, and thus discharge the obligation of the bond.—Smith v. Michigan State Bank, 102 Mich. 5.

§ 84. Period for redemption.

¶ 217. The right to redeem from execution sale, in the absence of contract, continues during the period fixed by statute, and no longer.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

¶ 218. Under Pub. Acts 1915, No. 314, Chap. XXII, §§ 96, 97, the period within which the execution debtor may redeem is fixed at one year from the time of execution sale,

and is not extended by § 113, giving execution creditors 15 months to redeem.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

¶ 219. Subsequent execution creditors may redeem from a prior execution sale within 15 months from the date of the sale by virtue of Comp. L. 1897, § 9185, but when such prior sale is alleged to be illegal and void, a petition to set it aside is the safer remedy. —Campau v. Detroit Driving Club, 130 Mich. 417.

§ 85. Computation of time.

General rules for reckoning time, including rules as to inclusion or exclusion of terminal days, see Time.

Statutory time, see Jud. Act, chap. XXIII, §§ 96, 101, 102; Comp. L. 1915, §§ 12911, 12916, 12917.

Time for making deed, see Jud. Act, chap. XXIII, § 116; Comp. L. 1915, § 12931.

¶ 220. The time for redemption under R. S. 1838 was to be computed exclusive of the day on which the sale was made.—Gorham v. Wing, 10 Mich. 486.

¶ 221. On sales made by the United States marshal in Michigan, on demands accruing in 1842, for moneys collected by a public officer, or for misconduct or neglect in office, two years' redemption was allowed.—Gorham v. Wing, 10 Mich. 486.

§ 86. Application, showing, terms, and amount required.

Showing required from creditor seeking to redeem from purchaser purchase from prior redemptioners, see Jud. Act, chap. XXIII, § 112; Comp. L. 1915, § 12927.

Computation of amount for redemption, see Jud. Act, chap. XXIII, §§ 96, 98 et seq.; Comp. L. 1915, §§ 12911, 12913 et seq.

¶ 222. Where judgment creditors redeem from an execution sale, and obtain from a purchaser an assignment of his certificate, it is of no importance that they did not present to him the proofs of their right to redeem. They may still claim both under their judgment and under the sale, and a subsequent creditor redeeming must pay the amount of both.—People ex rel. Austin v. Fralick, 12 Mich. 234.

§ 87. Waiver of rights.

¶ 223. A senior execution creditor waives the statutory period of redemption from execution sale of one year where, after the expiration of such period, and before any junior execution creditor has acquired any rights, he accepts payment of his judgment. —Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

§ 88. Bills to redeem.

¶ 224. Equity will not relieve a party who, through gross negligence or ignorance of the law, fails to redeem within the time prescribed.—Campau v. Godfrey, 18 Mich. 27.

¶ 225. A bill of complaint was filed to allow complainant to redeem from a sale of land by a sheriff. The failure to redeem was due to complainant's inability to raise the money necessary to do so, because of complainant's physical infirmities. There was no claim of fraud, or conspiracy or deception, nor did it appear that an unnecessary amount of land was sold. Held, that a demurrer to the bill was properly sustained. —Sielaff v. Woodruff, 171 Mich. 5.

§ 89. Effect of redemption.

Effect of expiration of redemption period to make title complete, see ante § 73.

Effect of redemption by creditor taking assignment from purchaser, see also ante ¶ 222.

General law of subrogation, see Subrogation.

To cut off junior lienor's right to subrogation, see ante ¶ 215.

Transition of right and title by successive redemptions, see Jud. Act, chap. XXIII, §§ 111, 113; Comp. L. 1915, §§ 12926, 12928.

F. DEFECTS IN SALE; OBJECTIONS AND RELIEF OF PARTIES.

Objections to writ or levy, see post, X.

§ 90. Invalidating effect of irregularities and omissions.

Sale at night, see ante ¶ 164.

Effect of delay in selling, see also ante § 59.

Insufficiency of description in certificate of levy on land, see ante § 43.

Irregular or inaccurate recitals in deeds, see also ante § 79.

Effect of failure to file certificate of execution sale, see also ante ¶ 204.

Want of notice of application for issuance of writ, see post ¶ 267.

Failure to sell in parcels and improperly selling in gross, see post § 91.

Fraud or inadequacy in price, see post § 92.

Effect as against bona fide purchasers and takers, see post § 93.

Urging specific objections as estoppel to urge others, see post § 95.

Proper procedure to correct mere irregularities, see post § 102.

Void sale of plank road franchises, see Corporations § 199.

¶ 226. A noncompliance by the sheriff with the requirements of the statute in regard to the levy, advertisement or sale of real estate is a mere irregularity, and must be complained of in due time, by motion, or it will be waived.—Spafford v. Beach, 2 D. 150.

¶ 227. Want of notice of a sheriff's sale may impose a liability on the sheriff, but does not invalidate the title of an innocent

purchaser under it.—Cook v. Knowles, 38 Mich. 316.

¶ 228. The title of a purchaser of real estate sold on execution is not affected by the insufficiency of the officer's return to the execution, or in his failure to give notice of the sale. The certificate of sale and the deed are the evidence of his title.—Spafford v. Beach, 2 D. 150; Cook v. Knowles, 38 Mich. 316.

¶ 229. Where complainant in a bill to set aside an execution sale assumes, for the purposes of the case, that the sale itself is valid, such defects in the sheriff's certificate of sale as wrong dates for the issue of execution and of levy are immaterial as between complainant and the execution purchaser.—Vroman v. Thompson, 51 Mich. 452.

¶ 230. The issue of two executions at once upon the same judgment to the sheriffs of different counties is irregular; but in an action of ejectment for premises sold under one of them, the other not being returned, the sale will not necessarily be held void, nor will the officer's omission to return a want of personal property be fatal thereto, especially if there is no showing that there was any.—Atwood v. Bearss, 45 Mich. 469.

¶ 231. Executions ought not to be removed at pleasure from the files by the plaintiffs therein or their counsel, or by a sheriff who has gone out of office. Such a removal, however, is only an irregularity, and does not of itself invalidate a sale on the execution.—Vroman v. Thompson, 51 Mich. 452.

¶ 232. Where an appraisal and sale of land was made under the provisions of the unconstitutional appraisal law of 1841 by virtue of an execution on a judgment upon contract rendered before the act took effect, and the plaintiff in the execution participated in the appraisal and purchased the premises on the sale at a sum exceeding two-thirds their appraised value, held that, the plaintiff's rights not being affected by the appraisal, the sale was valid and conveyed a good title.—Willard v. Longstreet, 2 D. 172.

§ 91. ——Improper sale in gross.

Effect on title under judicial sale, see also Judicial Sales, III.

Pleading and proof in trover against sheriff for improper sale, see Sheriffs, VI.

¶ 233. Failure to sell separately (How. St., § 6116) two contiguous forty-acre parcels occupied as one farm is no more than an irregularity, and cannot be questioned in an action of ejectment for the premises by the purchaser.—Hoffman v. Buschman, 95 Mich. 538.

¶ 234. Failure to follow the statute and sell in platted parcels or subdivisions cannot be taken advantage of collaterally, but the execution debtor by a motion in the same case may have the sale set aside.—Wolf v. Holton, 117 Mich. 321.

§ 92. ——Fraud or inadequacy of price.

¶ 235. Where a purchaser at a sheriff's sale, by a fraudulent combination with the sheriff and judgment debtor to prevent competition at the sale, is enabled to purchase property at much less than its value, the sale is void as to creditors.—Aldrich v. Maitland, 4 Mich. 205.

¶ 236. Where, after a fraudulent sale, the property was sold by another officer, on an execution in favor of another creditor, and the latter bid it off at an inadequate price, it was held this inadequacy would not defeat the purchase; the cloud cast upon the title by the former sale being a sufficient answer to the objection of inadequacy.—Aldrich v. Maitland, 4 Mich. 205.

¶ 237. Judicial sales which have been open and fair, with nothing done to prevent a sale at a higher price, should not be disturbed on the ground of inadequacy of price; and an execution sale cannot be set aside in a collateral proceeding on the ground of such inadequacy of price. The remedy, if any, is by motion promptly made in the cause itself.—Campau v. Godfrey, 18 Mich. 27.

§ 93. ——As to bona fide purchasers and takers.

Rights under levy alone, see also ante ¶ 132.

What constitutes notice of title or right, and evidence of such notice, see Notice and Record of Title, I.

Superiority of bona fide owner or incumbrancer to new execution for relief of evicted purchaser, see Jud. Act, chap. XXIII, § 130; Comp. L. 1915, § 12945.

¶ 238. A bona fide purchaser under an execution sale in attachment acquires no title where the record shows a want of jurisdiction, the affidavit for the writ being defective.—Wilson v. Arnold, 5 Mich. 98.

¶ 239. Execution sale of lands omitted from the filed notice of levy is void as to good faith purchasers from debtor.—Campau v. Barnard, 25 Mich. 381; Barnard v. Campau, 29 Mich. 162.

§ 94. Presumptions and evidence as to title or defects.

Presumption as to priority based on record, see ante ¶ 94.

Indorsement as evidence of nature of levy made, see also ante ¶ 110.

Certificate and deed as evidence of title, see also ante ¶ 228.

General presumptions as to regularity in official action and procedure, see Evidence § 34 et seq.

Presumptions as to jurisdiction of court and validity of judgment, see Courts § 80; Judgments, VII.
General rules of evidence, e. g., best and secondary, parol, and documentary, see Evidence, IV, V, VIII.
Parol proof to identify transaction of taking under levy, objection as secondary evidence, see Evidence ¶ 596.
Res gestæ of levy or taking of property, see Evidence § 463.
Proof of execution by secondary evidence on creditors' suit, see also Creditors' Suits § 28.
Admissibility and sufficiency of evidence of title in trover, trespass and replevin, see Conversion §§ 31, 37; Replevin, III; Trespass, II.
Proof of title as justification or claim of right in replevin, see Replevin, III.
Title as jury question in replevin, see Replevin, IV.
Admissibility and sufficiency of proof of title to land in general, see Ejectment, IV; Trespass, II; Quieting Title, III; Specific Performance, IV.
Necessity of proof of judgment to establish title in execution purchaser who was stranger to the action, see also Ejectment ¶ 171a.
Certificate of sale of real estate or record of certificate as prima facie evidence of title and regularity, see Jud. Act, chap. XXIII, § 95; Comp. L. 1915, § 12910.

¶ 240. An execution sale is presumed regular and made on proper notice if the party attacking it does not make out a prima facie case to the contrary; he cannot, by merely alleging its validity, place upon the execution purchaser the burden of establishing it.—Vroman v. Thompson, 51 Mich. 452.

¶ 241. A judgment in ordinary cases must be presumed to be correct, so far as the title of a good-faith purchaser at an execution sale thereunder is concerned.—Cook v. Kent Circuit Judge, 70 Mich. 94.

¶ 242. Plaintiff brought replevin for 20,000 feet of hemlock lumber, to which he claimed title through one who had purchased at an execution sale. The indorsement of levy and notice of sale described the property as "75,000 feet of lumber, in forty-five piles, consisting of birch, ash, elm, maple, pine, and oak lumber, piled and situated on the mill yard of H. [the execution debtor]." There were six or seven other piles of lumber in the yard at the time of the levy. Before the sale, defendant bought of the execution debtor the hemlock lumber in controversy. Plaintiff claimed that the hemlock was intermingled in the forty-five piles of lumber levied upon and advertised for sale, but the record on error failed to disclose that such was proved to be the case. Held, that plaintiff did not show himself entitled to maintain the action.—Dallavo v. Morse, 114 Mich. 675.

¶ 243. On a judgment levy against a homestead worth more than $1,500 under C. L. 1897, § 10369, How. 2nd Ed., § 13079, where the property sold for more than the appraised value, subject to prior incumbrances, appraisers were presumed to have taken into consideration the existence of such incumbrance.—Lieblien v. Hansen, 178 Mich. 11.

§ 95. Right to object or seek relief; estoppel and waiver.

See also ante ¶ 186, post ¶ 307.
Effect of delay to cure defects, see post § 96.
Conclusiveness of return nulla bona against attack on land title, see post § 111, ¶ 287.
Waiver by delay in objecting, see also ante ¶ 226.
Applicability of rule for inurement of after-acquired title by doctrine of estoppel, see ante § 81; and see Estoppel, II.
Estoppel to assert paramount claim, see post § 121.
Objection by person other than owner that exemptions were not set out, see ante ¶ 124.
Injunction against levy or sale, see Injunctions, II, B.
Bidding as for chattel as estoppel to claim that thing bought was fixture and part of realty, see Fixtures, II.
General law of waiver and estoppel, see Election and Waiver; Estoppel.

¶ 244. If one after a sale of an undivided interest in one of the parcels owned in common should receive a conveyance from the tenant in common of the lands so sold, he could not maintain a bill to set aside the sale on the ground of its being inadmissible, because if the sale was good it must stand, and if bad, so would the conveyance to him be on the same reasons.—Campau v. Godfrey, 18 Mich. 27.

¶ 245. Attending at an execution sale, and bidding, as if for the property of another, will estop the bidder from claiming title to the property sold, as against a purchaser whom he has thus induced to believe that it was not his.—Wilber v. Goodrich, 34 Mich. 84.

¶ 246. One is estopped as against execution purchasers from questioning the sale except upon the grounds asserted by him at the time of the sale.—Ganong v. Green, 64 Mich. 488.

¶ 247. Upon an execution sale of logs in attachment to enforce a lien, defendant made certain objections, which did not, however, include the objection that jurisdiction in attachment was not acquired because the affidavit was not filed and the writ issued on the same day. The logs were bid in by a purchaser relying on the advice of an attorney whom he had employed to examine the records of the suit, and who reported to him thereon. In replevin for the logs by the execution defendant against such purchaser,

it was held that the former was not estopped from raising the jurisdictional objection; since both had knowledge of the facts. —Northern Michigan Lumber Co. v. Lyon, 95 Mich. 584.

¶ 248. A judgment creditor, levying on and selling the debtor's land apparently incumbered by a mortgage, and buying in at the sale, cannot thereafter attack the mortgage as fraudulent as to him and assert the priority of his judgment lien; since that would be unfair to the mortgagee and to other bidders who were entitled to assume that the mortgage was valid as against his lien. —Belcher v. Curtis, 119 Mich. 1.

¶ 249. Irregularities in judgment based on attachment proceedings may be waived by defendant's conduct; so that a sale of property on execution may not be thereafter attacked.—Payment v. Church, 38 Mich. 776.

§ 96. Cure of defects by delay or laches.

Objection after redemption time that levy was excessive, see post ¶ 266.

¶ 250. An execution sale under a judgment void for want of jurisdiction does not enable the purchaser to claim the benefit of the five-year limitation clause of Comp. L. 1871, § 7137, How. St., § 8698, applying where defendant claims title by or through a deed upon a sale by a sheriff, etc.—Millar v. Babcock, 29 Mich. 526.

¶ 251. A motion to set aside an execution for irregularity, made five years after sale under it, comes too late.—Spafford v. Beach, 2 D. 150.

§ 97. New writ, levy or sale.

Resale on refusal of bidder to take and pay for property, see Jud. Act, chap. XXIII, § 54; Comp. L. 1915, § 12869.

New execution where execution has been satisfied and property afterwards appears not to have belonged to debtor or damages have been recovered as for wrongful levy, see Jud. Act. chap. XXIII, § 64; Comp. L. 1915, § 12879.

Provision for further execution in event of recovery against purchaser because of failure of title purchased, see Jud. Act, chap. XXIII, § 129; Comp. L. 1915, § 12944.

¶ 252. Abandonment of a sale on execution because of an error in the notice thereof does not necessarily invalidate a subsequent sale or notice if it does not appear that the execution debtor has been prejudiced.—Atwood v. Bearss, 45 Mich. 469.

§ 98. Remedies and relief of purchaser.

Statutory bill to declare equities in land sold, see post §§ 100, 101.

Bill for accounting of rents and profits, see post § 99.

Relief by motion to set aside sale, see post § 102.

Summary proceedings to obtain possession, see Forcible Entry.

Penal liability of sheriff for defaults and neglects, see Sheriffs, IV, B.

Provisions for recovery of amount paid in case of eviction or failure of title in action based thereon, see Jud. Act, chap. XXIII, § 128; Comp. L. 1915, § 12943.

¶ 253. A party having the legal right to a conveyance under an execution sale can compel the execution of it by mandamus, if refused; but an equitable right only to a deed must be enforced in equity.—Whipple v. Farrar, 3 Mich. 436.

§ 99. Accounting for rents and profits.

Right to rents, profits and issues during period for redemption, see ante §§ 73, 74.

¶ 254. Where one neglects for several years after the time of redemption expires to perfect his title under an execution sale, he waives all right to an account of the rents and profits for the intermediate period. —Whipple v. Farrar, 3 Mich. 436.

§ 100. Procedure under statute to declare interests and equities in land sold.

See also ante ¶ 67.

Necessity of strict procedure in levying on lands conveyed by debtor, see ante § 41.

Bar of purchaser's bill by year of delay, see post § 101.

Procedure before sale to aid levy, see Creditors' Suits.

Suits to set aside fraudulent transfer of lands, see Fraudulent Conveyances, V, A.

Pleading and procedure under statute to perfect and quiet title of property levied on and sold in hands of debtor's fraudulent grantee, see Fraudulent Conveyances, V.

General law of quieting title, see Quieting Title.

Statutory provisions for suits to declare equities in land levied on, see Pub. Acts 1917, No. 216, amending Jud. Act, chap. XXIII, § 82; Comp. L. 1915, § 12897.

¶ 255. A creditor cannot be allowed to sell land on execution with apparently a valid lien upon it by which its marketable value is affected, and then institute proceedings to set aside the incumbrance as a fraud upon his rights. In such a case he should file his bill in aid of execution before sale.—Marshall v. Blass, 82 Mich. 518.

¶ 256. Where a creditor, ignoring an assignment by his debtor which was preferential and void on its face, took judgment and sold the assigned land on execution, but did not file a bill in aid of such execution, and where the assignees never executed their trust but reconveyed to another assignor, defendant's grantor, held, that parties claim-

ing under the execution sale were entitled to have their title quieted.—Wolf v. O'Conner, 88 Mich. 124, on rehearing, reversing 83 Mich. 301.

¶ 257. Under Comp. L. 1897, § 9167, providing that lands fraudulently conveyed with intent to defeat creditors shall be subject to debts and may be levied upon and sold under execution, and that in case of levy upon the equitable interest of the judgment debtor before a determination of his rights, the judgment creditor may before sale institute proceedings to ascertain the rights of the judgment debtor, and that in case of a sale without such rights having been determined, he shall within one year institute proceedings to ascertain and determine the same, a bill attacking a conveyance as fraudulent must be filed within one year from the date of levy.—Daniel v. Palmer, 124 Mich. 335.

¶ 258. Where a judgment creditor knows at the time of a sale under execution that the legal title to the land levied upon was not in the defendant it is his duty to proceed within a year under Comp. L. 1897, § 9167, and institute proceedings to ascertain and determine the interest and equities of the judgment debtor in the premises levied upon and to settle the rights of the parties in interest.—Tiedemann v. Kroll, 144 Mich. 308.

¶ 259. The limitation of one year after sale of the equitable interest of a judgment debtor for the institution of proceedings in aid of execution by a judgment creditor, under Comp. L. 1871, § 4628, applies only to equitable interests and does not cover legal interests, such as the interest of a judgment creditor in the land of a debtor, fraudulently conveyed.—Orendorf v. Budlong, 12 Fed. 24.

§ 101. ——Effect of delay by purchaser.

Effect of delay to cure sale as against objecting defendant, see ante § 96.

¶ 260. The execution purchaser cannot bring ejectment unless he has complied with the requirements of How. St., § 6108, and either before the sale or within one year thereafter has instituted proceedings to define the debtor's interest.—Jenison v. Rankin, 57 Mich. 49; and see Messmore v. Huggard, 46 Mich. 558.

¶ 261. If one who has levied execution to reach an equitable interest in land delays more than one year to institute proceedings to determine the judgment debtor's rights and equities, he is guilty of laches (How. St., § 6108), and a bill to remove the cloud caused by such levy may be maintained by the holder of the legal title.—Edsell v. Nevins, 80 Mich. 146.

¶ 262. Failure by judgment creditor to proceed, under Comp. L. 1897, § 9167, which requires the purchaser at an execution sale to determine the rights and equities of the judgment debtor, is fatal to his suit to quiet title.—Kunze v. Solomon, 126 Mich. 290.

¶ 263. Complainants owned land and conveyed it by quitclaim deed, taking back a mortgage for a part of the purchase price. After the deed was recorded, but before the recording of the mortgage, defendant took out execution, and levied on the lands as the property of complainant, and purchased the land at a sheriff's sale. Held, that complainant's interest in the land was an equitable one, within the meaning of section 9167, 3 Comp. Laws 1897, and hence defendant, having failed to file its bill in equity within one year after the sale to determine complainant's interest, as required by the statute, took no interest under the levy and sale; and complainant, having taken possession apparently under his mortgage, was entitled to have the levy and sale removed as a cloud upon his title.—Gordon v. Township of Burleigh, 153 Mich. 493.

§ 102. Setting aside sale or other relief.

Motion and notice of motion, see post § 103.
Effect of setting aside sale, see post § 104.
Loss of right to move by five years' delay, see ante § 96.
Proper procedure where price is inadequate, see also ante ¶ 237.
Redemption or petition to set aside defective sale as better practice, see ante ¶ 219.
Chancery bills to redeem, see ante § 88.
Motions to quash levy or writ, see post § 117.
Bill to quiet title by holder of legal title, see also ante ¶ 261.
Defects and irregularities sufficient to invalidate sale, see ante §§ 90-93.
Improper sale in gross as ground to set sale aside, see ante ¶ 234.
Mandamus to compel proper action or order, see Mandamus, II, III.
Jurisdictional amount in controversy in suits in equity for relief, see Equity § 17.

¶ 264. Irregularities in a sale under an execution must be corrected by applying to the court out of which the writ issued to set the sale aside. There must be fraud to give equity jurisdiction; it is not sufficient that there is irregularity.—Cavenaugh v. Jakeway, W. 344.

¶ 265. A purchaser of land against which a certificate of levy has been filed may obtain relief against an irregular sale of the interest of the judgment debtor by application to the court wherein the judgment was rendered, but a bill will not lie to set aside the levy and sale as a cloud upon his title.—Rhode v. Hassler, 113 Mich. 56.

¶ 266. The execution debtor who fails to redeem within the time allowed by law cannot afterwards have the sale set aside on the ground that the levy was excessive.—Campau v. Godfrey, 18 Mich. 27.

¶ 267. A sale on execution under an alimony decree will be vacated where the party against whom the execution was issued was not served with notice of the application for execution.—Dewey v. Dewey, 151 Mich. 586.

¶ 267a. A court of equity will not relieve a garnishee from a sale of land belonging to such garnishee under an execution upon a judgment against such land as the property of the principal defendant, because of defects in the original proceedings against the principal debtor, and in the garnishment proceedings, where the creditor acted in good faith, and the garnishee appeared in the garnishee proceedings, which were continued from time to time and had ample opportunity to present any defense which he had.—Lafayette Benev. Society v. Richardson, 188 Mich. 57.

§ 103. Motion and notice of motion to set aside.

Conclusiveness of return on motion to set aside, see post § 111.

General motion practice, see Motions and Orders.

¶ 268. As to the authority of the circuit court to set aside, upon motion, an execution levy or sale for illegalities or in case of an excessive levy, or of a sale for an inadequate price, see Blair v. Compton, 33 Mich. 414.

¶ 269. Notice of proceedings to set aside an execution sale should be given to the purchaser at such sale.—Wilkie v. Ingham Circuit Judge, 52 Mich. 641.

¶ 270. Mandamus to vacate an order setting aside a sale on an execution that had been levied without waiting for the enrollment of the decree was denied, even though no notice of the proceedings to set aside the sale had been given to the purchaser, where (1) the date of the decree, as shown in the execution, was notice of the fact that the execution was prematurely issued; and (2) where the motion to set aside was not made until the time to redeem had expired.—Wilkie v. Ingham Circuit Judge, 52 Mich. 641.

§ 104. Effect of setting aside sale.

Effect of grant of new trial, vacation or reversal, see post § 124.

¶ 271. When a levy and sale are set aside on motion of the plaintiff on the ground that the property sold did not belong to the defendant in attachment, any claim of the plaintiff to the property or possession acquired by the sale is effectually barred.—Bacon v. Kimmel, 14 Mich. 201.

VIII. SATISFACTION, DISCHARGE AND DISPOSAL OF PROCEEDS.

§ 105. In general.

Voluntary payment as waiver of defects in writ, see post ¶ 296.

Payments to redeem, see ante, VII, E.

Necessity of discharge of original before issuance of alias writ, see ante § 10.

Levy as satisfaction of the judgment, see Judgments, XI.

Right of assignee of judgment and levy with notice of outstanding later mortgage, see Judgments, IX.

General law of payment and discharge, see Payment; Releases.

Contribution by coparties to exonerate or reimburse payer, see Indemnity, II.

Subrogation of paying party to rights under levy as against execution debtor, see Subrogation; Suretyship, III; and see Mortgages, VIII.

Payment of execution as waiver of right to appeal, see Appeal § 66.

Rate and computation of interest on execution, see Jud. Act, chap. XXIII, § 20; Comp. L. 1915, § 12835.

Direct payment without sale of money or evidences of debt taken on levy, see Jud. Act, chap. XXIII, §§ 38, 39; Comp. L. 1915, §§ 12853, 12854.

Payment of exemption money, see Jud. Act, chap. XXIII, § 50; Comp. L. 1915, § 12865.

Provisions for certificate and record of satisfaction of levy on real estate, see Jud. Act, chap. XXIII, § 83; Comp. L. 1915, § 12898.

Statutory duty to discharge real estate levy on record when paid or discharged by redemption, see Jud. Act, chap. XXIII, § 147; Comp. L. 1915, § 12962.

¶ 272. The rule excusing a judgment creditor buying at an execution sale from paying the amount of his bid applies only where his bid does not exceed the amount due under the execution, and where his bid is in excess of that amount it is his duty to pay it.—Munger v. Sanford, 144 Mich. 323.

¶ 273. One of several defendants in execution, to avoid levy gave plaintiff's attorney a check for the full amount, with no provision that any part of it was to be returned in any event. Her attorney testified that it was given not as payment of the execution but to protect plaintiff's attorneys, the execution to be kept alive. Held that it was a payment of the execution.—Thornton v. Damm, 120 Mich. 510.

§ 106. Set-offs.

Provisions for set-off of executions against each other, see Jud. Act, chap. XXIII, §§ 15-17; Comp. L. 1915, §§ 12830-12832.

¶ 274. A set-off of executions under How. St., § 7708, cannot be made where there has been a bona fide assignment of a part of the sum due on the first execution.—McRoberts v. Lyon, 79 Mich. 25.

¶ 275. That a judgment in the circuit court in a case appealed from justice's court is rendered also against a surety on the

appeal bond will not prevent the set-off, against an execution issued on a similar judgment after reversal of an execution for costs on reversal of the former judgment in the supreme court.—Bennett v. Hanley, 91 Mich. 143.

¶ 276. Judgment having been recovered by A. against B. and assigned to C. and thereafter reversed on error, and a new trial having resulted in a judgment similar to the first and execution being issued thereon, B. is entitled to set-off against it an execution for costs awarded him on the reversal.—Bennett v. Hanley, 91 Mich. 143.

§ 107. Payment into court and distribution of proceeds.

Right of grantee by fraud to have surplus after satisfaction of levying creditor, see Fraudulent Conveyances, III.
General law of payments into court for persons entitled and procedure for payment out again, see Payment, I, B, IV.
Disposal of surplus after satisfying debt and expenses, see Jud. Act, chap. XXIII, § 120; Comp. L. 1915, § 12935.

¶ 277. The failure of the sheriff to pay into court the amount to which the debtor was entitled as homestead exemption, did not invalidate a sale under execution; the debtor's remedy being by citation or an action against the sheriff.—Flynn v. Kalamazoo Circuit Judge, 136 Mich. 23.

IX. RETURNS TO WRIT, AND FILINGS OF PAPERS OF SALE.

To justices' writs, see Justices of the Peace, IV, H.

§ 108. Nature and necessity in general.

Indorsements of receipt by sheriff, see ante § 13.
Certificates of levy and sale, see ante §§ 43, 76.
Alias writ on return of original unsatisfied, see ante § 10.
Necessity of levy before return day, see ante § 45.
Return to attachment, see Attachment, VI, D.
Return to original process, see Process, II, D.
Returns to capias, see Civil Arrest §§ 14, 41.
Issuance and return of writ unsatisfied as basis for creditors' suit, see Creditors' Suits § 12.

§ 109. Time for return.

Time for return on which creditors' suit is based, see Creditors' Suits §§ 14, 17.
Statutory time for return day, see Jud. Act, chap. XXIII, § 1; Comp. L. 1915, § 12816.

¶ 278. An execution for the purposes of a transcript may lawfully be returned on the sixtieth day from its date—that being the return day—unless that day is Sunday. A return on Sunday is void.—Peck v. Cavell, 16 Mich. 9.

§ 110. Requisites and sufficiency of return.

Time for return, see ante § 109.
Amendments of return, see post § 113.
Effect of omission to return no personalty where sale of land was made, see also ante ¶ 230.
Effect of deficiencies on title of purchaser, see also ante ¶ 228.
Return to writ issued against receiver without leave as tainted with illegality of the writ, see ante ¶ 82.
Necessity and sufficiency of return to support creditors' suits, see Creditors' Suits §§ 12-15.
Specification of articles sold and prices realized, see Jud. Act, chap. XXIII, § 148; Comp. L. 1915, § 12963.
Return unsatisfied of writ issued on judgment for mortgage debt where other property than that mortgaged does not satisfy writ, see Jud. Act, chap. XXIII, § 126; Comp. L. 1915, § 12941.
Certificate of doings and return where one officer completes execution begun by another since deceased, see Jud. Act, chap. XXIII, § 21; Comp. L. 1915, § 12836.

¶ 279. To pass the title to real estate sold on execution under the appraisal law of 1841 it was not necessary that it should appear, from the officer's return to the execution, that either of the appraisers was chosen by defendant, or that he had an opportunity to choose one.—Crane v. Hardy, 1 Mich. 56.

¶ 280. A sheriff's deed on execution sale is not invalid because his return does not show that notices of sale were duly posted; the statute does not require that proof of publishing or posting be made matter of record.—Grand Rapids Nat. Bank v. Kritzer, 116 Mich. 688.

§ 111. Conclusiveness and effect of return.

Appraisal as evidence, see post § 112.
Rebuttal of indorsement of direction by plaintiff to officer to return writ, see post ¶ 291.
Indorsement amounting to abandonment of levy, see ante ¶ 154.
Conclusiveness of returns to other process, see Attachment § 75; Process, II, D.
Conclusiveness of return in bill by creditor based thereon, see Creditors' Suits § 29.
Conclusiveness of sheriff's return against debtor corporation in action against stockholders, see Corporations ¶ 1220.

¶ 281. Whether the sheriff's return to an execution is conclusive upon the defendant therein, and those claiming under him, or only prima facie evidence and liable to be impeached for the sheriff's fraud, quære.—Nall v. Granger, 8 Mich. 450.

¶ 282. The sheriff's return under a judgment levy is conclusive upon the parties.—Lieblien v. Hansen, 178 Mich. 11.

¶ 283. A sheriff's return upon an execution levy against real estate, was conclusive upon a motion to vacate the sale of the real estate, where no effort to amend the return filed before the decision of the circuit judge was made or asked before the rendering of the decision.—Flynn v. Kalamazoo Circuit Judge, 136 Mich. 23.

¶ 284. Where a sheriff made return to an execution that he had made levy on goods on a day named, which was prior to the giving of a mortgage thereon, it was held that the mortgagee was not precluded by this return from showing that in fact the levy was made after the mortgage was given, and that a false return of the time was made by collusion with the purchaser at the sheriff's sale.—Nall v. Granger, 8 Mich. 450.

¶ 285. One who claims rights in property that has been sold on execution can show the real facts as to the validity of the levy and sale, if his own title antedates the levy. —Winfield v. Adams, 34 Mich. 437.

¶ 286. Parol evidence is admissible to show that an execution was actually returned on Saturday, although the sheriff's return thereto is dated as of Sunday, where other parts of the record and the clerk's entry show the return to have been on Saturday.—Macomber v. Wright, 108 Mich. 109.

¶ 287. The sheriff's return nulla bona cannot be questioned in ejectment brought by the grantee in a deed on execution sale of defendant's land.—Luton v. Sharp, 94 Mich. 202.

¶ 288. That an execution regular on its face was returned by the officer nulla bona is evidence tending to show the insolvency of the execution debtor, and a discovery by counsel made years afterwards that had the judgment been attacked it might not have proved valid, does not detract from the evidence furnished by such return.—Riggs v. Whitaker, 130 Mich. 327.

§ 112. Filings and records.

Appraisal as declaration against interest of officer, see Evidence ¶ 2018.

Conclusiveness in evidence against officer of his appraisal to set out exemptions, see also Evidence ¶ 2923.

¶ 289. In an action against the officer the appraisal made under his writ is admissible against him as some evidence of the value of the property levied on.—Worthington v. Hanna, 23 Mich. 530; Hunt v. Strew, 33 Mich. 85; Densmore v. Mathews, 58 Mich. 616.

¶ 290. The appraisal made under the officer's writ is not evidence in his favor.—Dyer v. Rosenthal, 45 Mich. 588.

¶ 291. It seems proper to allow the plaintiff in an execution to dispute the sheriff's indorsement thereon that the plaintiff had directed him to return the execution to the clerk.—Vroman v. Thompson, 51 Mich. 452.

§ 113. Amendments or setting aside returns.

Return nunc pro tunc to cure alias writ, see post ¶ 302.

Of returns to other process, see Attachment § 74; Process, III.

Right of execution defendant to move to set aside false return on which creditors' bill is pending, see also Creditors' Suits ¶ 118.

¶ 292. An amendment to a return of a sheriff as to a matter of fact must be made voluntarily and cannot be compelled by the court.—Flynn v. Kalamazoo Circuit Judge, 138 Mich. 126.

¶ 293. A sheriff after levying execution on real estate made no entry on the writ of such levy, but filed a notice of it as provided for by statute. Held, that at a hearing on a bill in aid of the execution, the sheriff was properly permitted to attach a paper to the execution showing the proceedings he took under it.—Shepard v. Schrutt, 163 Mich. 485.

X. OBJECTIONS TO WRIT AND LEVY; QUASHAL OR OTHER RELIEF.

§ 114. Grounds of objection.

To contents or indorsements, see post § 115.

To alias writs, see post § 116.

Objections made after sale and affecting it, see ante VII, F.

Presumptions as to regularity, see ante § 94.

Issuance during time of stay and delivery to sheriff afterwards, see ante ¶ 10.

Want of seal, see also ante ¶ 24.

Levy accomplished by trespass, see ante ¶ 98.

Excessiveness of levy, see also ante ¶ 107.

Failure to give notice of levy, see ante ¶ 114.

Irregularity in making inventory and appraisal and setting out exemptions, see also ante ¶ 123.

Delay in making sale, see also ante ¶ 162.

¶ 294. It is doubtful whether a levy on chattels can be contested on the inconsistent grounds that the one in possession holds as mortgagee and under a bill of sale.—Haynes v. Leppig, 40 Mich. 602.

¶ 295. A levy upon an undivided half of a portion of partnership property is invalid and the sale will be perpetually enjoined on the application of the partnership.—Krupp v. Adams, 124 Mich. 215.

§ 115. ——Contents of writ or indorsements thereon.

Failure to indorse description of property, see also ante ¶ 27.

Improper command to make execution fees, see also ante ¶ 26.

Failure to indorse date of receipt, see also ante ¶ 29.

¶ 296. An execution issued upon a judgment on a guardian's bond did not state, as required by How. St., § 5998, that it was for the ward's use. Held, that such omission could not, in suit to recover back money paid on the judgment, be urged by the defendant in execution where no levy was made and where the judgment was voluntarily paid.—Kalmbach v. Foote, 86 Mich. 240.

¶ 297. An execution the command of which is general is not invalid because it recites that the action of assumpsit wherein the judgment was rendered was instituted to enforce a mechanic's lien, and also describes the property against which the lien was asserted, although there was only an ineffectual attempt to enforce the lien in such action.—Allured v. Voller, 107 Mich. 476.

¶ 298. A command to collect, in addition to the legal costs, twenty-five cents for the execution, is surplusage, and unwarranted by Comp. L. 1857, § 3790; How. St., § 6951, but does not make void the execution, as the officer is presumed to know that by law it cannot be collected.—Hollister v. Giddings, 24 Mich. 501.

¶ 299. The fact of levy should be indorsed on the execution; but its absence does not invalidate the execution if notice of the levy is duly recorded according to statute (Comp. L. 1871, § 4685; Pub. L. 1875, Act No. 5, p. 3; How. St., § 6173), and its subsequent indorsement is unimportant.—Vroman v. Thompson, 51 Mich. 452.

§ 116. ——Irregular alias or failure to revive writ.

¶ 300. The issue of execution after plaintiff's death without taking steps to revive the suit is only an irregularity, and may be cured by a revivor nunc pro tunc.—Jenness v. Lapeer Circuit Judge, 42 Mich. 469.

¶ 301. An alias fi. fa. issued on return of a previous execution levied upon real estate, which remained unsold for want of bidders, is irregular merely, but not void.—Spafford v. Beach, 2 D. 150.

¶ 302. Levy of an execution upon land was released because the land was not the judgment debtor's and the execution was indorsed nulla bona, but was not returned, and after its life had expired an alias was issued. Held, that such issue was merely irregular, since the court might have directed return nunc pro tunc, and that a levy thereunder was valid.—Miller v. Hanley, 94 Mich. 253.

§ 117. Method of objecting or obtaining relief.

See also ante ¶ 14.

Of attacking, setting aside or curing sale for defects, see ante §§ 98-104.

Injunction against levy or sale, see ante ¶ 295; and see Injunctions, II, B.

Proper parties to injunction suits, see Injunctions, III.

Necessity of joinder of complainant's wife or husband, see also Husband and Wife, VI.

Suits to quiet title and remove cloud created by levy and sale, see Quieting Title.

Amount in controversy to give equity jurisdiction, see Equity § 17.

Provision against replevin by defendant except for exempt goods, see Jud. Act, chap. XXVII, § 3; Comp. L. 1915, § 13082.

¶ 303. The proper method of attacking a levy of execution is by motion to quash it in the court under whose writ it is made where such court can furnish adequate relief.—Jensen v. Oceana Circuit Judge, 194 Mich. 405.

¶ 304. An excessive levy is not void. The party complaining of it should move the court to set it aside instead of proceeding by bill in equity.—Campau v. Godfrey, 18 Mich. 27.

§ 118. Estoppel and waiver.

To question sale or defects therein or affecting title, see ante § 95.

Of hostile or paramount claimant to question title, see post § 121.

¶ 305. A purchaser of a note secured by a mortgage, who afterwards purchased the mortgagor's interest subject to a levy, is estopped from denying the levy and commits trespass if he seizes the chattels while under the levy.—Nelson v. Ferris, 30 Mich. 497.

¶ 306. One who has recognized the validity of an execution by procuring release of property and giving other in lieu of it, whereon the other has acted, is bound, whether or not he supposed that the judgment was valid or had any knowledge of the truth in that regard.—Payment v. Church, 38 Mich. 776.

¶ 307. By making a specific objection one may become estopped to make different objections that might have been averted; hence a mortgagee who at the time of an execution sale objects thereto on the ground of his mortgage cannot, in trover against the purchaser, raise the objection that the constable's notice of sale did not contain the names of the parties.—Ganong v. Green, 64 Mich. 488.

¶ 308. Defendants claiming title to real estate under execution levies did not waive their rights to enforce such levies by not attacking as fraudulent a subsequent conveyance of such property, since the execution levy was notice to such purchaser of the fraud of her vendor.—Barrett v. Lowrey, 77 Mich. 668.

§ 119. Amendments or cure.

Alias execution on setting aside former sale and satisfaction, see ante ¶ 22.

Addition of seal by amendment, see also ante ¶ 24.

Addition of indorsement of date of receipt, see also ante ¶ 28.

New writ to carry out sale after expiration of return day, see also ante ¶ 160.

Amendments to cure alias writ or writ issued without proper revival, see also ante § 116.

Amendment of return, see ante § 113.

Authority of officer to change levy, see ante § 53.

Effect of amendment on appeal to alter accrued rights, see post § 124.

¶ 309. A levy made during the life of a judgment debtor cannot be cured of any radical defect by proceedings after his death.—Campau v. Barnard, 25 Mich. 381.

XI. ADVERSE AND PARAMOUNT CLAIMS TO PROPERTY TAKEN.

§ 120. Rights and remedies of owner of property taken as another's.

[Note. The right of property under a levy, when the debtor's title is disputed by a third person claiming by paramount or independent title, is usually questioned by actions for Conversion; Trespass; Replevin; Ejectment; Quieting Title. See these topics.]

Quieting title, see also ante ¶ 181.

Replevin rather than bill in aid as proper remedy to determine title in dispute, see Creditors' Suits § 6.

Levy on property in agent's hands, replevin by agent, see Agency ¶ 470.

¶ 310. A levy on property of a stranger to the process is a trespass, though the writ is valid.—Weber v. Henry, 16 Mich. 399; Heyman v. Covell, 36 Mich. 157.

§ 121. Estoppel to claim or question title.

See also ante ¶ 308.

Effect and conclusiveness of return to writ, see also ante § 111.

Right to question earlier mortgage, see also ante ¶ 186.

Estoppel to question title taken subject to execution, see also ante ¶ 244.

Estoppels in general, see Estoppel.

Representations as to identity of owner as estoppel to question levy against such person, see also Estoppel ¶ 114.

Levy on property as tenant's as estoppel to assert title as one's own, see also Estoppel ¶ 98.

¶ 311. One who purchases subject to levy is estopped from denying the levy.—Nelson v. Ferris, 30 Mich. 497.

¶ 312. One who disclaimed ownership and advised an attachment of chattels as the property of another, and assented to the levy, is estopped from setting up afterwards a claim of title as against such proceedings.—Sebright v. Moore, 33 Mich. 92.

¶ 313. Where an attaching creditor had induced another creditor to levy an attachment which afterwards became a prior lien by reason of the discontinuance of the first suit, the former is estopped, in so far as the value of the property may be needed for satisfying the latter claim, from asserting that the ownership of the property was in himself.—Vanneter v. Crossman, 42 Mich. 465.

¶ 314. Where a sheriff in good faith levies execution on certain property, a husband and wife are estopped from afterwards claiming that the property was that of the wife when at the time they failed to advise the sheriff of the exact situation and they were cognizant of the fact that the property was being taken as that of the husband.—Zuehlke v. Stone, 148 Mich. 478.

¶ 315. The principle of estoppel is inapplicable to a case where the administrator of an estate had attended a sale and bid upon property sold under an attachment, although he had previously formally notified the sheriff that the property attached belonged to his intestate and an affidavit to that effect was presented at the hearing where the order for sale was made. The administrator is not thereby estopped from suing the sheriff for the value of the property sold.—Major v. Brewster, 148 Mich. 623.

¶ 316. A person who becomes the owner of all or substantially all of the capital stock of a corporation, and who through dummy directors obtains an assignment of all of the corporate assets, cannot thereby defeat the rights of an execution creditor under a levy against the corporation to satisfy it out of such assets, he having relied on the assurance of the assignee that the judgment should be paid.—Lang v. Lundy, 185 Mich. 390.

XII. WRONGFUL EXECUTION AND LEVY AND LIABILITY FOR SAME.

§ 122. Wrongfulness in general.

Invalidity of levy made by trespass, see ante ¶ 98.

Excessive levy, see also ante ¶ 107.

Excessive selling, see also ante ¶ 177.

Right to sue after reversal of judgment, see post ¶ 327.

Wrongful levy and sale as slander of title, see Libel, II, D.

Elements of Conversion and Trespass, see those topics.

¶ 317. A sale on execution of personal property belonging to a third person is a

conversion, whether the officer making the sale removes it or not.—Scudder v. Anderson, 54 Mich. 122.

¶ 318. Retention of fees from the proceeds of a wrongful levy is a conversion.—Bringard v. Stellwagen, 41 Mich. 54.

¶ 319. A levy on specific partnership chattels of an attachment against one partner only is a trespass.—Haynes v. Knowles, 36 Mich. 407.

¶ 320. A plaintiff received as a gift from her husband a certain lot of goods which were subject to seizure on execution by her husband's judgment creditors. She in good faith, thinking them exempt, admixed them with goods of her own. The defendant officer, in making a levy, asked her to point out her own goods so that he might leave them. This she refused to do. Held, the officer was not liable for seizing the entire lot.—McCausey v. Hoek, 159 Mich. 570.

§ 123. Liability, responsibility and remedies.

Estoppel to hold sheriff liable on claim of title, see also ante ¶ 315.
Appraisal as evidence, see ante § 112.
Wrong, breach of duty, or neglect by sheriff or constable in executing process, see Sheriffs, IV.
Responsibility of party for sheriff's acts, see Sheriffs, IV.
Liability for act of levying officer as for act of agent, see also Agency § 51.
Actions and procedure against sheriffs, see Sheriffs, VI.
Remedy and procedure to protect or assert homestead, see Homesteads, VIII, IX.
Necessity of demand before suing execution purchaser for conversion because levy was invalid, see Conversion ¶ 45.
Necessity of demand before suing in trover, see Conversion § 10.
Actions of Conversion, Trespass, Replevin, Ejectment, see those topics.
Measure of damages for wrongful levy amounting to conversion, see Damages § 115.
Jurisdiction to sue United States marshals for unlawful or wrongful levy, see Courts § 102.
Remedies against United States marshals, see Officers, VI, A.

¶ 321. Where there have been several unlawful sales on executions against the same party, he may treat each as a conversion and recover separately and is not required to consolidate.—Wheeler v. Wallace, 53 Mich. 364.

¶ 322. A client was held liable for the taking of property upon a justice's execution issued at the instance of his attorney after the owner of the property had perfected an appeal.—Foster v. Wiley, 27 Mich. 244.

¶ 323. Where a statute authorizes the deputizing of persons to serve executions, the plaintiff selecting a person to serve the writ thereby makes himself responsible for his acts.—Harvey v. McAdams, 32 Mich. 472.

¶ 324. Express assent is not necessary to render plaintiffs in an execution liable for the unlawful acts in their behalf of one deputed to serve the writ where their acts imply acquiescence; and their keeping for him the property taken on the writ, and purchasing an article at the sale, is evidence of their sanction of what was done, though they asserted disapproval at the time.—Harvey v. McAdams, 32 Mich. 472.

XIII. RIGHTS ON REVERSAL OR OPENING OF JUDGMENT.

§ 124. In general.

Effect of setting aside sale, see ante § 104.
Set-off of costs on reversal against execution on judgment, see ante § 106.
Possibility that title bought on execution in ejectment may be defeated by new trial, see ante ¶ 191.
Implication of promise to repay, see Implied Contracts, II; Payment, VI.
Right to award of restitution on reversal of judgment or decree, see Jud. Act, chap. XXII, § 7; Comp. L. 1915, § 12797.

¶ 325. As a general rule, the granting of a new trial or the reversal or vacation of a judgment does not affect the title of a good-faith purchaser at an execution sale; otherwise where judgment in ejectment for value is vacated by defendant's taking new trial within three years pursuant to How. St., § 7822.—Cook v. Kent Circuit Judge, 70 Mich. 94.

¶ 326. Rights that have accrued under an execution of a judgment in trover will be saved, where, on appeal, such execution is recalled and reformed, so as to comply with the proper judgment.—Seymour v. Bruske, 140 Mich. 244.

¶ 327. An action is not barred by the fact that a sale on execution was had under a former judgment that was reversed, where the sale was set aside on such reversal before it became absolute.—Millikin v. Ferguson, 56 Mich. 189.

EXECUTIVE CLEMENCY to EXEMPLIFIED COPIES.

Cross-References.

Executive Clemency—
See Pardons and Paroles.
Executive Committees—
See Corporations, XVII, A; Counties, II; Municipal Corporations, III, IV.

Executors and Administrators—
See Estates of Decedents; Wills, VI, F.
Executory; Executed—
See specific topics treating of that which is claimed to be executory or executed, e. g., Contracts; Sales; Gifts; Trusts; Wills, VI.
Executory devises, see Wills, VI; and see Perpetuities.
Doctrine of execution of passive trusts under the statute of trusts, see Trusts, I, IV.
Interpretation of contracts as to executory nature, see Contracts § 171.
Illegality as bar to relief from executed agreement, see Contracts § 89.
Sufficiency of consideration as depending on contract being executed, see Contracts §§ 105-107.
Past considerations for contracts, see Contracts, V, B.
Execution of agreements taking them out of the statute of frauds, see Frauds, Statute of, II.
Exemplary Damages—
See Damages, VII.
Exemplified Copies—
As evidence, see Evidence, VIII, C, 2.

EXEMPTIONS.

TREATS of the constitutional and statutory right of a debtor to hold certain chattels or money or property of a given amount exempt from execution or other judicial process. It excludes the question whether personalty is of a nature that is susceptible of levy or seizure (see Attachment, III; Executions, IV) and also exemptions from taxation (see Taxes, III). The right to have property or money set apart to a decedent's widow as her widow's allowance is treated in Estates of Decedents, V, D.

Analysis.

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I. RIGHT IN GENERAL.

Constitutional right and amount of exemptions, see Const. art. XIV, § 1.

§ 1. Construction and policy of laws.

Withdrawing exemption on labor claims as class legislation, see Constitutional Law § 222.
Validity of laws affecting right under the constitution, see Constitutional Law § 290.
Increase of exemptions by law as law impairing Contract, see Constitutional Law § 181.
Exemptions from taxes, see Taxes, III.
Right of widow to widow's allowance as property to be set aside for her benefit, see Estates of Decedents, V, D.
Provisions of the constitution for exemptions, see Const. art. XIV, § 1.
Constitutional minimum of $500, see Const. art. XIV, § 1.
Applicability of exemption laws to attachment proceedings, see Jud. Act, chap. XXVI, § 7; Comp. L. 1915, § 13034.

¶ 1. Constitutional and statutory provisions exempting property from execution are remedial, and are to be construed liberally and beneficially for the debtor.—Alvord v. Lent, 23 Mich. 369; Stewart v. Welton, 32 Mich. 56; Rosenthal v. Scott, 41 Mich. 632; Wilson v. Bartholomew, 45 Mich. 41; Fischer v. McIntyre, 66 Mich. 681.

¶ 2. Const., art. XVI, § 1, which provides that the personal property of every resident of this state to consist of such property only as shall be designated by law, shall be exempted, to the amount of not less than $500, from sale on execution or other final process of any court, issued for the collection of any debt, was infringed by Pub. Acts 1885, No. 14, § 1 (How. St., § 1717a), limiting the right of exemption to the articles therein enumerated, not exceeding $500 in value, in cases where the execution is issued upon a judgment for personal labor.—Burrows v. Brooks, 113 Mich. 307.

§ 2. Personal nature of right.

Extraterritorial effect, see post § 3.
Persons entitled, see post §§ 4-6.
Right in more than one capacity or character, see post § 7.
Persons entitled to assert right, see post §§ 29, 30.
Right of owner alone to assail levy for failure to set out exemptions, see also Executions ¶ 124.

¶ 3. The exemption of $250 worth of stock in trade as provided by 2 How. Stat., § 7686, to enable a person to carry on the business in which he is principally engaged is a purely personal privilege which must be exercised by the debtor at the time of levy, and the buyer of a stock of goods obtains no right as against the seller's creditors to the exemption which such seller might have claimed.—J. L. Hudson Co. v. No-Name Hat Co., 174 Mich. 109.

§ 3. Extraterritorial effect.

Effect of nonresidence, see post § 5.
See also generally Conflict of Laws, I.

¶ 4. An exemption follows the debt into another jurisdiction where the debtor himself has not been personally subjected to such jurisdiction.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

¶ 5. A railroad company doing business in Indiana and owing an employee residing there wages exempt by the local law from garnishment was garnished in Michigan by a resident of the latter state to whom a debt due from said employee and contracted in Indiana had been assigned by the creditor, an Indiana man. Held, that where no jurisdiction had been obtained over the person of the principal debtor, the exemption of his wages was a vested right in rem which followed the debt.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

§ 4. Persons entitled.

Nonresidence or absence of debtor or family, see post § 5.

Occupational exemptions, see post § 6.

Persons entitled to assert right as distinguished from persons entitled to right, see post §§ 29, 30.

¶ 6. A boarding house keeper is entitled to the same exemption of household furniture as any other householder, though such furniture had been procured to carry on his business, and he had abandoned such business; and household furniture purchased for the purpose of keeping the boarding house is exempt to the amount of $250, even as against a judgment for the purchase price.—Vanderhorst v. Bacon, 38 Mich. 669.

¶ 7. A married woman who supports her family or contributes to its support by the employment of a team may claim the benefit of the laws exempting a team from execution.—McHugh v. Curtis, 48 Mich. 262.

¶ 8. A partner need not be an active member of the firm in order to be entitled to his exemption. Nor does each partner's right depend upon the amount he has drawn out of the firm; partnership dealings and adjustments between the partners or between them and creditors cannot be inquired into in a suit by one partner for his statutory exemption.—McCoy v. Brennan, 61 Mich. 362.

¶ 9. Where execution issued upon a claim against a firm that had dissolved and divided its property, the suit having been brought after the division, a partner who continued in the business could retain as exempt from execution $250 in value of the stock received by him on the division. The question of the right of a firm, or of persons in the character of partners, to assert the exemption privilege is not here involved.—Worman v. Giddey, 30 Mich. 151.

¶ 10. Copartners cannot join in trover for their individual exemptions in the partnership property; and if they do, the misjoinder is fatal.—Rogers v. Raynor, 102 Mich. 473.

¶ 11. Quære, whether a fraudulent vendee is entitled to claim the exemption of his fraudulent vendor where the property is in excess of the exemption.—Williams v. Brown, 137 Mich. 569.

¶ 11a. The purchaser of a stock of goods sold in contravention of the bulk sales law cannot claim the benefit of the vendor's exemption when to secure the exemption a selection must be made from the mass of property sold, and when no such selection was made or agreed upon at the time of the sale.—McCormick v. Kistler, 175 Mich. 422.

§ 5. ——Nonresidence or absence of debtor or family.

Extraterritorial effect, see ante § 3.

Right to exemption of property to be used in business to be carried on out of state, see post ¶¶ 58, 60.

¶ 12. Exemptions from execution and garnishment given by the Michigan statutes are personal privileges which cannot be claimed by nonresidents.—Kelson v. Detroit, G. H. & M. Ry. Co., 146 Mich. 563.

¶ 13. A resident of Michigan who removes to a foreign state thereby loses the benefit of the Michigan exemption laws as to any property which may be afterwards found within the state.—McHugh v. Curtis, 48 Mich. 262.

¶ 14. The statute (see How. St., § 8032), exempting from garnishment the wages of a "householder having a family" to the amount of $25, applies to a husband residing in this state, and who is supporting his family in Canada from his wages.—Pettit v. Muskegon Booming Co., 74 Mich. 214.

¶ 15. Temporary absence from state owing to unlawful attachment of exempt household effects cannot be construed as nonresidence so as to destroy exemption from seizure on another writ.—Erickson v. Drazkowski, 94 Mich. 551.

¶ 16. Where, because of defendant's unlawful seizure upon attachment of plaintiff's exempt household effects, plaintiff is compelled to seek shelter at her mother's house five miles distant in another state, the point that plaintiff was a nonresident cannot be raised to defend a seizure under a second attachment levied while plaintiff was temporarily in such other state.—Erickson v. Drazkowski, 94 Mich. 551.

¶ 17. A debtor must, under the exemption laws, be conclusively presumed to reside where his family lives with his consent, where there has been no separation between husband and wife, and where they occupy the old home; and it is not otherwise if he be voluntarily absent.—Freehling v. Bresnahan, 61 Mich. 540.

§ 6. ——Occupational exemptions.

Property used in occupation or business, see post §§ 17-23.

Exemption belonging to person by reason of his trade, profession, business, or occupation, see Jud. Act, chap. XXIII, § 43, ¶¶ 8, 9; Comp. L. 1915, § 12858, ¶¶ 8, 9.

¶ 18. As to what constituted a physician within the meaning of the exemption act, Sess. L. 1842, p. 70, and the act (Sess. L. 1844, p. 73) repealing ch. 2, tit. 8, part I, R. S. 1838, see Sutton v. Facey, 1 Mich. 243.

¶ 19. Whether one is a practicing physician within the meaning of the exemption laws is a question relating rather to the business in which he is engaged than to the degree of skill with which he exercises it; though some degree of skill is necessary.—Sutton v. Facey, 1 Mich. 243.

§ 7. Right in more than one capacity or character.

Things exempted to individuals and to householders respectively, see Jud. Act, chap. XXIII, § 43; Comp. L. 1915, § 12858.

¶ 20. Where a person who had been trading for several years left it off, and devoted his time chiefly to settling his business affairs, for which he was obliged to travel about, and used a horse and wagon for that purpose, as well as for the cultivation of a small tract of land, it was held that both of these were legitimate employments within the exemption law.—Kenyon v. Baker, 16 Mich. 373.

¶ 21. A farmer who is also a householder owning several cows for use on a farm is entitled to an exemption, as a householder, of two cows under Comp. L. 1897, § 10322, subd. 6, even though in addition to this he is entitled to an exemption, as a farmer, of $250 worth of the stock animals described in Comp. L. 1897, § 10322, subd. 8, which would include such cows.—Feenstra v. Tanis, 145 Mich. 409.

§ 8. Joint and common owners.

Right of partner to exemption against chattel mortgage executed by other partner in firm's name, see Partnership, IV, A.

¶ 22. Where execution is levied upon a stock of goods belonging to a firm, each partner is entitled to exemption to the amount of $250.—Skinner v. Shannon, 44 Mich. 86; Waite v. Mathews, 50 Mich. 392; Chipman v. Kellogg, 60 Mich. 438.

§ 9. Rights between husband and wife.

Necessity of wife's consent to selection of what shall be exempt, see post ¶ 95.

¶ 23. A husband who has left his wife cannot replevy from her household goods that would be exempt from execution.—Smith v. Smith, 52 Mich. 538.

§ 10. Subjection to levy for purchase price or labor debts.

Notice of suit and filing of notice, see post § 11.

Nonexemption of occupational chattels (§ 12858, ¶ 8) from purchase money judgment, see Jud. Act, chap. XXIII, § 44; Comp. L. 1915, § 12859.

¶ 24. In order that a judgment for purchase price of chattels shall be free from exemption, as provided by How. St., § 7716, it is not necessary that the judgment shall recite what it is for; since the statute makes no such requirement.—Lillibridge v. Walsh, 97 Mich. 459.

¶ 25. Property levied upon under attachment for the purchase price is not subject to exemption.—Gottesman v. Chipman, 125 Mich. 60.

¶ 26. The property exempt, under Comp. L. 1897, § 10322, subd. 8, to one by virtue of his trade, profession, occupation, or business, is by reason of section 10324 subject to levy for the purchase price, though it is of the class also exempted to him as a householder under section 10322, subd. 6.—Feenstra v. Tanis, 145 Mich. 409.

¶ 27. The transferee of a note given for the purchase-money of property exempt from execution by How. St., § 7686, subd. 8, cannot claim benefit of exception from exemption provided by How. St., § 7716, since by transferring the note the seller elected to regard the purchase price as paid.—Shepard v. Cross, 33 Mich. 96.

§ 11. ——Notice of suit and filing of notice.

Provisions of statute as to notice of purchase-money action, see Jud. Act, chap. XXIII, § 44; Comp. L. 1915, § 12859.

¶ 28. Under judgment for purchase-price, How. St., § 7716, as amended by Laws 1885, Act No. 159, § 2, providing that certain personalty otherwise exempt from execution shall be liable to levy under judgment for purchase-price, and avoiding sale made after suit begun and notice filed, does not create a lien upon the property but applies to the remedy for the recovery of the purchase-price: the notice is analogous to a lis pendens, and the statute is not limited to cases in which no security for the debt is taken.—Roberts v. McGur, 82 Mich. 221.

¶ 29. How. St., § 7716, which subjects certain personalty, otherwise exempt, to execution issued on a judgment for the purchase price, and which avoids any sale made by the vendee after commencement of the suit in which judgment is rendered, provided notice be filed, etc., does not make the filing of notice a prerequisite to the right to levy upon the property so long as it remains the property of the judgment debtor, or is in the hands of a fraudulent transferee; but merely

restricts the right of alienation to any one after the notice is filed.—Lillibridge v. Walsh, 97 Mich. 459.

¶ 30. The statute denying exemptions where the debt is for the purchase price does not create a lien upon the property, but applies to the remedy merely; and there is no force in the contention that, in the absence of fraud, the vendee is bound by actual notice.—Lillibridge v. Walsh, 104 Mich. 153.

¶ 31. Property otherwise exempt from execution, but subject thereto under How. St., § 7716, for the purchase price, may be seized in the hands of third persons where its transfer to them was made for the purpose of defeating said statutory right of the vendor, although the notice provided for in the statute was not filed prior to said transfer.—Lillibridge v. Walsh, 104 Mich. 153.

§ 12. Levy and subjection of surplus value.

Levy and sale of chattel exceeding exempt value and rendition of surplus to creditors and exempt portion to debtor, see Jud. Act, chap. XXIII, § 50; Comp. L. 1915, § 12865.

Bond by debtor to release chattel levied on as exceeding exempt value, see Jud. Act, chap. XXIII, § 50; Comp. L. 1915, § 12865.

§ 13. Waiver or alienation of right.

Loss or waiver of right by offering property for sale, see also post ¶ 49.

Loss of right by conducting business unlawfully, see post § 23.

Loss of right by absconding, see also post ¶ 69.

Waiver of right by failure to make demand, see also post ¶¶ 85, 86.

Waiver of right by contract involving labor to be done on exempt property for which contractors entitled to lien, see also post ¶ 125.

Public policy as to agreements for waiving exemptions, see Contracts § 73.

Power of partner to find copartner by alienation or incumbrance, see Partnership, IV, A.

¶ 32. As between himself and his creditor a judgment debtor can waive his exemption, which is a personal privilege.—Wilson v. Montague, 57 Mich. 638.

¶ 33. The exemption of stock in trade from the levy of execution thereon is under the control of the merchant alone, and his waiver of such exemption need not be signed by his wife to be valid.—Charpentier v. Bresnahan, 62 Mich. 360.

¶ 34. A written consent by a debtor to the public or private sale in bulk of his entire stock of goods on several executions under which it is held, and the application of the proceeds, less the costs of the sale, in liquidation pro rata of the debts of the several plaintiffs, is evidence of a waiver by the debtor of his statutory exemption, unless contradicted or qualified by legitimate evidence tending to break its force.—Rich v. French, 99 Mich. 27.

¶ 35. Plaintiff's husband, one McCausey, and one Sprague were formerly partners. They gave a trust mortgage of their stock of goods for the benefit of creditors. The trustee closed them out after allowing them to select certain goods under the statutory exemption. McCausey turned over his share of the exempted goods to plaintiff. Judgment creditors who never consented to the selection of goods made under the exemption levied on them in the hands of plaintiff, who failed to claim the exemption. Held, that by such failure she waived her right to the exemption.—McCausey v. Hoek, 159 Mich. 570.

¶ 35a. A judgment for defendant in replevin for exempt property taken by him on execution bars trover against him for its conversion unless after the return of the property and before its sale the claim of exemption is plainly made.—McGuire v. Galligan, 57 Mich. 38.

II. PROPERTY EXEMPT; AMOUNT AND ITEMS.

§ 14. In general.

Provisions and sustenance, see post § 15.

Household goods and domestic animals, see post § 16.

Property used in business or trade, see post §§ 17-23.

Building and loan stock, see post § 24.

Insurance, benefits or workmen's compensation, see post § 25.

Wages, see post § 26.

Alternative right to money exemption, see post § 27.

Proceeds of sale of exempt property, see post § 28.

Right in general, see ante I.

Assertion, enforcement and protection of right, see post, III.

Construction of law as to amount and limitation of exemption, see ante ¶ 2.

Construction and policy of law in general, see ante § 1.

Exemption of homesteads, see Homesteads.

Of cemetery lots and lands, see also Cemeteries ¶ 4.

Property incapable of levy or attachment, see Executions, IV; Attachments, III.

Leviability of property affected with public interest, see Executions, IV.

Property subject to levy on execution, see Executions, IV.

What law governs property having changed situs, see Conflict of Laws § 5.

Constitutional minimum of $500, see Const., art. XIV, § 1.

Enumeration of exempted chattels, see Jud. Act, chap. XXIII, § 43; Comp. L. 1915, § 12858.

Amount exempt as measured by value, see Jud. Act, chap. XXIII, § 43, ¶¶ 5, 7-9; Comp. L. 1915, § 12858, ¶¶ 5, 7-9.
Sewing machine, spinning apparatus and stoves, see Jud. Act, chap. XXIII, § 43, ¶ 1; Comp. L. 1915, § 12858, ¶ 1.
Exemption of cemetery rights and burial places, see Jud. Act, chap. XXIII, § 43, ¶ 3; Comp. L. 1915, § 12858, ¶ 3.
Exemption of seat, pew or slip in house of worship, see Jud. Act, chap. XXIII, § 43, ¶ 2; Comp. L. 1915, § 12858, ¶ 2.
Exemption of arms and accoutrements, see Jud. Act, chap. XXIII, § 43, ¶ 4; Comp. L. 1915, § 12858, ¶ 4.
Library and school books, see Jud. Act, chap. XXIII, § 43, ¶ 5; Comp. L. 1915, § 12858, ¶ 5.

§ 15. Provisions and sustenance.

Householder's exemption of fuel and provisions, see Jud. Act, chap. XXIII, § 43, ¶ 6; Comp. L. 1915, § 12858, ¶ 6.
Subsistence for exempt animals, see Jud. Act, chap. XXIII, § 43, ¶ 9; Comp. L. 1915, § 12858, ¶ 9.

¶ 36. As to whether corn and potatoes lately planted and just emerging from the ground are exempt as "provisions" under Comp. L. 1857, chap. 131, § 27, subd. 6, How. St., § 7686, subd. 6, quære.—King v. Moore, 10 Mich. 538, equally divided court.

¶ 37. Comp. L. 1857, chap. 131, § 27, subd. 9, How. St., § 7686, subd. 9, exempting from execution a sufficient quantity of hay, grain, feed and roots for properly keeping for six months the animals specified as exempt from execution, does not exempt any more of those articles than may be necessary for keeping such of the animals mentioned as the debtor has at the time of the levy.—King v. Moore, 10 Mich. 538.

¶ 38. The exemption from execution of six months' provision for a householder and his family is for the benefit of those of his children who are over age as well as those who are under, if they have no home elsewhere than with their father.—Stilson v. Gibbs, 53 Mich. 280.

§ 16. Household goods and domestic animals.

Horse used in defendant's business, see post ¶ 44.
Horse used by farmer, see post ¶ 46.
Horses not used in business, see also post ¶¶ 53, 54.
Horses intended for use in business not yet begun, see also post ¶ 58.
Right of farmer to claim exemption of steer, heifer and two calves, see post ¶ 45.
Householder's exemption of household goods, furniture and utensils up to $250, see Jud. Act, chap. XXIII, § 43, ¶ 7; Comp. L. 1915, § 12858, ¶ 7.
Householder's exemption of sheep and fleeces, cows, and swine, see Jud. Act, chap. XXIII, § 43, ¶ 6; Comp. L. 1915, § 12858, ¶ 6.

¶ 39. A piano cannot be classed as "household goods, furniture, or utensils," within the meaning of How. St., § 7686, subd. 7, which exempts to each householder, from levy and sale under any execution, or upon any final process of a court, "all household goods, furniture, and utensils, not exceeding in value $250."—Kehl v. Dunn, 102 Mich. 581.

§ 17. Property used in business or trade.

Use or connection with "business," see post § 18.
Principal business, see post § 19.
Business not yet begun, see post § 20.
Interruption or suspension of business, see post § 21.
Business abandoned, see post § 22.
Business unlawfully conducted, see post § 23.
Persons entitled to occupational exemption, see ante § 6.
Articles exempt by reason of trade, profession, business, or occupation of debtor, see Jud. Act, chap. XXIII, § 43, ¶¶ 8, 9; Comp. L. 1915, § 12858, ¶¶ 8, 9.

¶ 40. Where an exemption is claimed of articles necessary to enable the debtor to carry on his profession, trade, etc., it is not required that they be absolutely necessary or "essentially requisite." It is sufficient that they be suitable and actually used to enable him to carry on his trade.—Kenyon v. Baker, 16 Mich. 373, impliedly overruling Morrill v. Seymour, 3 Mich. 64.

¶ 41. Sawmill machinery used in a manufacturer's business is exempt under How. St., § 7686, subd. 8.—Wood v. Bresnahan, 63 Mich. 614.

¶ 42. A carpenter may hold lumber exempt though he may intend to use it in building a house for himself.—Hutchinson v. Roe, 44 Mich. 389.

¶ 43. A dentist's tools are exempt under the term "mechanical tools" used in Comp. L. 1857, § 4492, How. St., § 7716.—Maxon v. Perrott, 17 Mich. 332.

¶ 44. A horse, wagon and harness, worth less than $250, used in defendant's business are exempt from execution, and may be replevied from attaching creditors, by one holding title under a bill of sale from defendant, executed prior to such attachment.—Emerson v. Bacon, 58 Mich. 526.

¶ 45. Under How. St., § 7686, subd. 8, which exempts from sale on execution the "tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value $250," a farmer can claim such exemption from hay, oats, corn, a yearling steer, a heifer, two spring calves, and a quantity of clover seed and cornstalks

on his farm at time of the levy, not exceeding in value said exemption.—Hutchinson v. Whitmore, 90 Mich. 255.

¶ 46. A two-year-old halter-broken colt, kept by a farmer with reference to its use for farming purposes, may be claimed as exempt under How. St., § 7686, subd. 8, giving an exemption to enable one to carry on the business in which he is wholly or principally engaged.—Tunningly v. Butcher, 106 Mich. 35.

¶ 47. A farmer's seed-wheat being necessary to wheat farming is exempt from execution under Comp. L. 1871, § 6101.—Stilson v. Gibbs, 46 Mich. 215.

¶ 48. Pool tables are not exempt as necessary to carry on the business of saloon-keeping.—Goozen v. Phillips, 49 Mich. 7.

§ 18. ——Use or connection with "business."

Use of pool tables in connection with business of saloon-keeping, see also ante ¶ 48.

¶ 49. The mere fact that one having property exempt from execution under Comp. L. 1857, § 4465, subd. 8 (How. St., § 7686, subd. 8), offers it for sale, will not deprive him of the exemptions; but if he buys it and holds it rather for sale and speculation than for the particular use which alone exempts it, and it is not in fact needed or kept for such use, it is not exempt.—O'Donnell v. Segar, 25 Mich. 367.

¶ 50. In replevin for a yoke of oxen claimed as exempt from execution under Comp. L. 1857, § 4465 (How. St., § 7686), the question of plaintiff's occupation relates only to the time of, and previous to, the taking; and his occupation at any subsequent time is immaterial, as is also the question whether subsequent to the taking he had another team which he claimed as exempt, or had recovered a judgment for another team on the ground that they were exempt.—O'Donnell v. Segar, 25 Mich. 367.

¶ 51. A wagon made, during leisure, for sale, by a blacksmith whose principal business is custom work, is exempt under the statute, subd. 8.—Stewart v. Welton, 32 Mich. 56.

¶ 52. Masquerade suits made by a tailor during dull times and hired out by him as a principal means of livelihood during the winter are exempt under the statute.—Fischer v. McIntyre, 66 Mich. 681.

¶ 53. A horse and buggy taken in payment by a person engaged in the business of an inventor, and in selling machines made under his inventions, for speculative purposes only, and not necessary in his business, and held by him to sell again, are not exempt under How. St., § 7686, subd. 8, from levy and sale on execution; where on the facts found there was no use of the horse in carrying on any business.—Boyle v. Walsh, 105 Mich. 237.

¶ 54. An unbroken colt not kept or raised with the intention of being used in his business by the owner who has two other horses that are so used is not exempt from levy.—Hogan v. Neumeister, 117 Mich. 498.

§ 19. ——Principal business.

¶ 55. The exemption, under the statute (see How. St., § 7686, subd. 8), of articles to enable the debtor to carry on his profession, trade, etc., can be claimed only for the debtor's principal business, if he is engaged in more than one, unless the articles are used in both.—Morrill v. Seymour, 3 Mich. 64; Kenyon v. Baker, 16 Mich. 373.

¶ 56. In determining which is the principal business, regard is not to be had to profit but to the occupation or business on which the party chiefly relies for a livelihood, and which engrosses the most of his time and attention through the year.—Smalley v. Masten, 8 Mich. 529.

¶ 57. To establish a right of exemption under How. St., § 7686, subd. 8, the business in which the debtor is "wholly or principally engaged" must be shown.—Murphy v. Mulvena, 108 Mich. 347.

§ 20. ——Business not yet begun.

¶ 58. A team of horses taken in part payment for a merchandise stock and intended for use in farming by the person lately the merchant is exempt to him as a farmer, he having bought a farm in another state but not yet having actually engaged in farming.—People ex rel. Fletcher v. Lee, 71 Mich. 493.

§ 21. ——Interruption or suspension of business.

¶ 59. One actually engaged in farming up to the time of his moving does not lose his right to the exemption of his team from execution while moving from one farm in this state to another to resume the same occupation.—O'Donnell v. Segar, 25 Mich. 367.

¶ 60. Property does not lose its exempt character though its owner is removing from the state so that he may engage in the same business elsewhere, if he still continues a resident of Michigan (settling the query on this point in O'Donnell v. Segar, 25 Mich. 367).—Wood v. Bresnahan, 63 Mich. 614.

¶ 61. The statute exempting a tradesman's tools from execution contemplates the exercise of this right of exemption when his loss of all that is not exempt causes at least a temporary breaking up and stoppage of his business.—Harris v. Haynes, 30 Mich. 140.

¶ 62. One who had failed in the hardware and tinning business was held entitled to retain the tinner's tools as exempt from his assignment, even though he had scarcely used them for four months afterwards, it not being shown that he had left his business or gone into any other.—Harris v. Haynes, 30 Mich. 140.

¶ 63. An execution debtor does not lose the benefit of the exemption of a quantity of goods to enable him to carry on his business, by selling them or keeping them until they can be used to the best advantage although he temporarily suspends his business; and they cannot be levied on unless he goes into some new business in which they would be of no material use to him.—Rosenthal v. Scott, 41 Mich. 632.

¶ 64. The exemption of property necessary to enable one to carry on the business in which he is wholly or principally engaged continues while he is moving from one place to another to carry on the same business, or other business in which he is to be similarly engaged and to carry on which the property is necessary.—Miller v. Miller, 97 Mich. 151.

¶ 65. The exemption of horses in favor of one whose principal occupation is farming continues while he is moving from one place to another to carry on that business or other business in which he is to be wholly or principally engaged, and while they are necessary to enable him to carry it on.—Miller v. Miller, 97 Mich. 151.

§ 22. ——Business abandoned.

¶ 66. If the husband abandons the principal business in carrying on which the horses were necessary, they are no longer within the exemption of the statute, and the wife has no interest in them that entitles her to maintain an action for their value against her husband's vendee.—Miller v. Miller, 97 Mich. 151.

¶ 67. The exemption of $250 given by How. St., § 7686, subd. 8, to enable one to carry on the business in which he is wholly or principally engaged, is beyond the control of the debtor's wife, and therefore the wife of a merchant who has abandoned his business, with which she has no connection, cannot maintain an action against an execution creditor of the husband for the value of an exemption in the stock, under How. St., § 6297, C. L. § 8692.—Betz v. Brenner, 106 Mich. 87.

¶ 68. An insolvent merchant, having stated that he would return to his home within a few hours, left for parts unknown. Three days after his departure, his stock was attached. Although no claim of exemption was made, the officer set aside goods to the value of $250 as exempt under How. St., § 7686, subd. 8. Four months thereafter, the goods so selected, having in the meantime remained unclaimed, were seized and sold under execution, and the debtor's wife brought trover for their value. Nothing had been heard from the debtor at the time of the trial, which occurred eight months after his departure. Held, that the debtor had abandoned his business, and hence lost his exemption right, and that verdict should have been directed for defendant.—Betz v. Brenner, 106 Mich. 87.

¶ 69. As against the creditors of the seller of a stock of goods, it is proper to refuse to allow the buyer the benefit of the seller's exemption of $250, provided by How. Stat., § 7686, subd. 8, to enable a person to carry on the business in which he is principally engaged where it appears that the seller absconded and thereby forfeited his right to exemption.—J. L. Hudson Co. v. No-Name Hat Co., 174 Mich. 109.

§ 23. ——Business unlawfully conducted.

¶ 70. A partner continuing to run a saloon business licensed in the firm name, but not taking out a new license and paying a tax in his sole name after the firm dissolved, cannot claim an exemption of chattels pertaining to the business so conducted unlawfully.—McCarthy v. Payne, 141 Mich. 571.

§ 24. Building and loan stock.

Of building and loan association stock, see Comp. L. 1915, § 10010.

Exemption of shares in building and loan associations, see Jud. Act, chap. XXIII, § 45; Comp. L. 1915, § 12860.

¶ 71. A husband occupying a dwelling house owned by his wife is not a person who has a homestead within the meaning of Pub. Acts, 1887, No. 50 (How. St., § 3981 et seq.), which provides that stock issued by corporations organized under it shall be exempt from execution unless held by a person who has a "homestead."—Morley Bros. v. National Loan & Investment Co., 120 Mich. 171.

§ 25. Insurance, benefits or workmen's compensation.

Exemption of life insurance money, see Comp. L, 1915, § 11489.

Exemption of benefit of fraternal beneficiary societies, see Comp. L. 1915, § 9408.

Of payments under Workmen's Compensation Act, see Comp. L. 1915, § 5451.

¶ 72. Under Comp. L. 1897, § 7754, making the money or other benefit, charity, relief, or aid to be paid, provided or rendered by any beneficiary association exempt from "any legal or equitable process * * * to pay any debt or liability of a certificate holder," a wife suing for a divorce cannot by injunction prevent payment to the husband of the money due under a certificate held by and payable to him as beneficiary on the life of his father.—Hunt v. Branch Circuit Judge, 141 Mich. 423.

¶ 73. Under Pub. Acts, 1903, No. 53, § 15, exempting from attachment certain money or other benefits "to be paid," the proceeds of a benefit certificate paid by a fraternal order and deposited in a bank subject to check are not exempt and are liable to attachment or garnishment to pay any debt or liability of the certificate holder or of any beneficiary, or of any person having any rights thereunder.—Recor v. Commercial & Sav. Bank of St. Clair, 142 Mich. 479.

§ 26. Wages.

Exemption of wages spent for support of nonresident family, see ante § 5, ¶ 14.

Amount exempt from garnishment, see Jud. Act, chap. LXXVI, § 5; Comp. L. 1915, § 14365; and see also Jud. Act, chap. XXVIII, § 37, ¶ 3; Comp. L. 1915, § 13158, ¶ 3, which in effect makes the foregoing applicable to garnishment in courts of record.

¶ 74. A householder who took work upon contract, was entitled on garnishment to the benefit of the statute of exemptions, though the labor of others was also covered by the contract price.—Rikerd Lumber Co. v. Chrouch, 135 Mich. 703.

§ 27. Alternative right to money exemption.

¶ 75. A person entitled to a team to carry on his business may select instead any other property to the amount of $250 needed in his business.—Wyckoff v. Wyllis, 8 Mich. 48.

§ 28. Proceeds of sale of exempt property.

¶ 76. If one has disposed of all the property that he had that was subject to execution, for the very purpose of converting the proceeds into that kind of property that was exempt under the statute, it would not deprive him of the exemption so long as his occupation is really such as the statute requires and the particular property is needed in that occupation; nor would it constitute legal fraud.—O'Donnell v. Segar, 25 Mich. 367.

¶ 77. The proceeds of the voluntary sale of exempt personal property, designed for investment in other exempt property, to take the place of that sold, are not subject to garnishment in the hands of the purchaser or to attachment in the debtor's hands.—Cullen v. Harris, 111 Mich. 20.

III. ASSERTION, ENFORCEMENT AND PROTECTION OF RIGHT.

§ 29. Right to assert; who entitled.

Wife's right, see post § 30.

Person entitled to assert right against garnishment, see post ¶¶ 109, 110.

Persons entitled to right as distinguished from persons entitled to assert right, see ante § 4.

Personal nature of right, see ante § 2.

Right of purchaser to assert exemption to which seller entitled, see ante ¶ 3.

¶ 78. Exemption being for the benefit of the family, husband and wife may join in a proper suit in relation to the loss of exempt property.—Shepard v. Cross, 33 Mich. 96.

¶ 79. Plaintiff's husband, one McCausey, and one Sprague were formerly partners. They gave a trust mortgage of their stock of goods for the benefit of creditors. The trustee closed them out, after allowing them to select certain goods under the statutory exemption. McCausey turned over his share of the exempted goods to plaintiff. Held, judgment creditors of the partners were not bound by the latter's selection of goods as to the amount due them under the exemption, and might question the correctness of such selection by having them seized on execution in the hands of plaintiff assignee, who received them without giving consideration.—McCausey v. Hoek, 159 Mich. 570.

§ 30. ——Wife's right.

Necessity of wife's consent to sale or incumbrance of exempt property, see post § 45.

Right of wife to sue in her own name for exempt property taken on execution against her husband, see Husband and Wife, VI.

¶ 80. A wife may bring trover for the value of an animal belonging to her husband and exempt from execution which is unlawfully sold by a poundmaster.—Ingersoll v. Gage, 47 Mich. 121.

¶ 80a. A married woman who supports her family or contributes to its support by the employment of a team may claim the benefit of the laws exempting a team from execution.—McHugh v. Curtis, 48 Mich. 262.

¶ 81. A married woman, who is a member of a firm, may claim the statutory exemption in firm property, though she resides in a different place from that in which the business is carried on, and is mainly engaged in household duties.—McCoy v. Brennan, 61 Mich. 362.

¶ 82. The exemption being intended as much for the benefit of the wife and family as for that of the husband, her action under Comp. L. 1857, § 3294, How. St., § 6297, cannot be defeated by showing that he turned out the property to be levied on.—King v. Moore, 10 Mich. 538.

¶ 83. The wife's right to sue for an article exempt from execution against her husband is not confined to property that is incumbered by him or that is levied on.—Ingersoll v. Gage, 47 Mich. 121.

§ 31. Notice and demand.

¶ 84. The debtor is not obliged to give notice that he claims an exemption.—Vanderhorst v. Bacon, 38 Mich. 669.

¶ 85. Where no duty of selection is imposed upon the officer seizing the property, the debtor waives his right to exemptions if he fails to make demand therefor.—Williams v. Brown, 137 Mich. 569.

¶ 86. Even if a vendee is entitled to claim the exemption of his fraudulent vendor, the statute imposes no duty upon the attaching or levying officer to make the selection for him, and in the absence of demand the right is waived.—Williams v. Brown, 137 Mich. 569.

§ 32. Selection and setting out.

Debtor's refusal or absence, see post § 33.
"Selection" by mortgaging part of exempt class, see post § 34.
Time for selection, see post § 35.
Choice between several chattels, see post § 36.
Choice of mortgaged or other property, see post § 37.
Several exemptions in same property, see post § 38.
Duty of levying officer to make selection for vendee claiming exemption of vendor, see also ante ¶ 86.
Inventory, appraisal and setting out of exemptions as part of valid levy, see also Executions § 47.
Selection and persons to be appraisers, see Executions § 48.
Appraisal and selection on attachment, see also Attachment §§ 56, 57.
Validity of assignments reserving exempt property, see Assignments for Creditors § 10.
Right to select exemptions after assignment in general terms, see Assignments for Creditors § 19.
Right of defendant, his agent, or levying officer in order named to make selection, see Jud. Act, chap. XXIII, § 47; Comp. L. 1915, § 12862.
Right of defendant and officer for him to select animals to the number exempt from flock levied on, see Jud. Act, chap. XXIII, § 49; Comp. L. 1915, § 12864.

¶ 87. The debtor has the right to make his own selections under the statute of such articles as are or may be used in carrying on the business in which he is wholly or principally engaged.—Town v. Elmore, 38 Mich. 305.

¶ 88. How. St., § 7686, providing that "the following property shall be exempt from levy * * * to each householder two cows," etc., reposes the right of selection in a husband where he is the householder and execution debtor.—Harley v. Procunier, 115 Mich. 53.

¶ 89. A sheriff in levying on personalty has no right to exclude the owner from his premises and then select and set aside the property exempt by law from execution.—Bayne v. Patterson, 40 Mich. 658.

¶ 90. It is important to the debtor's business to have the benefit of his exemptions; the officer is bound to act promptly in setting them off to him and must not hinder or impede a selection.—Handy v. Clippert, 50 Mich. 355.

¶ 91. Comp. L. 1897, § 10326, does not require an attaching or levying officer to select exemptions for any other than the debtor.—Williams v. Brown, 137 Mich. 569.

§ 33. ——Debtor's refusal or absence.

¶ 92. The officer levying an execution on property subject to an exemption under How. St., § 7686, subd. 6, may, under section 7690, select the exemption for the debtor, if the latter is absent at the time of the levy.—Murphy v. Mulvena, 108 Mich. 347.

¶ 93. Where it appears that a selection was regularly and legally made by the officer (How. St., § 7690) in the absence of the execution debtor and on refusal of his servant to do so, the error, if any, as to the conclusiveness of his return, that the debtor "refused" to select his exemption, does not call for a determination.—Murphy v. Mulvena, 108 Mich. 347.

§ 34. ——"Selection" by mortgaging part of exempt class.

Choice of mortgaged property, see post § 37.

¶ 94. How. St., § 7686, subd. 9, providing that any chattel mortgage, bill of sale or lien on exempt property shall be void unless signed by the wife of the mortgagor, does not apply where the mortgagor, having numerous chattels of the class specifically exempt, mortgages some of them leaving enough to satisfy his exemptions; since that in effect makes a selection of the exemptions and a mortgage of those not exempt.—Harley v. Procunier, 115 Mich. 53.

¶ 95. Where a man owns five cows a mortgage upon two of them is valid though not signed by his wife, he having the right, without her concurrence or consent, to select which shall be exempt, and the giving of the mortgage being a selection of those which are not exempt (How. St., § 7686).—Harley v. Procunier, 115 Mich. 53.

§ 35. ——Time for selection.

¶ 96. If a defendant in execution has not been allowed to exercise his statutory right to choose what he is entitled to have exempted, he can elect to take what has been sold under the execution and may sue the levying officer for its value.—Stilson v. Gibbs, 53 Mich. 280.

§ 36. —— Choice between several chattels.

Right to choose for exemption property wrongfully sold by levying officer, see ante ¶ 96.

¶ 97. An execution debtor is not prevented from making his own selection of property exempt from execution by the fact that he has property in another county belonging to the exempt class.—Baldwin v. Talbot, 43 Mich. 11.

§ 37. ——Choice of mortgaged or other property.

"Selection" by mortgaging part of exempt class, see ante § 34.

¶ 98. An execution debtor need not select mortgaged property for his exemptions.—Bayne v. Patterson, 40 Mich. 658; Baldwin v. Talbot, 43 Mich. 11; Ganong v. Green, 71 Mich. 1.

¶ 99. A mortgagee of the debtor may, as against the execution creditor, properly release from his mortgage property selected by the debtor as exempt.—Ganong v. Green, 71 Mich. 1.

¶ 100. No selection so as to bind a mortgagee can be made of a specific portion of chattels belonging to a class that is exempt to a specified amount.—Bayne v. Patterson, 40 Mich. 658.

¶ 101. An execution debtor's right to make his own selection of property exempt from execution is not affected by his having covered his other property not exempt with a fraudulent chattel mortgage.—Baldwin v. Talbot, 43 Mich. 11.

§ 38. ——Several exemptions in same property.

Right of partner to sue for exemptions without joining other partners, see Partnership, VI, A.

¶ 102. If, upon a levy of partnership property, two or more partners, in closing their exemptions, should select the same piece of property, the officer may select for them where they do not agree.—Skinner v. Shannon, 44 Mich. 86; Chipman v. Kellogg, 60 Mich. 438.

¶ 103. In an action on the bond of a constable, arising out of his release of a levy in execution upon the stock in trade—not over $300 in value—of a milliner, who has a partner, her father, a carpenter, working by the day and having few tools according to the testimony, it is error for the court to direct counsel not to argue to the jury that the father's principal business was that of a carpenter, "as there is no evidence that he had any tools of the value of $250"; for if such was his principal business, nothing but the daughter's exemption—$250—could be claimed in the goods.—Coville v. Bentley, 76 Mich. 248.

¶ 104. It is not necessary in levying on a farmer's stock, animals (cows), under a judgment for the purchase price to levy on all the debtor's animals and then allow him to select the exempt ones (Comp. L. 1897, § 10328), since under section 10324 the exempt property described in section 10322, subd. 8, is not exempt from levy for a judgment for the purchase price, and since cows used by a farmer are within that subdivision though they may also be exempt to the debtor, as a householder, under subdivision 6 of the same section.—Feenstra v. Tanis, 145 Mich. 409.

¶ 105. The officer making levy is as much bound to respect exemption, where the property is that of a partnership, as in other cases.—Waite v. Mathews, 50 Mich. 392.

§ 39. Inventory and appraisal.

Inventory and appraisal of exemptions as part of valid levy, see also Executions § 47.

Persons to be appraisers, see also Executions § 48.

Inventory and appraisal provisions, see Jud. Act, chap. XXIII, § 46 et seq.; Comp. L. 1915, § 12861 et seq.

¶ 106. A mortgagee of chattels upon which a subsequent execution has been levied is not affected by the levying officer's omission to appraise the property and set off to the debtor the amount of his exemption.—Wilson v. Montague, 57 Mich. 638.

¶ 107. A horse that had been seized on execution was replevied as exempt before the inventory was completed from which the selection of exempt property was to be made. Held, that defendant should have been allowed to show that plaintiff had other horses, one only being exempt by law.—Gass v. Van Wagner, 63 Mich. 610.

¶ 108. The statute (How. St., §§ 7687, 7688; Comp. L. 1871, §§ 10325, 10326) provides that, when a levy is made upon property of any class or species which is exempt by law from execution to a specified amount or value, the officer may make an inventory of the property, and cause the same to be appraised, and defendant may thereupon select from such inventory an amount of such property not exceeding, according to such appraisal, the amount of his exemption. Held, that the statute is fully complied with, in case of the seizure of goods under a justice's court attachment, by the service on defendant of the inventory made by the officer of the attached property, and the tender to defendant of the use of the appraisal which the officer has caused to be made of said property, to enable defendant to select his exemption.—Jones v. Peek, 101 Mich. 389.

§ 40. In garnishment proceedings.

Amount of wages exempt from garnishment, see ante § 26.

Exemption from garnishment of proceeds of sale of exempt property, see ante ¶ 77.

Right to exemption from garnishment of wages spent for support of nonresident family, see ante ¶ 14.
Liability of exempt property to garnishment by reason of its assignment or transfer by principal debtor, see post ¶ 117.
Garnishment in general, see Garnishment.
Persons, choses and property subject to garnishment, see Garnishment, II.
Rights, defenses and liability of garnishee towards plaintiff, see Garnishment, IX.
Rights, defenses and liability of garnishee towards defendant, see Garnishment, X.
Release or discharge of garnishee in general, see Garnishment, XII.
Claim and payment to defendant of amount in garnishment which is legally exempt, see Jud. Act, chap. LXXVI, § 10; Comp. L. 1915, § 14370.

¶ 109. Property exempt from execution is also exempt, at the election of the debtor, from process in garnishment.—Wilson v. Bartholomew, 45 Mich. 41.

¶ 110. A garnishee cannot raise the defense that the property in question was exempt property and therefore not subject to garnishment; that point being personal to the debtor or his privies.—Seitz v. Starks, 136 Mich. 90.

§ 41. Actions and suits for protection of exemption.

Evidence and question of fact, see post § 42.
Denial of relief by comity to prevent evasion of exemptions by suing in other state, see Conflict of Laws ¶ 15.
Order in creditors' suit to turn over exempt property, see Creditors' Suits ¶ 134.
Joinder by husband and wife in suit for exemptions, see Husband and Wife, VI.
Pleading in trover for exempt goods sold on execution, see Conversion § 23, ¶¶ 105, 106.
Interest or loss of profits from use, as damages for taking exempt tools of trade, see Damages ¶ 238.

¶ 111. A bill filed by one who has made an assignment for the benefit of creditors, and asking that the assignment should be so corrected as to secure to complainant his rights and exemptions in the property assigned, should specify the rights of exemption relied on, or present a statement of facts showing what they are and to what they apply.—Chandler v. Jenks, 50 Mich. 151.

§ 42. ——Evidence and questions of fact.

¶ 112. A plaintiff in replevin, seeking to hold a yoke of oxen exempt from execution under Comp. L. 1857, § 4465, subd. 8 (How. St., § 7686, subd. 8), must show: 1. That he owns or is entitled to possession of the oxen. 2. That his business calls for the use of a team or yoke of oxen. 3. That he has no other team, or perhaps none which together with this exceeds $250 in value, or, if they do exceed that sum, that he has taken the proper course to select these oxen or has been wrongfully prevented from making such selection.—O'Donnell v. Segar, 25 Mich. 367.

¶ 113. In determining the right of exemptions, testimony of the owner that a part of the stock of merchandise was purchased the previous year as against the testimony of attaching creditors that the goods were all sold by them within sixty days of the levy raises an issue of fact for the jury.—Gottesman v. Chipman, 125 Mich. 60.

¶ 114. In replevin suit the question whether certain articles are exempt from seizure on execution is for the court, where the testimony, as to the facts upon which the claim of exemption is based, is not conflicting.—Fischer v. McIntyre, 66 Mich. 681.

IV. RIGHTS IN THE PROPERTY AND RIGHTS OF THIRD PERSONS.

§ 43. In general.

Alienation and transfer of exempt property, see post §§ 44-45.
Mortgage or lien on exempt goods, see post § 46.
Rights of trustee in bankruptcy to temporary possession, see Bankruptcy § 3.

¶ 114a. The purchaser of goods exempt from execution obtains a title which overrides the lien of any subsequent attachment levy, and indeed of any previous levy unless it be for unpaid purchase money; and the title cannot be destroyed by subsequent admissions or acts of the debtor.—Buckley v. Wheeler, 52 Mich. 1.

§ 44. Alienation and transfer of exempt property.

Necessity of wife's consent, see post § 45.
Right of buyer to seller's exemption, see ante ¶ 69.
Effect on exemption of offering for sale, see ante ¶ 49.
Transfer by debtor of exempt property as a transfer to hinder or defraud creditors, see Fraudulent Conveyances, I, A.
Chattel mortgage on exemptions unsigned by wife as valid mortgage of husband's nonexempt chattels, see Chattel Mortgages § 9.
Construction of mortgage clause excepting exemptions, see Chattel Mortgages, § 15, ¶ 67.

¶ 115. A debtor can do what he pleases with any of his property that is exempt from execution, and his disposition of it cannot subject it to execution or affect the exemption.—Buckley v. Wheeler, 52 Mich. 1.

¶ 116. Exempt property used in the debtor's business and transferred by him to a third person either absolutely or for security is not attachable.—Emerson v. Bacon, 58 Mich. 526.

¶ 117. Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution.—Anderson v. Odell, 51 Mich. 492.

¶ 118. The rule that a sale by the debtor made after a levy is superior thereto, if the chattel is of the exempt class and subject to selection, has no application to property not of the exempt class, though like it in kind, which the debtor's transferee claims to have purchased.—Hogan v. Neumeister, 117 Mich. 498.

§ 45. ——Necessity of wife's consent.

Necessity of wife's joinder to alienate or mortgage exempt chattels except occupational exemptions, see Jud. Act, chap. XXIII, § 43, ¶ 9; Comp. L. 1915, § 12858, ¶ 9.

¶ 119. Neither sales nor incumbrances of exempt property are valid without the wife's assent in some way manifested.—Snyder v. People, 26 Mich. 106, 110.

¶ 120. The wife's assent need not be in writing when the husband makes an absolute sale of exempt chattels.—Holman v. Gillette, 24 Mich. 414.

¶ 121. A sewing machine, though exempt from levy and sale on execution under How. St., § 7717, is not covered by the ninth subdivision of How. St., § 7686, which declares that any chattel mortgage or bill of sale, executed by a husband, of any of the exempt property described in said section 7686, except subdivision 8, shall be void unless signed by the wife.—Singer Mfg. Co. v. Cullaton, 90 Mich. 639.

¶ 122. One's property—such as a span of horses—exempt from execution because necessary to enable him to carry on the business in which he is wholly or principally engaged, may be sold by him without his wife's consent.—Miller v. Miller, 97 Mich. 151.

¶ 123. The wife's written consent is unnecessary to the validity of her husband's sale of exempt horses used by him in carrying on his occupation of farming (see How. St., § 7686, subds. 8, 9).—Miller v. Miller, 97 Mich. 151.

§ 46. Mortgage or lien on exempt goods.

¶ 124. A chattel mortgagee of the debtor may, as against the execution creditor, properly release from his mortgage property selected by the debtor as exempt.—Ganong v. Green, 71 Mich. 1.

¶ 125. Where partners in a venture involving the publication and sale of a book deliver the paper and electrotype plates to contractors, who are to do the press work and binding, they waive their individual exemptions, and subject the books to the lien of the contractors for their labor.—Rogers v. Raynor, 102 Mich. 473.

EXHAUSTION.

Cross-References.

Exhaustion of Funds—
- As excuse for nonrepair of highway, see Highways, XII.
- Affecting right to payment or allowance of claim by municipality, see Counties, V, VI; Municipal Corporations, XIII, XIV; Townships, VI.

Exhaustion of Legal Recourse—
- Basis for creditors' suit, see Creditors' Suits, I, C.
- Basis for recourse to stockholders for corporate debt, see Corporations §§ 327, 336.
- Primary resort to liability of primary party before charging party secondarily liable, see Guaranty, III, IV; Indemnity; Suretyship; Negotiable Instruments.

Exhaustion of Legal Remedy—
- As basis for equity jurisdiction, see Equity § 38.

EXHIBITIONS AND SHOWS.

TREATS of rights, duties and liabilities of persons or corporations conducting public shows, expositions, theaters, and the like towards the general public and persons attending such shows.

Analysis.

§ 1. In general; licensing and regulation.
§ 2. Duty and liability to patrons.
§ 3. Contributory negligence.
§ 4. Actions for injuries.
§ 5. Evidence.
§ 6. Jury questions and instructions.

§ 1. In general; licensing and regulation.

Regulation of theaters and moving picture shows as class legislation, see Constitutional Law § 216.

Regulation of shows by fire marshal as invading local self-government, see Constitutional Law § 79.

Criminal exhibitions, human deformities and obscene pictures, see Crimes § 95.

Sunday shows and games as crime, see Crimes, II; Indictment; Sunday.

Power of townships and villages to license and regulate exhibitions and shows, see Comp. L. 1915, §§ 3474, 3475.

Powers of village councils to regulate public exhibitions and shows, see Comp. L. 1915, § 2640.

Employment of children or women in shows and exhibitions, see Comp. L. 1915, §§ 5331, 5332.

Statutory regulations for sale of seats in shows and exhibitions, see Comp. L. 1915, §§ 7150-7157.

Right of all persons to equal privileges regardless of race or color, see Comp. L. 1915, §§ 15570, 15571.

Statutory provisions for fire escapes, see Comp. L. 1915, § 5334.

Statutory regulations for construction and operation of moving picture theaters, see Comp. L. 1915, §§ 7165-7185.

¶ 1. Where a theater is situated in an inclosure, and a charge is made to enter the inclosure, but no charge is made for some of the seats in the theater, the owner of such theater may be required to pay a license fee to the township or village in which it is situated, for such theater is one "to which admission is obtained on payment of money," within the meaning of section 3480 Comp. Laws 1897.—People v. Richards, 150 Mich. 434.

¶ 2. Act No. 257, Pub. Acts 1913, placing moving picture theaters under the supervision of the State Fire Marshal is a valid exercise of the police power.—Jewel Theatre Co. v. State Fire Marshal, 178 Mich. 399.

¶ 3. Act No. 257, Pub. Acts 1913, placing moving picture theaters under the supervision of the State Fire Marshal, and providing that audience rooms in such theaters shall be on the ground floor only, and that local regulation should not be disturbed, is not in conflict with an ordinance allowing upper floors to be used in cases where the theaters were in operation before the passage of the ordinance.—Jewel Theatre Co. v. State Fire Marshal, 178 Mich. 399.

§ 2. Duty and liability to patrons.

Contributory negligence, see post § 3.

Actions for injuries, evidence and jury questions, see post §§ 4-6.

Liability for injuries from condition of building unrelated to use for show, see Buildings.

Liability of agricultural societies for negligence, see generally Agriculture § 4.

Liability of keeper of wild animal in place frequented by public, see Animals § 12 et seq.

Statutory provisions for safety of persons attending exhibitions and shows, see Comp. L. 1915, §§ 7212-7220.

¶ 4. The owner of a public park to which the public is invited is bound to keep the same in reasonably safe condition, even though he does not operate it for pecuniary profit.—Blakeley v. White Star Line, 154 Mich. 635.

¶ 5. . Proprietors of public entertainments are not insurers of the safety of patrons, but they must exercise, to prevent disaster, care commensurate to the situation.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 6. The proprietor of a show tent is bound to anticipate, in selecting and erecting the tent, the ordinary and usual storm of the season and latitude and its probable consequences, reference being had to the character of the structure to which the public was invited, and in view of such storm arising and such consequences to use ordinary care in such selection and erection so as to prevent injury to patrons.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 7. The proprietor of a show tent who does not use ordinary care in the selection and erection of the tent, as the result of which a patron is injured in a storm, is liable unless the storm was so violent in character that whether defendant was or was not negligent in such selection and erection the result would have been the same.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 8. In an action to recover damages for personal injuries sustained from the effects of a sudden windstorm while plaintiff was attending defendant's show in defendant's tent, if, as claimed by plaintiff, the storm was an ordinary one, and, as claimed by defendant, the tent was selected and erected with ordinary care, in view of probable storms arising and their consequences, held that there was no duty on the part of defendant to warn its audience of the approach of the storm.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 9. That in the latitude where defendant erected its show tent, summer storms with wind and rain were common, that the wind often attained considerable velocity and did considerable injury, and that such storms often arrived or broke suddenly and were as soon gone, held to be circumstances to be considered by defendant in erecting the tent and by the patrons of the show in attend-

ing.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 10. A woman who was injured by catching her foot under a buckled up mat in front of the ticket window of a theater, cannot recover from the proprietor where it does not appear that he was aware of the condition of the mat, or that it had existed for such length of time as to impart constructive notice of the defect.—Holmes v. United Theatres Co., 186 Mich. 548.

Duty of proprietor of place of amusement to maintain safe exit, see note, 2 N. C. C. A. 530-532.

¶ 11. A person injured by the explosion of a firecracker at a circus, cannot be held to have "assumed the risk" of such an explosion because of the fact that he attended a previous exhibition, where no injury was sustained, as the persons attending the performance had the right to assume that the owner of the circus would exercise due care against dangerous explosions, and would use reasonably safe appliances.—Herrick v. Wixom, 121 Mich. 384.

Liability of agricultural societies or fair associations for negligence, see note 8 N. C. C. A. 198-207.
Liability of proprietor of theater or public hall for injury to patrons, see note 7 N. C. C. A. 167-176.
Injuries sustained in skating rink, see note 2 N. C. C. A. 519-520.
Liability of agricultural societies or fair associations for negligence, see note 8 N. C. C. A. 198-207.
Liability for injuries on miniature or scenic railway or similar device, see note 1 N. C. C. A. 609-613; 4 N. C. C. A. 46-50.
Liability for injury in "scenic" or miniature railroad or like device at amusement park, see note 14 N. C. C. A. 788-796.
Liability for injury sustained in connection with balloon ascension, see note 1 N. C. C. A. 456-459.
Liability for injury growing out of use of streets for exhibitions or celebrations, see note 8 N. C. C. A. 784-791.
Liability of proprietor of bathing resort for personal injury to patron, see note 1 N. C. C. A. 490-499.
Liability for injuries to persons in natatoriums and bathing houses, see note 6 N. C. C. A. 954-957.
Duty of proprietor of place of amusement to maintain safe exit, see note 2 N. C. C. A. 530-532.
Liability for loss of or injury to articles loaned for exhibition purposes, see note 2 N. C. C. A. 885-886.
Distemper contracted by dogs at dog show, see note 2 N. C. C. A. 385.

§ 3. Contributory negligence.

¶ 12. The defendant, the owner of an amusement resort to which the public were invited, permitted some ball players to play throw and catch outside the baseball diamond, and near a dancing pavilion. Plaintiff was injured by a thrown ball while watching the dance. Held, the defendant owed a duty to keep the grounds reasonably safe, and, the ball game being held out of its proper place, the plaintiff did not assume the risk, and defendant was liable.—Blakeley v. White Star Line, 154 Mich. 635.

¶ 13. A person leaving a moving picture theater through a hallway leading to the place of exit, is entitled to presume that the defendant owner has discharged his duty of having the premises in a reasonably safe condition as to lights and construction.—Branch v. Klatt, 165 Mich. 666.

§ 4. Actions for injuries.

Evidence, see post § 5.
Jury questions and instructions, see post § 6.

¶ 14. Negligence held to be the gravamen of an action to recover damages for personal injuries sustained by plaintiff while attending defendant's show in defendant's tent by the effect upon the tent of a windstorm, notwithstanding the declaration alleged as inducements to plaintiff to enter the tent an advertisement circulated by the defendant to the effect that the tent was storm-proof and wind-proof and alleged also that plaintiff paid the price of admission asked by defendant.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

§ 5. Evidence.

¶ 15. On a suit by a patron against the owner of a moving picture theater for injuries sustained on stumbling on an unlighted curved step, evidence of prior similar accidents in the same place, the conditions being shown to be the same, is admissible to prove both notice of the defect and negligence, but it is not permissible to show that others stumbled in the same place after the accident.—Branch v. Klatt, 173 Mich. 31.

¶ 16. On a suit by a person against the owner of a moving picture theater, the plaintiff testified that she fell on a curved step in the exit that was unlighted and without a handrail, and her testimony was supported by four witnesses. Seven witnesses for the defense testified that handrails had been provided and that the exit was amply equipped with electric light. There were interested and apparently disinterested witnesses on both sides and the jury viewed the premises. Held, a special finding by the jury at the instance of the defendant that handrails had been provided was not improper.—Branch v. Klatt, 173 Mich. 31.

¶ 16a. In a suit for injuries sustained by plaintiff while riding on defendant's merry-go-round, plaintiff in his direct examination testified that he did not notice guards and would have seen them had there been any.

Held, it was not error in view of this to permit defendant upon his direct examination to state that he had not, in the course of his life, seen a machine with a railing around outside to fence the children in.—Harris v. Crawley, 170 Mich. 381.

Application of doctrine of res ipsa loquitur in action for injuries caused by defective apparatus at place of amusement, see note 5 N. C. C. A. 55.

§ 6. Jury questions and instructions.

¶ 17. Whether the facts upon which the defendant's liability depends were established, in an action to recover damages for personal injuries sustained while plaintiff was attending defendant's show in defendant's tent by the effect of a sudden windstorm breaking upon the tent, held to be for the jury.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 18. Plaintiff in leaving a moving picture theater walked along a dark hallway, which was the only passage to the exit of the theater provided by the defendant owner. While attempting to feel her way down a flight of stairs in said hallway, she fell and was injured. In a suit for personal injuries, held, the trial court was in error in directing a verdict for defendant on the ground of plaintiff's contributory negligence, as such question was for the jury.—Branch v. Klatt, 165 Mich. 666.

¶ 19. An instruction, in an action for injury sustained by a spectator at a circus by an explosion of a firecracker by one of the performers, which attempts to preclude recovery if the spectator was found to be a trespasser, is erroneous, as a trespasser is not beyond the pale of the law, and may recover damages for negligence resulting in injury.—Herrick v. Wixom, 121 Mich. 384.

¶ 20. In an action for injuries sustained on a roller-coaster in an amusement park, where the evidence shows that the place bore the names of the defendants, and that one of them assisted in starting the car in which the plaintiff was injured, an instruction should have been given to the effect that the plaintiff could not recover unless the jury were satisfied by a preponderance of the testimony that the defendants owned, controlled and operated the coaster.—Cichon v. Wolff, 186 Mich. 331.

¶ 21. In an action to recover damages for personal injuries sustained by the effects of a sudden windstorm while plaintiff was attending defendant's show held in defendant's tent, an instruction that, "as applied to this case, an act of God may be defined as a natural cause, such as a storm of wind, whatever its characteristics may be, which cannot be prevented by the exercise of ordinary care and the use of those appliances which the situation of the party renders it reasonable that he should employ," held to be proper.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 22. In an action to recover damages for personal injuries sustained from the effects of a sudden storm while plaintiff was attending defendant's show in defendant's tent, an instruction, that as defendant presumably knew the actual condition of the tent it was its duty to warn its audience of the approach of the storm, held not to be erroneous.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 23. In an action to recover damages for personal injuries sustained from the effects of a sudden windstorm while plaintiff was attending defendant's show in defendant's tent, an instruction, that the burden was upon defendant to show that the storm was so violent that it was the sole proximate cause of plaintiff's injuries, held to be erroneous, as the plaintiff had the burden upon the whole case to prove defendant's negligence was the proximate cause of such injuries.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

¶ 24. In an action to recover damages for personal injuries sustained while plaintiff was attending defendant's show in defendant's tent from a sudden windstorm, an instruction, that defendant was not required to contemplate or provide against unusual or extraordinary storms, held proper as proffered without the addition that the storm was of such a character that human care and foresight could not anticipate or guard against it.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

EXHIBITS to EXPLANATION.

Cross-References.

Exhibits—
- Attachment to pleadings, see Pleading, I; Equity, VII, A.
- Attachment to depositions, see Depositions § 18.
- Marking and identifying at trial, see Trial, V, A; Indictment, IX, B.
- Manner of incorporation in record for appeal or error, see Appeal § 104; Indictment, XVI, C.
- Attached to chancery pleadings as evidence, see Equity § 164b.

Existence of Other Remedy—
- As reason for denying specific remedy or relief, see Equity § 38; Appeal, I; Certiorari §§ 6, 7; Mandamus, I; Injunctions, I, II; Nuisances, III; Specific Performance, I; and other specific topics.
- Election of remedies, see Election and Waiver.

Existing Debts—
- As considerations for promises, see Contracts § 123.

As consideration of value for transfer, see Fraudulent Conveyances, I; Negotiable Instruments, XIII; Notice and Record of Title, I, C.
As subject of set-off, see Set-off.
Existing Laws—
Vested rights under, see Constitutional Law, XI.
Implied in terms of contract, see Contracts § 164.
Implied as portions of corporate charters, see Corporations § 21.
Ex Maleficio Trusts—
See Trusts, IV.
Ex Officio Powers and Functions—
See Corporations, XVII; Officers, VI.
Exoneration—
Of bail, see Arrest, XI; Civil Arrest § 53.
Of parties from costs awarded against other parties, see Costs §§ 34 et seq., 74, 132 et seq.
Equitable or contract right to indemnity, reimbursement, contribution, or payment in exoneration, see Indemnity; and see also Guaranty; Suretyship; Estates of Decedents §§ 217, 223, 225, 301; Marshalling Assets; Foreclosure, II, C, III, E (sale in inverse order).
Of one property or devise by charge on another by will, see Wills, VI.
Ex Parte Proceedings—
See specific topics treating of proceedings which may be ex parte or in course of which ex parte proceedings may be had, e. g., Animals §§ 5-9 (impounding and distraint); Attachment; Bankruptcy; Corporations § 239 (receivership); Habeas Corpus; Injunctions; Receivers; Reference; Guardianship; Estates of Decedents; Wills, V (probate); etc.
Reviewability of ex parte proceedings, see Appeal § 13; Certiorari § 10 et seq.
Motions heard ex parte, see Motions and Orders.
Orders and decrees ex parte as res adjudicata, see Former Adjudication; Probate Courts, III; Habeas Corpus; and the like.
Expatriation—
See Aliens and Citizens § 3.
Expectancies—
Assignability, see Assignments § 4; Estates of Decedents § 357.
Interests of heirs, distributees, legatees, and devisees, see Descent; Wills, VI; Estates of Decedents.
Considered as vested rights, see Constitutional Law § 246.
Future estates, see Life Estates, Remainders and Reversions.
Fraud in bargaining for assignment, see Fraud, I, II.
Dealings by personal representatives with heirs, see Estates of Decedents, X, A, XIII, A.
Expectancy of Life—
Computation of damages in action for death, see Death by Wrongful Act § 38.
As element of damages for personal injuries, see Damages, I, III, E, IV, IX.
Compounding dower for value of expectancy, see Dower §§ 55, 56.
Expectations—
Representations as fraud or basis for estoppel, see Fraud, I; Estoppel, III.
Expenditures; Expenses—
Allowable as costs, see Costs, III, V, B.
Allowance for alimony, see Divorce, X.
Elements of damages, see Damages, I, C.
In drain, highway or improvement proceedings, see Drains §§ 46-48; Local Improvements, VI; Highways, II, B.
In extradition proceedings, see Extradition.
Reimbursement of officers, representatives and agents, see Agency, IV, B; Brokers § 15; Estates of Decedents, X, D; Guardianship, V; Officers, VIII; Receivers, VI; Sheriffs, III, IV, A; Trusts, X.
Of administration as charge, see Estates of Decedents, X, D; Wills, VI, F.
Experience—
To qualify expert witness, see Evidence, VI, B; Indictment, VIII, B.
Experience Tables—
As evidence of life expectancy, see Damages §§ 329, 330, 366; Death by Wrongful Act §§ 26, 28.
Experiments—
In evidence, see Evidence, IX; Indictment, VIII, B.
Expert Evidence—
See Evidence, VI; Indictment, VIII, B.
Cross-examination of experts, see Examination of Witnesses §§ 72-75.
Fees of experts, see Witnesses, VII.
Expiration—
See specific topics treating of that which expires, e. g., Insurance; Corporations, II, B, XXIII; Landlord and Tenant, II.
Explanation—
As res gestæ or admissions or self-serving declarations, see Evidence, VII, C-E.
Of writings by parol evidence, see Evidence, V.
In criminal evidence, see Indictment, VIII, B.
By witness of his testimony, see Examination of Witnesses § 34.

EXPLOSIVES AND COMBUSTIBLES.

TREATS of the law relating to handling, possession, use or sale of explosive or highly inflammable substances, and the attendant duties and liabilities.

Analysis.

§ 1. In general.
§ 2. Duty and negligence.
§ 3. ——Manufacturer's or seller's liability to user.
§ 4. Contributory negligence.
§ 5. Actions for injuries.
§ 6. ——Presumptions and evidence.
§ 7. ——Jury questions and instructions.

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§ 1. In general.

Duty and negligence, see post §§ 2, 3.
Contributory negligence, see post § 4.
Actions for injuries, see post §§ 5-7.
Use of explosives or combustibles in connection with crimes, see Crimes, II; Indictment.
Use of explosives or combustibles for killing fish or game, see Fish and Game.
Statutory provisions for shipment and transportation of explosives and combustibles, see Comp. L. 1915, §§ 8244, 15251-15259.
Shipment of explosives and combustibles on public conveyances, see Comp. L. 1915, §§ 15257-15259.
Right of warehouseman to dispose of explosives or combustibles for protection of other property, see Comp. L. 1915, § 6596.
Regulations by State Fire Marshal for manufacture, storage, sale, use and transportation of explosives and combustibles, see Comp. L. 1915, § 9111.
Power of council of fourth-class cities to regulate sale and use of explosives, see Comp. L. 1915, § 3021.
Power of village councils to regulate use of explosives and combustibles, see Comp. L. 1915, §§ 2640, 2759.

§ 2. Duty and negligence.

Manufacturer's or seller's liability to user, see post § 3.
Explosions of steam boilers and compressed air containers, see Negligence; Master and Servant, III.
Personal liability of officer of corporation vending explosive or combustible substance to purchaser thereof in the market injured by it, see Corporations ¶ 602.
Excessiveness of award for loss of sight by explosion, see Damages ¶ 940.

¶ 1. A small boy, finding a dynamite cartridge in a common packing box in sawdust, proceeded to crack it on a stone, and maimed himself for life. The boy was rightfully on the premises, and his father was at work hard by. The packing box was on the ground under a rude shed and was marked "Powder," but neither the boy nor his father could read. It had been left exposed by the agent of the landlord. Held, that an action would lie against the landlord for the injury.—Powers v. Harlow, 53 Mich. 507.

¶ 2. One who delivers to another such an article or substance as gasoline for kerosene is liable for injuries resulting therefrom, even though he was ignorant of its noxious character, if, in the exercise of ordinary prudence, he or his servant should have possessed such knowledge.—McLawson v. Paragon Refining Co., 198 Mich. 222.

¶ 3. A mutual understanding between adjoining mining companies that each, in blasting, may throw rock upon the other's premises will be no defense to an action for injury to a person rightfully on such premises.—Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

¶ 4. Where excavations had been in progress within 500 feet of plaintiff's horse shoeing shop for several weeks, and dynamite blasts were of frequent occurrence, defendants were not negligent in failing to apprise him of intended blasts, as they were events which, under the circumstances, he should have anticipated.—Mitchell v. Prange, 110 Mich. 78.

¶ 5. Where an owner permits the employee of another to use his shop for warming and eating dinner and the employee to start the fire uses a can containing volatile oil not painted red and stenciled as required by Pub. Acts 1909, Act 37, How. 2nd Ed., § 2598, the injured person is a licensee.—Molin v. Wisconsin Land & Lumber Co., 177 Mich. 524.

¶ 6. The owner of a shop permitting a licensee to use the premises to warm and eat his dinner, in the absence of a general custom as to using kerosene to start fires, owes no duty to the licensee using a can he supposed contained kerosene to keep a volatile oil in a receptacle painted red and stenciled

as required by Pub. Acts 1909, Act 37.—Molin v. Wisconsin Land & Lumber Co., 177 Mich. 524.

Liability for injury resulting from explosion of kerosene or other oils, see note 8 N. C. C. A. 161-166.
Liability for injury caused by explosion of gasoline, naphtha or benzine, see note 8 N. C. C. A. 209-239.
Keeping of explosives in violation of law or ordinance as affecting liability for injury from explosion, see note 9 N. C. C. A. 863-876.
Liability for injury to passenger on passing train injured by explosion near track, see note 4 N. C. C. A. 74-86.
Liability for injury to member of fire department by explosion, see note 13 N. C. C. A. 302-306.
Liability for injury from explosive left in building by former owner, see note 4 N. C. C. A. 311-321.
Injuries to children from explosives, see notes 4 N. C. C. A. 349-364; 12 N. C. C. A. 864-880.

§ 3. ——Manufacturer's or seller's liability to user.

Statutory provisions for marking of high explosives, see Comp. L. 1915, §§ 7202-7207.

¶ 7. A bottler of charged cider is not liable to his vendee for injuries caused by the explosion of the bottle in his hands in the absence of contract between the parties or knowledge on the defendant's part of the danger.—O'Neill v. James, 138 Mich. 567.

¶ 8. Under Pub. Acts 1899, No. 26, providing for the inspection of illuminating oils, and making it unlawful to sell rejected or condemned oil or oil which has not been inspected, the manufacturer or wholesaler of oil which is not up to the standard is liable to a remote purchaser for injury resulting therefrom, since such act recognizes illuminating oil which is not up to the standard as a dangerous substance.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 9. A manufacturer, who knowingly makes and puts upon the market a highly dangerous article which does not contain intrinsic evidence of its dangerous character, e. g., inflammable stove polish, without notice by label or otherwise, is liable in action for personal injuries sustained by a purchaser although the article was purchased from a third party or retailer.—Clement v. Crosby & Co., 148 Mich. 293.

¶ 10. Negligence may be predicated upon the act of a manufacturer in placing on the market, for sale and common domestic use, an explosive compound, without notifying the public, by a proper label or otherwise, of its dangerous character.—Clement v. Crosby & Co., 157 Mich. 643.

¶ 11. When stove polish purchased of a dealer proves to be explosive, and an injury results, an action lies against the manufacturer of the article, and not against the dealer, unless he is guilty of negligence.—Clement v. Rommeck, 149 Mich. 595.

¶ 12. A dealer who buys in the open market, stove polish which purports to be safe and proper for use, and sells it for a purpose for which it is apparently intended, is not liable, in the absence of negligence, if it turns out that the article is not adapted to the use, and causes injury.—Clement v. Rommeck, 149 Mich. 595.

Liability of manufacturer or seller of gasoline or acetylene lighting system for injury to purchaser, see note 12 N. C. C. A. 499-518.

§ 4. Contributory negligence.

¶ 13. Neither the injured lad nor his father were negligent where the boy, rightfully on defendant's premises, while his father was working hard by, found dynamite in a packing box and tried to crack it on a rock, the box being marked "Powder," but they being unable to read.—Powers v. Harlow, 53 Mich. 507.

¶ 14. The simple act of using kerosene for the starting of a new fire does not preclude the user thereof from recovering, in an action to recover damages for personal injuries resulting from negligent substitution by defendant of gasoline for kerosene, upon the ground that he was guilty of contributory negligence as a matter of law.—McLawson v. Paragon Refining Co. of Michigan, 198 Mich. 222.

¶ 15. Pouring kerosene directly from a can in relighting a dying fire or kindling a new one, without the party first assuring himself there is no fire in the stove, is negligence per se.—McLawson v. Paragon Refining Co., 198 Mich. 222.

§ 5. Actions for injuries.

Presumptions and evidence, see post § 6.
Jury questions and instructions, see post § 7.

¶ 16. Where a blacksmith was injured by a kick from a horse which was frightened by an explosion in a sewer trench several hundred feet from the shop, it was error, in an action against the excavators who caused the explosion, to permit a recovery upon the ground that the charge of dynamite was excessive, or that it was not properly covered, when the only ground of negligence set up in the declaration was the failure of defendants to give notice of the blast.—Mitchell v. Prange, 110 Mich. 78.

¶ 17. Under a declaration alleging that certain kerosene was "adulterated" it may be shown that the admixture of other matter

was the result of the process of manufacture, as well as that such other substance had been added after manufacture.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 18. A declaration in an action against the manufacturer of an article dangerous in character which states that it was manufactured and put on the market by the defendant as a stove polish and that it was defendant's duty to know the property of the goods and that it should not manufacture and sell dangerous and highly inflammable substances as are liable to ignite, explode or spontaneously burn and bring suffering and pain to persons ignorant of the constituent parts which are artfully and deceitfully kept from the knowledge of the purchasing public, is a sufficient allegation of defendant's duty, although there is no allegation that all the defendant's products are of that character.—Clement v. Crosby & Co., 148 Mich. 293.

¶ 19. An allegation in a declaration for damages for the injuries resulting from the sale of a highly dangerous article wherein it was alleged that the constituent part of the product "was and is artfully and deceitfully kept from the knowledge of the purchasing public" necessarily implies scienter on the part of the defendant.—Clement v. Crosby & Co., 148 Mich. 293.

¶ 20. Where a declaration states the manufacture of a dangerous compound and placing it upon the market at the same time charging the deceitful and wilful concealment from the public of its dangerous elements and properties and further stating that these are such as to cause spontaneous combustion, explosion, etc., and that the plaintiff purchased the article without any warning, there is a practical charge of fraudulently and wilfully putting the article upon the market.—Clement v. Crosby & Co., 148 Mich. 293.

§ 6. ——Presumptions and evidence.

Judicial notice of explosiveness and dangerousness of substances, see Evidence § 3.
Negative evidence that warning was not heard, see Evidence § 80.

¶ 21. One excavating a trench for a sewer cannot be said to have been negligent in not refilling it before exploding a dynamite blast, in the absence of evidence to show that such a requirement would be a reasonable one.—Mitchell v. Prange, 110 Mich. 78.

¶ 22. In an action against a manufacturing company for injuries due to negligence in placing on the market a compound for blacking stoves, without a label or notice of its dangerous character, whereby plaintiff, while applying the compound, was injured by its explosion, plaintiff was not bound to aver or prove what caused the compound to ignite, if she used it as directed, and without negligence.—Clement v. Crosby & Co., 157 Mich. 643.

¶ 23. In an action for negligence against the owner of a tank wagon containing explosives where injuries were inflicted upon a young child because of an explosion of the tank while the child was playing thereon, while the tank was left in the street unattended, an ordinance prohibiting the leaving of any wagon or vehicle in the public street when not in actual use is admissible in evidence, having a material bearing on the question of the negligence of the defendant.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, per McAlvay, C. J., Carpenter, Montgomery and Moore, JJ.

¶ 24. The knowledge of a consulting engineer in employment of the defendant gas company, being chargeable to it, he may be asked on cross-examination after he has stated that the drips pumped out of gas mains are explosive, if it was necessary that a vent on the tank holding such drips ought to have been closed and fastened as a precaution against fire.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, per McAlvay, C. J., Carpenter, Montgomery and Moore, JJ.

¶ 25. In an action for damages for personal injuries alleged to have been caused by the explosion of adulterated kerosene, it is not error to permit an expert to give a brief description of the process of producing kerosene from petroleum, since such testimony may have furnished some aid to the jury in determining what the substance sold to plaintiff was.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 26. In an action for damages for personal injuries alleged to have been caused by the explosion of adulterated kerosene sold by defendant, it is competent to show that gasoline would throw off vapor at a lower temperature than kerosene of the legal test standard, and that oil of the legal test would not ignite under the conditions shown to exist but that if mixed with gasoline or other similar substance, it might.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 27. The fact that plaintiff's case, in an action for damages for personal injuries alleged to have been caused by the explosion of adulterated kerosene, rests largely upon inferences drawn from the facts proven, is not fatal where it does not rest upon mere conjecture.—Stowell v. Standard Oil Co., 139 Mich. 18.

Application of doctrine of res ipsa loquitur in action for injuries by explosion, see note 5 N. C. C. A. 53, 54.

§ 7. ——Jury questions and instructions.

¶ 28. In an action for negligent injury resulting from the lack of due precautions in the conduct of one's business, defendant can-

not be permitted to answer that the profits on the business are not sufficient to warrant taking them. And the question as to the necessity for the precautions is for the jury. So held where it was a question whether in blasting in an open mine the pit ought not to be covered before firing the blast.—Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

¶ 29. In an action for injury from a mining blast the questions whether any notice was given before the blast was fired, and, if so, whether it was sufficient, are questions of fact; and if there is any conflict in the evidence it must go to the jury.—Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

¶ 30. In an action against a bottler for personal injuries caused by the explosion of a bottle of charged cider in the hands of the plaintiff, a bartender, in the act of serving it to the customer, testimony for the plaintiff that the explosion must have been caused by the bottle having been overcharged, and testimony for the defendant that it was filled in the usual way and that no bottle had ever been charged excessively, raises a question of fact for the jury as to the defendant's negligence.—O'Neill v. James, 138 Mich. 567.

¶ 31. It cannot be said as matter of law that leaving a tank wagon containing explosive liquids in a street with its vent open, so that boys playing thereon after warning exploded it with matches, was not an act imminently dangerous to human life; so as to absolve defendant from liability on the theory that the act of the boys was an intervening human agency, their act not being a responsible cause.—Iamurri v. Saginaw City Gas Co., 148 Mich. 27, per McAlvay, C. J., Carpenter, Montgomery and Moore, JJ.

¶ 32. Whether defendant's agent, in making investigation as to the nature of the contents of a can supposed to contain kerosene to be furnished to plaintiff's decedent who was killed as a result of using same to start a fire, exercised that high degree of care imposed upon him by the fact that he was handling a dangerous and, under certain circumstances, a highly explosive substance, held to be a question for the jury.—McLawson v. Paragon Refining Co., 198 Mich. 222.

¶ 33. In an action for personal injuries resulting from the explosion of stove blacking, it appeared that defendant placed the substance on the market without label or notice of its dangerous character, and that it exploded while plaintiff was applying it to a gas range. Plaintiff testified that before making the application she had turned off the gas, and that there was no flame on the stove, and claimed that the explosion resulted altogether from friction in making the application. Other evidence in the case made it quite clear that the substance would only explode on contact with a flame. Held, that the question of defendant's negligence was, notwithstanding testimony of plaintiff, a question for the jury, and it was not necessary for them to infer that she was deliberately untruthful.—Clement v. Crosby & Co., 157 Mich. 643.

EX POST FACTO LAWS to EXTRA WORK.

Cross-References.

Ex Post Facto Laws—
- See generally Constitutional Law, XI.
- Corporate by-laws, see Corporations, § 68.
- Rule for prospective construction of statutes, see Statutes, VI.

Exposure—
- Resultant damages from illness, see Damages, III, E.
- Of person as crime, see Crimes § 95; Indictment.
- To ridicule or contempt by defamatory words or publications, see Libel.
- Questions exposing witness to self-crimination or disgrace, see Examination of Witnesses, IV.
- "Exposures" amounting to material factors of insurance risk, see Insurance, VII, VIII, XII.

Express and Implied—
- See generally topics treating of that which may be either express or implied, e. g., Contracts; Implied Contracts; Covenants for Title; Sales, VI (warranties); Corporations, XI-XIII (corporate powers); Agency, II (implied authority); Trusts, II-IV.

Express Companies—
- Liability on traveler's checks, see Banking § 31.
- General law of corporations and joint stock companies, see Corporations; Joint Stock Companies.
- As common carriers, see Carriers § 1.
- Common carriage by express companies, see Carriers, II.
- Carriage of live animals, see Carriers § 96.

Expression of Opinion—
- Affecting competency of juror, see Jury, III.

Expulsion—
- From association, see Associations §§ 4-6.
- From trains, see Carriers, IV, D; Railroads, VIII, B.
- From fraternal association, see Fraternal Associations, V.
- From school or college, see Schools, VI, X; University of Michigan.
- From church society, see Religious Societies, II, III.

Expunging—
- Striking out pleadings or parts of them, see Equity § 118; Pleading, IV.
- Striking out evidence, see Trial, V, C; Indictment, IX, B.

Improper matter from records, see Judgments, V, VI; Records.
Extensions—
Of time under contracts and the effect of such extensions, see Contracts; Sales; Chattel Mortgages; Landlord and Tenant; Mortgages; Negotiable Instruments; Guaranty; Suretyship; Vendors and Purchasers; and other specific topics.
Of time for proceedings, see specific topics treating of the proceeding in question, e. g., Appeal, VI; Pleading; Defaults; Reference.
Of corporate term and existence, see Corporations § 8.
Of highways, see Highways, II, B.
Of railroads, see Railroads, II; Street Railways, I.
As consideration for promise, see Contracts, V, A.
As affecting or releasing secondary obligors, see Negotiable Instruments, VI-XI; Guaranty, III; Suretyship, II, III.
Extinguishment—
Of estates or interests in land, see specific topics treating of the various interests, e. g., Easements; Dower; Homesteads; Licenses to Enter; Landlord and Tenant.
By merger, see Real Property; Mortgages, VII, D.
Modification, merger, novation, or release of contract, see Contracts, VIII; Novation; Releases; Accord.
Merger in judgment, see Former Adjudication, IV.
Extortion—
As crime, see Crimes § 129.
As duress, see Duress.
Extra Allowances—
For costs, see Costs, III, V, B.
To personal representatives or trustees, see Estates of Decedents, X, D; Trusts, X.
Additional alimony, see Divorce, X, E.
Extra Compensation—
Under contracts, see Contracts, VI, E; Building Contracts, V.
Extra Work—
Under contracts, see Contracts, VI, E.
Under building contracts, see Building Contracts, V.

EXTRADITION.

TREATS of procedure for pursuit of fugitives from justice and their return to the place of crime for trial.

Analysis.

§ 1. Interstate requisitions.
§ 2. Criminality of offense.
§ 3. Sufficient of indictment, accusation or complaint for crime.
§ 4. Privilege of prisoner, detention for other purposes or trials.

§ 1. Interstate requisitions.

Criminality of the offense and sufficiency of the charges, see post §§ 2, 3.
Sufficiency on habeas corpus to show flight, see Habeas Corpus.
Costs of pursuing and capturing fugitives as county charge, see Counties § 32.
Provision for appointment of extradition agents to pursue fugitives and demand them in other states or countries, see Comp. L. 1915, § 15884.
Statutory duty of governor when demand is made for fugitive, see Comp. L. 1915, § 15885.
Arrest of fugitive and delivery to requisition agent, see Comp. L. 1915, § 15885.
Proceedings for arrest of fugitives and detention until requisition from state whence they fled, see Comp. L. 1915, §§ 15887-15890.
Right to opportunity to apply for habeas corpus or other judicial examination into validity of arrest and detention, see Comp. L. 1915, § 15885.
Governor's warrant for delivery and transportation of prisoner, see Comp. L. 1915, § 15886.
Duty of attorney general to investigate and report in extradition cases on request of governor, see Comp. L. 1915, § 15885.
Fee of secretary of state for extradition warrant on interstate extraditions, see Comp. L. 1915, § 100.
Audit and allowance of expenses of agents to retake fugitives from justice, see Comp. L. 1915, § 15884.
Provisions as to liability for expense of arresting and detaining fugitives awaiting requisition, see Comp. L. 1915, § 15891.

¶ 1. The extradition between states of criminals who are said to be fugitives from other states is governed by the constitution and laws of the United States; one state cannot deal with another without the approval of congress, and its policemen have no greater power than the state to which they belong.—Malcolmson v. Gibbons, 56 Mich. 459.

¶ 2. An arrest cannot be made in Michigan for purposes of extradition to another state without compliance with the laws of the United States.—Malcolmson v. Gibbons, 56 Mich. 459.

§ 2. Criminality of offense.

¶ 3. One cannot be extradited between states of the Union except for offenses that are strictly criminal (bastardy is not such), and with which he has been legally charged as a fugitive from justice.—In re Cannon, 47 Mich. 481.

§ 3. Sufficient of indictment, accusation or complaint for crime.

Scope of examination on habeas corpus, see Habeas Corpus.
Arrests and detention for trial for crime in general, see Arrest.
Who is "fugitive from justice" indictable without preliminary examination, see Arrest § 28, ¶ 79.
Proofs of flight and copies of indictment, information, complaint, and other papers to accompany requisition, see Comp. L. 1915, § 15885.

¶ 4. Demand by the governor of one state upon that of another for extradition cannot be made until the offender has been indicted or otherwise complained of in the regular course of justice. U. S. Rev. Stat. § 5278. And in Michigan the complaint must be on oath and must bring the case within the provision of the law; the prisoner is also entitled to bail, and the complaining party must be answerable for costs and charges and his support (How. St., §§ 9623-9626).—Malcolmson v. Gibbons, 56 Mich. 459.

¶ 5. An information is a sufficient basis for extradition.—People v. Stockwell, 135 Mich. 341.

¶ 6. An information for obtaining a note by false pretenses as a basis for extradition, based upon a sworn complaint for conspiracy upon which the respondent was originally apprehended, was not required to charge the same precise offense named in the original warrant of arrest, although a nolle pros. was entered in such original proceeding.—People v. Stockwell, 135 Mich. 341.

¶ 7. A complaint and warrant in a criminal proceeding in another state will be deemed sufficient for purposes of extradition under the Constitution of the United States, art. IV, par. 2, § 2, providing that a person "charged" in any state with treason, felony or other crime, who shall flee from justice, and be found in another state shall, upon demand of the executive of the state to which he fled, be delivered up to the authorities of the state having jurisdiction of his crime, where the fugitive has in fact, however inartificially, been charged with the crime in the state from which he has fled.—Dragisick v. Judge of Recorder's Court, 195 Mich. 112.

§ 4. Privilege of prisoner, detention for other purposes or trials.

Habeas corpus to test legality of detention, see Habeas Corpus.

¶ 8. Courts should refuse, in cases that are entirely free from doubt, to allow any use to be made of extradition proceedings whereby good faith would be plainly violated, and the measures necessary to bring the accused within their jurisdiction would be perverted.—In re Cannon, 47 Mich. 481.

¶ 9. One cannot be detained within the jurisdiction to which he is extradited to answer for some other offense than that for which he was taken, and for which extradition could not be allowed. This is especially so where the first charge cannot be maintained.—In re Cannon, 47 Mich. 481.

EXTRATERRITORIALITY to FALSEHOOD.

Cross-References.

Extraterritoriality—
- Force and effect of laws, see Conflict of Laws.
- Jurisdiction of courts, see Courts, §§ 43-45; Indictment, III.

Extrinsic Evidence—
- To interpret or construe writings, see Evidence, V.

Facsimiles—
- As originals or copies, see Evidence §§ 108, 109.

Factions—
- Party schism or division as affecting designation on ballots, see Elections, §§ 23, 35.
- Religious schism, see Religious Societies.

Factors—
- See Brokers and Factors.

Factory Regulations—
- See Master and Servant, III; Buildings; Constitutional Law; Workmen's Compensation Law.

Facts and Law—
- Province of court and jury, see Trial, VI; Indictment, IX, D, E; Instructions; and see the cross-references in those topics.
- Review on error or appeal, certiorari or exceptions, see Appeal, XII; Indictment, XVI; Certiorari; Justices of the Peace, V, VI; and specific topics referred to in them.

Verdicts and findings, see Verdicts and Findings.
Deductions of witness amounting to admissible opinion or conclusion of fact or law, see Evidence § 211 et seq.; Indictment, VIII, B.
Failure of Consideration—
See Contracts, V, C.
Ground for rescission or excuse for breach, see Rescission, II; Contracts, VII, C; Sales, V, C; Vendors and Purchasers, VII, VIII.
Burden of proof and evidence, see Contracts, V, D.
Defense as against bona fide holder, see Negotiable Instruments, XIII.
Failure of Issue—
Construction of words in deeds or wills, see Deeds, III; Wills, VI.
Validity of time of suspension of power to alienate, see Perpetuities.
Heirs of person dying issueless, see Descent, §§ 16, 17.
Failure of Proof—
Ground for directing verdict, see Directing Verdict.
Amounting to variance, see Pleading, X; Indictment, I, E.
Bad inference against person failing to make proofs, see Evidence, §§ 63-65; Indictment, VIII, A.
Failure of Purpose—
Effect on testamentary gift, see Wills, VI.
Failure of Trust—
See Trusts, XIV; Wills, VI.
Failure to Find Facts—
See Verdicts and Findings.
As restricting review on error, see Appeal, § 438 et seq.
Fair Market Value—
See Values.
Fairness—
As essential basis for equitable relief, see Equity, I, II; Specific Performance, III.
Unfairness in general or unconscionableness, see Fraud, I, II; Equity, I-III.
Fairs—
See Agriculture, §§ 3, 4; see also Exhibitions and Shows.
Faith Healing—
See Medicine and Surgery.
Falling Objects—
Liability for injuries caused by, see Buildings, § 4 et seq.; Carriers, IV, E; Master and Servant, III; Highways, XII; Negligence, II.
False Coloration—
See Food, § 2.
Falsehood—
As fraud, see Fraud.
As crime, see Crimes, §§ 115, 116; Indictment.

FALSE IMPRISONMENT.

TREATS of civil liability for illegally and without justification arresting a person or forcibly denying to him liberty of movement and of actions to enforce such liability. It excludes the torts of Malicious Prosecution (and Abuse of Process) which see.

Analysis.

I. What constitutes and persons liable.

§ 1. Definition and elements of the tort.
§ 2. Discharge from arrest and termination of prosecution.
§ 3. Aggravation and mitigation of the wrong.
§ 4. Justifiable complaint.
§ 5. Justifiable arrest.
§ 6. ——For breach of the peace or ordinance.
§ 7. ——Preventive arrest.
§ 8. ——Detention or arrest on another's advice or request.
§ 9. Justification by warrant or process.
§ 10. ——Warrant not in possession of arresting officer.
§ 11. ——Sufficiency of warrant or process.
§ 12. Arrest on one ground and justification by another.
§ 13. Illegal or unreasonable detention after legal arrest.
§ 14. Arrest under unconstitutional statute.
§ 15. Existence and sufficient accusation of crime.
§ 16. Unlawful commitment.
§ 17. Detention as insane person.
§ 18. Detention by quarantine.

§ 19. Waiver or consent to detention.
§ 20. Persons liable.
§ 21. ——Bystanders called to assist.
§ 22. ——Participating officers.
§ 23. ——Corporations.

II. Actions.

§ 24. In general.
§ 25. Pleading.
§ 26. Burden of proof and presumptions.
§ 27. Admissibility of evidence.
§ 28. ——Of malice and aggravation or mitigation.
§ 29. Sufficiency of evidence.
§ 30. Questions of law and fact and instructions.

[Note. No cross-references to statutes will be found in this topic. Consult references to the statutes found in topics Arrest; Civil Arrest; Costs; Damages; Justices of the Peace, III; and other related topics.]

I. WHAT CONSTITUTES AND PERSONS LIABLE.

§ 1. Definition and elements of the tort.

Immateriality of probable cause or lack of it, see also post ¶¶ 113, 114.

Element of termination of prosecution and discharge, see post § 2.

Consent to detention or waiver of the wrong, see post § 19.

Persons liable for the wrong and participation therein as making person liable, see post §§ 20-23.

Measure and elements of damages for the wrong, see Damages § 128.

Actionable malicious prosecution and abuse of process, see Malicious Prosecution (and Abuse of Process).

¶ 1. Actual manual arrest of the person is not necessary to constitute false imprisonment. A demonstration of physical violence, which to all appearance can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished.—Brushaber v. Stegemann, 22 Mich. 266.

¶ 2. It is not necessary that the party be restrained after an unsuccessful attempt to escape from custody; it is enough if the restraint be put upon a person either by force or fear.—Moore v. Thompson, 92 Mich. 498.

¶ 3. An arrest and imprisonment exist where a party submits to an arrest without requiring an officer to resort to actual violence.—Josselyn v. McAllister, 25 Mich. 45.

¶ 4. An action for false imprisonment will not lie where the plaintiff has not been arrested, and though his manual seizure is not necessary to an arrest there must be some sort of personal coercion.—Hill v. Taylor, 50 Mich. 549.

¶ 5. Where one is accused of larceny, and is informed that an officer is at hand to arrest her if she does not produce the stolen articles, and where, when she seeks to go out, her accuser stands between her and the door, holding his hand on the knob, and where upon her refusal to go through the streets with an officer she is taken in an omnibus to her house and a search is made there, the restraint upon her liberty is sufficient to warrant an action for false imprisonment.—Moore v. Thompson, 92 Mich. 498.

§ 2. Discharge from arrest and termination of prosecution.

Favorable termination as essential of cause of action for malicious prosecution, see Malicious Prosecution, V.

¶ 6. An action for false imprisonment on an illegal civil arrest may be maintained before the proceedings on which the arrest was had are terminated by a judgment.—Josselyn v. McAllister, 22 Mich. 300.

¶ 7. One making a complaint against another for perjury is not liable to be proceeded against for damages for false imprisonment during the pendency of the criminal proceedings.—In re Kelley, How. N. P. 106.

§ 3. Aggravation and mitigation of the wrong.

Evidence of aggravation or mitigation, see post § 28.

Mitigation and aggravation of damages, see Damages, V.

¶ 8. Night arrests and arrests on the eve of Sunday, or when it is hard to obtain the means for immediate deliverance, are oppressive and unjustifiable except in cases of pressing necessity. And the complaint before a magistrate should be made and supported by sworn testimony as speedily as possible.—Malcolmson v. Gibbons, 56 Mich. 459.

¶ 9. To justify handcuffing a person arrested for felony and en route to jail, it is not

necessary that he be unruly, or that he attempt to escape, or that he should be a notoriously bad character.—Firestone v. Rice, 71 Mich. 377.

§ 4. Justifiable complaint.

Justifiable arrests, see post §§ 5-14.
Sufficiency of complaint, see post § 15.
Nonliability of person making fair statement to magistrate on which warrant issues, see post § 20.
Direction of verdict where action taken was under other complaint, see post ¶ 157.
Sufficiency of evidence of justification, see post § 29.

¶ 10. To justify, in an action for false imprisonment, the making of a criminal complaint, defendant's information should have been such as, if believed, business men of ordinary care would act upon.—Livingston v. Burroughs, 33 Mich. 511.

§ 5. Justifiable arrest.

For breach of the peace or violation of ordinance, see post § 6.
Arrest to prevent crime, see post § 7.
Detention on another's advice or request, see post § 8.
Justification by warrant or process, see post §§ 9-11.
Arrest on one ground and justification on another, see post § 12.
Wrongful detention after legal arrest, see post § 13.
Arrest under invalid statute, see post § 14.
Unlawful commitment of prisoner, see post § 16.
Justification of persons called to officer's assistance, see post § 21.
Nonexistence of actual crime, see post § 15.
Justifiable complaints, see ante § 4.
Pleading justification, see post § 25.
Burden of proof of justification, see post § 26.
Justification as question of law or fact, see post § 30.
Legality of arrest without warrant, see also Arrest, I.
Felonies and misdemeanors distinguished, see also Arrest, I; Crimes § 5.

¶ 11. An officer of justice is bound to know the law, and if he makes an arrest which the facts on which he proceeds would not justify, if true, he is a wrongdoer.—Malcolmson v. Gibbons, 56 Mich. 59.

¶ 12. An officer who, in arresting for felony without a warrant, acts in good faith and after such reasonable investigation as circumstances permit, is not liable.—Filer v. Smith, 102 Mich. 98.

¶ 13. As a prosecution for adultery cannot be instituted except by the injured husband or wife, an officer is not justified in making an arrest without a warrant by his having good reason to believe and by his good faith belief that the person arrested has been guilty of adultery.—Filer v. Smith, 96 Mich. 347.

¶ 14. Arrest without warrant, as for a felony, is legal if the offense is one statutorily punishable by imprisonment in the state prison, unless the statute expressly declares the crime to be a misdemeanor.—Firestone v. Rice, 71 Mich. 377.

¶ 15. The statutory offense of maliciously injuring, etc., any dam, reservoir, etc. (How. St., § 9168), being punishable by imprisonment in the state prison, and not being declared a misdemeanor, is a felony as regards an officer's right to arrest without process.—Firestone v. Rice, 71 Mich. 377.

¶ 16. The crime of seduction is a felony and hence a sheriff may arrest without warrant where facts are placed before him which justify him in believing that the person arrested is guilty.—Friesenhan v. Maines, 137 Mich. 10.

¶ 17. Representations apparently truthful were made to a sheriff that a dam had been cut, and that the informers had tracked two persons to the house of one Z., for whom, and for an unknown person, they had a warrant. At said house the shoes and trousers of Z., and plaintiff, who were the only male occupants, were found to be wet, and the shoes were claimed by informers to correspond with the tracks. A wet spade bearing sand claimed to resemble that of the dam was found in the house. Held, that the sheriff had reasonable cause for arresting plaintiff.—Firestone v. Rice, 71 Mich. 377.

¶ 18. An arrest without a warrant on the ground that a felony had been committed under How. St., §§ 9274, 9275 (concerning malicious obstruction of operation of railroad), was not justified by a newspaper article stating that plaintiff and his companions boarded, while drunk, a street car, refused to pay their fare, and that a fight ensued in putting them off.—White v. McQueen, 96 Mich. 249.

¶ 19. The manner and appearance of a person on being accused of crime do not justify his arrest so as to constitute a defense in an action for false imprisonment.—Somerville v. Richards, 37 Mich. 299.

¶ 20. Arrest for misdemeanor not committed in the officer's presence cannot be made without warrant.—Ross v. Leggett, 61 Mich. 445.

¶ 21. Under How. St., §§ 8596-8598, it is a misdemeanor in all concerned to shift the custody of a prisoner with intent to evade a writ of habeas corpus and in trespass for false arrest it was held error to refuse to so charge.—Malcolmson v. Gibbons, 56 Mich. 459.

¶ 22. A guy-post for a tower of an electric light company, which company was under contract to light the city, and was authorized by the city to put such posts in the streets, was placed in the lawn between the sidewalk and the curb in front of certain premises whose owner forbade its being set therein. Held, that the cutting of such post by such owner was no more than a misdemeanor, if any offense at all; and an arrest as for felony was illegal.—Ross v. Leggett, 61 Mich. 445.

¶ 23. In an action for false imprisonment, where the proceedings for the arrest complained of were in fact criminal in character, but were treated by both parties as civil, whether the court would be justified in holding the plaintiff to the same rules as if they were civil proceedings, quære.—Pardee v. Smith, 27 Mich. 33.

§ 6. ——For breach of the peace or ordinance.

Misdemeanors not amounting to breaches of the peace, see ante § 5.
Arrest to prevent breach of the peace when threatened, see post § 7.
Evidence of specific acts on prior occasions to show justification, see post ¶ 115.
What constitutes breach of the peace by arrested person, see also Crimes § 7.
Power by municipal ordinance to authorize arrest without warrant, see Municipal Corporations, IX, E.

¶ 24. Arrest and imprisonment without a warrant are authorized only for offenses committed in the presence of the arresting officer and at the time.—Larson v. Feeney, 196 Mich. 1.

¶ 25. An officer is liable for arresting without a warrant a peddler selling meat without a license, contrary to an ordinance.—Schnider v. Montross, 158 Mich. 263.

¶ 26. An arrest without a warrant is justified only in cases of felony and breaches of the peace; and the president of a village who orders the arrest of a vender of pop-corn and peanuts, because he has no license, makes himself responsible and liable for the consequences, as he has no authority, as conservator of the peace, to imprison citizens in such a summary manner, the act not being malum in se, but only malum prohibitum, there being no danger of escape, and there being no obstruction in the public highway requiring immediate removal for the convenience of the public.—Tillman v. Beard, 121 Mich. 475.

¶ 27. A president of a village organized under Pub. Acts 1895, No. 3, who is made a conservator of the peace and charged with the duty of enforcing ordinances of the village, and who in good faith makes a complaint causing the arrest of a person for violation of an ordinance, is not liable for false imprisonment where the ordinance is afterwards held invalid, as public policy requires that a party who acts in good faith is not required to take the risk of being mulcted in damages if the courts afterwards hold it unconstitutional.—Tillman v. Beard, 121 Mich. 475.

¶ 28. A peace officer may arrest for a breach of the peace committed against himself as well as for those committed against others.—Davis v. Burgess, 54 Mich. 514.

¶ 29. The use of grossly indecent, profane and abusive language towards another person upon the public street, and in the presence of others, is a breach of the peace.—Davis v. Burgess, 54 Mich. 514.

¶ 30. The use of profane, vile and obscene language towards a police officer who inquires into the conduct of plaintiff, a stranger in the city, justifies said officer in making plaintiff's arrest.—Buman v. Michigan Cent. R. Co., 168 Mich. 651.

¶ 31. An officer may arrest without a warrant only in cases of felony or breaches of the peace and an arrest without warrant for selling goods without proper license is illegal.—Schnider v. Montross, 158 Mich. 263.

¶ 32. One who refuses to explain why he has been waiting behind a tree, and refuses to state his name or his business, to a police officer, is not guilty of a breach of the peace so as to give such officer authority to arrest him without a warrant.—Cook v. Hastings, 150 Mich. 289.

¶ 33. Mere suspicion that a woman is plying the vocation of a street-walker or common prostitute does not justify an officer in arresting her without a warrant when there is no act indicating that she is upon the street for that purpose.—Pinkerton v. Verberg, 78 Mich. 573.

¶ 34. A policeman is not justified in arresting without a warrant a woman quietly walking on the street at a late hour of the night, even though she may just have come from a disreputable saloon, where there was nothing to indicate that she was intending to ply a prostitute's vocation by solicitation.—Klein v. Pollard, 149 Mich. 200.

¶ 35. The fact that plaintiff in an action to recover damages for illegal arrest and imprisonment without a warrant, was a bad girl, with a jail record, and admitted violations of the same ordinance on other occasions, held not sufficient to justify such arrest and imprisonment without a warrant.—Larson v. Feeney, 196 Mich. 1.

¶ 36. For a woman in passing a man on a public street to cough and say to him "Hello, there, kid," held not to constitute such disorderly conduct in violation of an

ordinance as to warrant her arrest and imprisonment without a warrant.—Larson v. Feeney, 196 Mich. 1.

¶ 37. There is no probable cause for the arrest of the owner of a house for the crime of keeping a place for immoral purposes where the person causing the arrest has no information tending to connect such owner with the alleged crime.—Schneider v. Shepherd, 192 Mich. 82.

§ 7. ——Preventive arrest.

Unnecessary detention after arrest, see also post ¶ 64.

¶ 38. A magistrate may order into custody a drunken person committing a breach of the peace in his presence even though so drunk as to be insane; for though an insane person cannot commit crime he may be prevented from doing harm.—Lott v. Sweet, 33 Mich. 308.

¶ 39. Threats or other indications of an intended breach of the peace will not justify an arrest without a warrant, unless the facts warrant the officer in believing it necessary for preventing their immediate execution; as where the threat is coupled with some overt act.—Quinn v. Heisel, 40 Mich. 576.

¶ 40. Arrests without process to prevent threatened breaches of the peace are not justified unless the breach has proceeded far enough to sustain proceedings against the person committing it, without reference to past similar offenses which he may have committed before the officer arrived.—Quinn v. Heisel, 40 Mich. 576.

§ 8. ——Detention or arrest on another's advice or request.

Liability of officer acting in good faith on telegraphic advice, see also post ¶ 88.
Evidence of good faith and belief in arresting unidentified person, see post § 27.
Grounds and propriety of arrest for extradition, see Extradition.

¶ 41. The advice of one who is not an attorney, but who sometimes advises his neighbors for pay, is not admissible as evidence of advice of counsel in an action for false imprisonment.—Livingston v. Burroughs, 33 Mich. 511.

¶ 42. Advice of counsel, though followed in good faith, will not necessarily justify a false imprisonment caused by the client, though it might be admissible upon the question of malice if it showed facts indicating that the party believing them may have acted without improper motives.—Josselyn v. McAllister, 22 Mich. 300.

¶ 43. Where police officers are sued for an assault and battery committed in preventing plaintiff from hindering another, who desired to make a sewer connection for which the codefendant had not obtained the necessary consent from the city council, the secretary of the board of public works, who is not a lawyer, cannot be allowed to testify to opinions given by him to one of the defendant policemen as to the legal right to make the connection.—Zube v. Weber, 67 Mich. 52.

¶ 44. The fact that a police officer acts under the instruction of the prosecuting attorney in arresting and detaining a person suspected of burglary does not constitute a defense to an action for false imprisonment, where the arrest was not authorized; but it has a bearing on the good faith of the officer, and may thus affect the question of damages.—Linnen v. Banfield, 114 Mich. 93.

¶ 45. The marshal of Alpena arrested a man on Saturday evening on the strength of a letter purporting to come from the chief of police of Philadelphia, and signed with his name by some person whose initials only were attached. The letter stated nothing that would constitute a criminal offense in Michigan, but the marshal detained the prisoner as a matter of "official courtesy." Held, that the arrest was illegal.—Malcolmson v. Gibbons, 56 Mich. 459.

¶ 46. Supposition that plaintiff, a foreigner speaking no English, resembled description sent by telegram is not probable cause for directing arrest without inquiry.—Maliniemi v. Gronlund, 92 Mich. 222.

§ 9. Justification by warrant or process.

Necessity of warrant to justify arrest, see ante §§ 5-8; and see Arrest, I.
Warrant not in possession of arresting officer, see post § 10.
Sufficiency of the warrant or process, see post § 11.
Pleading justification, see post § 25.
Burden of proof and presumptions, see post § 26.
Evidence of probable cause to arrest plaintiff as person unknown described in warrant, see post ¶ 121.
Justification as matter of law or fact, see post § 30.
Justification by process or superior command or official duty in general, see Officers, VI, A; Sheriffs, IV.

¶ 47. An action for false imprisonment will not lie where the detention was by virtue of a warrant issued by a court having jurisdiction of the subject-matter, and regular on its face.—Tryon v. Pingree, 112 Mich. 338.

¶ 48. A civil action for damages for trespass to the person will not lie against one who has made a criminal complaint, or against his attorney, in a case where the warrant issued thereon is sufficiently regular on its face to protect the officer who executes it.—Wheaton v. Whittemore, 49 Mich. 348.

¶ 49. A complaint and warrant valid on their face will protect, not only the officer

making the arrest and the magistrate issuing the warrant, but the complaining witness as well, from liability for false imprisonment; but the latter might be liable for malicious prosecution.—Schultz v. Huebner, 108 Mich. 274.

§ 10. ——Warrant not in possession of arresting officer.

Manner of making arrests when several officers are participating, see Arrest § 21.

¶ 50. An arrest at one city at the direction of the officer, when the warrant was in the possession of such officer at another city, was illegal.—McCullough v. Greenfield, 133 Mich. 463.

§ 11. ——Sufficiency of warrant or process.

Pleading insufficiency of the warrant, see post § 25.
Presumption of jurisdiction of justice to issue warrant, see post ¶ 112.
Requisites and sufficiency of capias, see Civil Arrest, I-III.
Sufficiency of warrant for crime, see Arrest, IV.

¶ 51. A warrant of arrest, though omitting several statutory elements, was held substantially good as leading to an inference of what the statute required to be made out; and the defects were held to be irregularities and not jurisdictional so as to make the justice liable for false imprisonment.—Pardee v. Smith, 27 Mich. 33.

¶ 52. Technical accuracy in a warrant of arrest is not required. It is enough if the warrant informs the accused of the nature of the accusation and if it recites the substance thereof.—Haskins v. Ralston, 69 Mich. 63.

¶ 53. A complaint made on information and belief and not supported by testimony of other witnesses, does not confer jurisdiction on a justice of the peace to issue a criminal warrant.—Brown v. Hadwin, 182 Mich. 491.

¶ 54. A register in chancery cannot without an order of court issue a precept for the arrest of one ordered to pay money, or, in default of payment, to undergo imprisonment, and such an attachment is no justification in an action for false imprisonment.—Thompson v. Ellsworth, 39 Mich. 719; In re Simons, 49 Mich. 511.

¶ 55. Where attorneys procured an order for a capias from a court having authority to issue process against the person of the defendant, and under which he was arrested, and they were sued in trespass therefor, it was held that, though the order for capias might be erroneous, it was not void, and the attorneys were protected by it.—Ward v. Cozzens, 3 Mich. 252.

¶ 56. One who, as agent of a creditor, has promoted a proceeding under the nonimprisonment act, is not liable in an action for false imprisonment if the warrant of arrest, though sued out with a bad motive, and though irregular or improvidently issued, was not absolutely void; if adequate to protect the magistrate it would protect defendant.—Johnson v. Maxon, 23 Mich. 129.

¶ 57. Where, upon an insufficient affidavit, a capias ad resp. is indorsed with an order to hold to bail, and is issued, the process is valid until set aside by a direct proceeding, and both the officer making the arrest and the affiant are protected.—Johnson v. Morton, 94 Mich. 1.

¶ 58. If an order, to hold to bail upon a capias is based upon an affidavit that upon its face negatives any liability whatever to plaintiff, such order is beyond jurisdiction and void, and constitutes no protection to those instituting the suit against an action for false imprisonment; for an arrest and imprisonment in a civil case upon void process are as if without process, and cannot be justified. So held, where the capias issued in a libel action declaring on an official statement which was absolutely privileged.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 59. One making an affidavit for a writ of capias ad respondendum, and the sheriff serving the writ are protected from liability for damages for false imprisonment where the affidavit, although technically defective, discloses actionable misconduct on the part of the person arrested.—Thomas v. Rosecrantz, 193 Mich. 357.

§ 12. Arrest on one ground and justification by another.

¶ 60. An arrest made for one purpose cannot be justified by another, and the arresting officer's belief that the prisoner has violated the laws of Michigan will not excuse the arrest unless it is proposed to prosecute him in Michigan.—Malcolmson v. Gibbons, 56 Mich. 459.

§ 13. Illegal or unreasonable detention after legal arrest.

Unlawful commitment, see post § 16.
Questions of law and fact as to unreasonableness, see post § 30.

¶ 61. If a justice of the peace refuses to accept a recognizance for an appeal, tendered within twenty minutes after the sentence was pronounced, or to have anything to do with it or the sureties, simply on the ground that it is too late to appeal, and directs the officer to imprison the party, he will be liable for the imprisonment. An appeal perfected by the actual giving of proper bail terminates the jurisdiction of the justice, both of the subject-matter and the person, and his mittimus will no longer protect him.—Guenther v. Whiteacre, 24 Mich. 504.

¶ 62. An officer is authorized to detain for a reasonable time only a person arrested without warrant on a charge of felony; and where, after an arrest made on the evening of December 31, the prisoner was detained without bail until the evening of January 2, the delay could not, as matter of law, be held reasonable; when based on the false assumption that no proceedings could have been had on January 1st.—Linnen v. Banfield, 114 Mich. 98.

¶ 63. Where a sheriff makes a legal arrest without any intent to detain the person arrested an unreasonable time or to do him any other wrong, the legality of the arrest is not tainted by a subsequent illegal detention.—Friesenhan v. Maines, 137 Mich. 10.

¶ 64. A motorman was arrested and detained on the ground that the overhead system of the street railway was so out of repair as to be dangerous and had been declared a common nuisance by the common council, and that the running of cars increased the danger, and that he would not promise to desist. The running of cars could have been prevented by cutting the feed wires off from the power house or by disabling the cars. At the time of the arrest, the controller crank had been taken from the motorman and was in the hands of the police officers, and he could not start his car without them. Held that the arrest and detention was not justified and a verdict in favor of the motorman against the mayor and chief of police for false imprisonment was affirmed.—Mumford v. Starmont, 139 Mich. 188.

§ 14. Arrest under unconstitutional statute.

See also ante ¶ 27.

¶ 65. If an officer making arrest actually believes an invalid statute to be constitutional, the case must be a very plain one to make such ignorance of the law culpable. —Hill v. Taylor, 50 Mich. 549.

¶ 66. A justice of the peace is not liable in an action for false imprisonment because he holds an unconstitutional ordinance constitutional, and enforces by the arrest and imprisonment of one who violates it; nor is the officer who executes the warrant of arrest so liable if the warrant is fair on its face.—Brooks v. Mangan, 86 Mich. 576.

§ 15. Existence and sufficient accusation of crime.

Direction of verdict on ground that no offense was shown, see post ¶ 158.

¶ 67. The fact that a party is dishonest and buys goods without intending to pay for them does not excuse his arrest on a criminal charge of obtaining the goods by false pretenses.—Tefft v. Windsor, 17 Mich. 486.

¶ 68. Boarding a street car when drunk, refusing to pay fare, using vile language whereby passengers are annoyed, refusing to get off the car when asked, and showing fight when put off, do not constitute violations of How. St., §§ 9274, 9275, punishing those who wilfully and maliciously by act or intimidation impede or obstruct, or combine to impede or obstruct, the operation of a railroad. —White v. McQueen, 96 Mich. 249.

¶ 69. Where a complaint under the statute (Comp. L. 1871, § 1998) against keeping billiard-tables for gaming alleges that the respondent has "incurred a penalty by the violation of" the statute (specifying it), and that the billiard-table was kept in his house, and was resorted to for play with his knowledge and consent, the complaint is sufficient to give jurisdiction, and not open to attack in a collateral proceeding.—Pardee v. Smith, 27 Mich. 33.

¶ 70. A statement that a certain person named, described as grand-master of a specified lodge in Pennsylvania, has absconded, taking with him the funds of the lodge, charges no crime under our laws. In Michigan the company would have to be incorporated, and the officer hold the funds officially, to make him guilty, as an officer, of embezzlement (How. St., § 9151).—Malcolmson v. Gibbons, 56 Mich. 459.

¶ 71. The fact that the complaining witness who lodged complaint for slanderous words under How. St., § 9315, construed the language used as imputing the commission of a "crime," rather than an "infamous or degrading act," does not render the complaint and warrant void where the words are set out in it. The offense charged is to be determined by the words alleged to constitute it, and not by the inference drawn from them by the affiant.—Schultz v. Huebner, 108 Mich. 274.

¶ 72. A complaint for the sale of liquor in violation of the local option law which does not state the name of the purchaser is bad. —Brown v. Hadwin, 182 Mich. 491.

§ 16. Unlawful commitment.

Unlawful detention after lawful arrest, see ante § 13.

Evidence as to motive for detention in charitable institution, see post § 28.

Liability or immunity of detention home as governmental agency, see Asylums and Hospitals § 3.

¶ 73. A commitment in a criminal case which is void upon its face does not afford protection to the officer executing it, and he consequently may be liable for damages for false imprisonment.—Larson v. Collins, 195 Mich. 492.

¶ 74. Under a village charter providing for the amount of a fine which it authorizes

to be imposed on conviction of certain offenses "to be made of the property of the defendant, if any such can be found," and if not, then imprisonment, a judgment that, in case the defendant did not pay the fine and costs, she should be at once committed to the county jail, is unauthorized. And proceedings resulting such a judgment, and a mittimus void on its face on the same ground, afford no justification to the justice before whom they were taken, or to the officer who executed them, against the action of the person thereby unlawfully imprisoned.—Sheldon v. Hill, 33 Mich. 171.

¶ 75. A conviction under a complaint charging vagrancy in violation of a city ordinance, in general terms without setting out the facts constituting the offense, would not justify detention if release was sought by habeas corpus.—Gardner v. Couch, 137 Mich. 358.

¶ 76. Defendant was convicted of a crime by a justice of the peace, and appealed to the circuit court. He had the plaintiff brought before the circuit court commissioner and there obtained an order that the plaintiff should give a recognizance with a surety for his appearance as a witness to testify in defendant's behalf, and that upon failure to do so he should be committed to prison. Plaintiff refused to comply, and was committed by the justice of the peace. Held, under c. 330, Comp. Laws 1897, § 11856 et seq., as amended by Act No. 177, Pub. Acts 1875, and Act No. 141, Pub. Acts 1879, the justice had no authority to commit to prison, and defendant was liable in an action of false imprisonment.—Bates v. Kitchel, 160 Mich. 402.

¶ 77. Where an action of false imprisonment is predicated upon imprisonment of plaintiff upon his disobedience of an order requiring him to give bail for his appearance as a witness, or in default thereof to stand committed, defendant cannot assert that plaintiff is not entitled to recover for the reason that it was his disobedience of the lawful portion of the order and not the enforcement of the unlawful portion that brought about the injury about which he complains.—Bates v. Kitchel, 166 Mich. 695.

¶ 78. Defendant was instrumental in having plaintiff committed to prison by a justice of the peace for the plaintiff's failure to supply a recognizance and surety for his appearance as a witness in a criminal case in which defendant was on trial. Under the statutes, the justice had no jurisdiction to enter the order. Held, in an action for false imprisonment, the defendant was not excused by the fact that the justice acting in good faith made a mistake in judicial interpretation.—Bates v. Kitchel, 160 Mich. 402.

§ 17. Detention as insane person.

See also ante ¶ 38.

Admissibility of evidence as bearing on insanity of the person, see post ¶¶ 124, 125.

¶ 79. Whether the superintendent of an insane asylum is liable for detaining a sane person whom in good faith he believes to be insane; and whether, in doubtful cases, an inquisition to determine the insanity of a person is prerequisite to confinement in an asylum, quære.—Van Deusen v. Newcomer, 40 Mich. 90.

§ 18. Detention by quarantine.

¶ 80. Local Acts 1893, No. 403, § 11, making it the duty of the Detroit Board of Health to take such measures for the preservation of the public health as they may in good faith deem public safety or health demands, was designed to give such board larger powers than given to other boards in the state and such section 11 clearly fell within the exception of Comp. L. 1897, § 4459, excepting from the general law cities with charters inconsistent with it; and the board had power to make a rule providing that where smallpox should break out in one-half of a double frame house, both halves of the house should be quarantined; and the members of the board are not liable as for false imprisonment of a person so quarantined.—Highland v. Schulte, 123 Mich. 360.

§ 19. Waiver or consent to detention.

Sufficiency of evidence of involuntary detention, see post ¶ 145.

Admissibility of evidence of plea of guilty, see post § 27.

¶ 81. Liability for an illegal arrest was not waived by the failure of the accused to object to the manner of his arrest when arraigned, and pleading guilty to the offense charged in the warrant.—McCullough v. Greenfield, 133 Mich. 463; Larson v. Feeney, 196 Mich. 1.

§ 20. Persons liable.

For commitment of witness to appear as such, see ante § 16.

Justification of officer by process as extending to informant or prosecutor, see ante ¶¶ 49, 55-59.

Coliability of agent with principal, see Agency §§ 52, 85.

Liability of assignor for act of assignee suing out wrongful capias in collecting debt, see also Assignments ¶ 80.

Liability to action as interest allowing custodian of person to review habeas corpus, see Certiorari ¶ 35.

¶ 82. One who in making a criminal complaint merely states the facts and circumstances to the prosecuting attorney, and swears to the complaint drawn by the latter underlying such facts, is not liable for false imprisonment, though the facts sworn to

make out no criminal offense.—Murphy v. Walters, 34 Mich. 180.

¶ 83. One who simply lays facts before a magistrate, leaving all determination to that officer, is not liable for false imprisonment unless he takes some part in furthering the arrest or urging the detention of the accused. —Murphy v. Walters, 34 Mich. 180.

¶ 84. A person making complaint can only be liable for false imprisonment where the officer making the arrest is liable, though his animus may aggravate his liability. But his animus will not make him liable if his purpose is not carried out, unless, perhaps, where he seeks to serve the warrant himself. —Hill v. Taylor, 50 Mich. 549.

¶ 85. An arrest upon a justice's warrant delivered by the plaintiff or complaining witness in the case to a constable for service will not sustain an action against such plaintiff or complainant for false imprisonment where there is no showing that he acted maliciously or directed the arrest, or was present when it was made, and where no question was raised as to his good faith or the jurisdiction of the justice.—Love v. Wood, 55 Mich. 451.

¶ 86. If one whose store has been broken into makes complaint in due form for a search-warrant, stating the facts and no more to the officers, he is not liable for such officers' acts in exceeding or departing from the writ, or in arresting and detaining the person suspected.—Linnen v. Banfield, 114 Mich. 93.

¶ 87. Where the plaintiff in an action for false imprisonment, voluntarily sought an interview with the defendant at his office and was not there put under restraint, and where she herself called for a police officer for the purpose of having the defendant reiterate a charge of theft, and where the officer stated in substance that as the defendant accused plaintiff of theft she would have to go to the station, and the plaintiff thereupon returned with the officer, and where it appeared that whatever restraint the officer placed upon plaintiff was not shown to have been at the request of the defendant, held the facts did not constitute false imprisonment.—Shinglemeyer v. Wright, 124 Mich. 230.

¶ 88. One who, without making inquiry, and acting simply on a suspicion that plaintiff, a foreigner speaking no English, resembles a description sent by telegram of a person unknown to him, points out plaintiff to an officer as the person whom the officer is seeking to arrest for larceny, thus causing his arrest and imprisonment, is liable in damages though acting without malice.—Maliniemi v. Gronlund, 92 Mich. 222.

¶ 89. An agent having, in behalf of his principal, begun proceedings by which he has made himself liable for false imprisonment, cannot defend himself by showing that he acted under instructions; nor can he show similar proceedings under similar circumstances elsewhere, in mitigation.—Josselyn v. McAllister, 22 Mich. 300.

¶ 90. The assignor of a chose in action is not liable to an action for false imprisonment where the assignee, suing in the assignor's name, improperly began suit by capias, the affidavit for which was made by the assignor's agent but not in his behalf.—Park v. Toledo, C. S. & D. R. Co., 41 Mich. 352.

§ 21. ——Bystanders called to assist.

¶ 91. One who responds to the call of a person known to him to be an officer to assist in making an arrest is protected against an action for false imprisonment if in his acts he confines himself to the officer's order and direction.—Firestone v. Rice, 71 Mich. 377.

¶ 92. Under How. St., §§ 591, 9250, authorizing the sheriff to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace, and providing a penalty for refusal, a person is justified in giving such aid without further inquiry when the sheriff calls upon him, and he is not liable to an action for false imprisonment unless his act is in itself wanton and beyond what he is required to do, though the sheriff's acts are without authority.—Firestone v. Rice, 71 Mich. 377.

§ 22. ——Participating officers.

Evidence as to purpose for which another was procured to make arrest, see post ¶ 130.

Liability and immunity of justices and judicial officers in general, see Judges, II; Justices of the Peace, II.

¶ 93. If an arrest by a police officer is in its inception wrongful, other officers who act and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in the strict discharge of their official duties.—Cook v. Hastings, 150 Mich. 289.

§ 23. ——Corporations.

Pleading want of authority of agents and nonparticipation by corporation, see post § 25.

Capacity of corporations for torts, see Corporations § 111.

¶ 94. A corporation may be held liable for false imprisonment even though a malicious intent must be proved.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 94a. Where the cashier of a bank instituted an action which was in the bank's

name and was commenced by capias issued on his affidavit alleging that he was cashier and agent of the bank, and authorized by it to make the affidavit, and the bank supported the action and bore the expenses of it, it will be presumed in an action against the bank for false imprisonment that he had authority to institute the action.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 95. Action by capias by a bank instituted without authority by the cashier's action is ratified by the fact that the attorneys for plaintiff in such action were the regular attorneys of the bank and were paid by it, and that on the quashing of the capias the bank sought to have the order quashing it set aside by mandamus, and paid the expenses of the proceeding.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 96. Where a private charitable institution designated by statute as a place to which the courts may commit persons convicted of certain offenses, detains by its agents a girl without such process of law, it is liable for the acts of its agents for such false imprisonment.—Gallon v. House of Good Shepherd, 158 Mich. 361.

¶ 97. Where a private charitable institution designated by statute as a place to which the courts may commit persons convicted of certain offenses, detains a girl without such process of law, it cannot escape liability on the ground that its trust funds would be diverted from their purpose by the payment of damages.—Gallon v. House of Good Shepherd, 158 Mich. 361.

II. ACTIONS.

§ 24. In general.

Measure of damages, see Damages § 128.
Limitations of actions, see Limitations.
Validity of verdict for one and against other defendant, see Verdicts, IV.

¶ 98. Trespass on the case lies for false imprisonment.—Moore v. Thompson, 92 Mich. 498.

§ 25. Pleading.

General law of pleading, see Pleading.
Joining count with counts for slander, malicious prosecution or other causes, see Pleading, II.
Amendment by adding new counts for malicious prosecutions, see Pleading, VI.
Affidavit for capias in action for false imprisonment, see Civil Arrest § 7.

¶ 99. In an action for false imprisonment the warrant of arrest cannot be attacked as bad on its face for insufficient description of the crime charged, where the declaration does not allege that such warrant is bad for any reason.—Haskins v. Ralston, 69 Mich. 63.

¶ 100. In an action for false imprisonment the facts amounting to a justification for the arrest must be pleaded and this is especially true where the arrest has been made without a warrant.—Tubbs v. Haessig, 149 Mich. 185.

¶ 101. Where a sheriff is sued for false imprisonment, the defense that in arresting plaintiff he had reasonable cause to believe him to have been guilty of a felony is inadmissible under the plea of not guilty, but must be specially pleaded.—White v. McQueen, 96 Mich. 249.

¶ 102. A bank when sued jointly with its cashier for false imprisonment in an action instituted by the latter must, in order to avail itself of any alleged want of authority in the cashier, plead the fact; and it is not enough to set forth that the acts, if committed, were committed by such codefendant "acting as the" bank's cashier or agent.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 103. Where a declaration avers that an imprisonment of the plaintiff has been effected by means of threats and violence, it is a sufficient averment of malice to permit proof of it and to justify a recovery or an aggravation of damages on that ground.—Brushaber v. Stegemann, 22 Mich. 266.

¶ 104. In an action for false imprisonment, an averment that plaintiff incurred large expense in obtaining his liberation from imprisonment is a sufficient allegation of special damages to sustain proof of the amount of the attorney fee.—Swart v. Kimball, 43 Mich. 443.

¶ 105. The averment in a declaration for false imprisonment that plaintiff, who was required to give a bond for the jail limits, thereby "was greatly hindered and prevented from performing and transacting his necessary business, and from engaging and contracting in business which he might otherwise have embarked in," cannot sustain proof of such special damage as that his business required him to go out of the county, and that he had been applied to to go out of the county on such business.—Fuller v. Bowker, 11 Mich. 204.

¶ 106. A declaration in justice's court for false imprisonment averred that plaintiff was "thereby delayed and injured in his business," to wit, at the venue stated. Held sufficient to warrant evidence of damage.—Thompson v. Ellsworth, 39 Mich. 719. [Note. This paragraph follows the official syllabus. The opinion does not show the facts. Editor.]

§ 26. Burden of proof and presumptions.

Instruction as to burden, see also post ¶ 160.
General law of presumptions and burden, see Evidence, II.

Presumption of knowledge of the law as basis for implication of malice, see also Evidence ¶ 206.
Burden of proving time of accrual of action to start limitations, see Limitations, VII.
Presumptions as to running of limitations, see Limitations, VII.

¶ 107. Plaintiff in an action against a magistrate for false imprisonment is not under the burden of proving all of the papers and proceedings incident to the arrest; but the burden of proving justification is on the magistrate defending.—Stensrud v. Delamater, 56 Mich. 144.

¶ 108. In an action for false imprisonment the burden is upon the defendant to justify the arrest in accordance with his notice.—Tubbs v. Haessig, 149 Mich. 185.

¶ 109. In an action for false imprisonment, the mere fact that the plaintiff has been imprisoned is sufficient, standing alone, to raise the presumption that the imprisonment was illegal; but if the plaintiff shows that such imprisonment was caused by a complaint made by the defendant before a magistrate, the issuance of a warrant thereon, and a trial and conviction under it, and that the chief damages resulted from plaintiff's imprisonment upon such conviction, the burden is upon him to show that the complaint was invalid.—Barker v. Anderson, 81 Mich. 508.

¶ 110. An insured person, after being paid his claim, was prosecuted criminally upon the complaint of the insurance company's state agent for obtaining the money under false pretenses, and upon his discharge he sued the company for false imprisonment. Held, that it could not be inferred from the mere fact of agency that the agent represented the company in instituting the criminal proceedings, and that the burden of proof was upon plaintiff to show affirmatively authorization from defendant.—Travis v. Standard Life & Accident Ins. Co., 86 Mich. 288.

¶ 111. A declaration contained an ordinary count for false imprisonment, and also a count in which plaintiff's arrest under a complaint and warrant was alluded to, but without averment that the papers or proceedings were defective or that there was a lack of jurisdiction. Upon the trial, plaintiff, after showing defendant's connection with the arrest, and the damages, put in evidence the complaint, which stated no offense, and warrant and the proceedings before the justice. Held, that the offering of the papers in evidence, although unnecessary under the first count, did not constitute an election to proceed under the second, but only imposed the additional burden upon the plaintiff of showing that the proceedings were without jurisdiction.—Thompson v. Stoddard, 112 Mich. 687.

¶ 112. That there was a sufficient showing to justify the issuance of a warrant and to confer jurisdiction on a justice of the peace to do so, will be presumed from the recitals of a warrant of the preliminary examination of witnesses.—Brown v. Hadwin, 182 Mich. 491.

§ 27. Admissibility of evidence.
Of malice, aggravation and mitigation, see post § 28.
Sufficiency of evidence, see post § 29.
General rules for competency of evidence, see Evidence, III-IX.
Witnesses and examination of witnesses and privileged communications, see Examination of Witnesses; Witnesses.
Competency, impeachment and credibility of witnesses, see Witnesses.
Admission as harmless error, see Harmless Error.

¶ 113. In an action for false imprisonment in procuring plaintiff's arrest upon a criminal complaint and warrant, which charged no offense known to the law, it is immaterial, except so far as exemplary damages are concerned, whether defendant had or had not reasonable or probable cause; his good faith could not prevent recovery of actual damages.—Livingston v. Burroughs, 33 Mich. 511.

¶ 114. It is immaterial, in an action for false imprisonment, whether the plaintiff had money with which he might have paid a fine and escaped the imprisonment complained of.—Barker v. Anderson, 81 Mich. 508.

¶ 115. In an action for an illegal arrest for street-walking, specific acts of lewdness on plaintiff's part cannot be shown.—Pinkerton v. Verberg, 78 Mich. 573.

¶ 116. In an action by a woman against a police officer for damages for illegal arrest and false imprisonment, in which the defense was that plaintiff was violating an ordinance of the city relating to soliciting for prostitution, held that the ordinance was improperly excluded as evidence.—Durham v. Feeney, 195 Mich. 318.

¶ 117. In an action by a woman against a police officer for damages for illegal arrest and false imprisonment, where the defense was that plaintiff was violating an ordinance of the city relating to soliciting for the purpose of prostitution, held that the provisions of the charter of the city relating to the duties of police officers were improperly excluded from evidence.—Durham v. Feeney, 195 Mich. 318.

¶ 118. In an action to recover damages for illegal arrest and imprisonment without a warrant, testimony that plaintiff had pleaded guilty to the offense charged in a warrant subsequently issued therefor and served, held

not admissible on question of waiver of liability for such arrest.—Larson v. Feeney, 196 Mich. 1.

¶ 119. In an action by a woman, who was arrested by a police officer for the violation by the plaintiff, in his presence, of an ordinance of the city relating to soliciting for prostitution, against such police officer for damages for illegal arrest and false imprisonment, held that the answer of plaintiff that she was guilty, when the police magistrate, upon arraignment, explained to plaintiff that she was charged with soliciting for the purpose of prostitution contrary to the terms of the city ordinance, was admissible as being in the nature of an admission and as tending to characterize plaintiff's understanding of the purpose of her conduct at the time of the arrest.—Durham v. Feeney, 195 Mich. 318.

¶ 120. Testimony of plaintiff's witness in an action for false imprisonment and malicious prosecution, growing out of a dispute over the legal existence of a highway and the arrest of plaintiff for obstructing it, of an arrangement made about the time of such controversy, with plaintiff by witness for the right to haul a quantity of logs over the disputed highway, payment to be made by an order upon defendant, which order defendant subsequently refused to pay, was irrelevant and immaterial.—Thurston v. Wright, 77 Mich. 96.

¶ 121. In an action for false imprisonment and assault and battery committed in arresting plaintiff for a felony under a warrant against an unknown party, statements made by the sheriff's informers before and at the time of the arrest are competent upon the question of probable cause therefor.—Firestone v. Rice, 71 Mich. 377.

¶ 122. In an action for false imprisonment based upon an unlawful arrest, evidence of the advice of attorneys given to defendant after the arrest is inadmissible to justify the arrest; and even though admissible as bearing upon the question of subsequent detention, it should appear that it was predicated upon a full disclosure of all the facts.—Filer v. Smith, 96 Mich. 347.

¶ 123. Where, in an action against an officer for false imprisonment, he having arrested the wrong person, plaintiff has introduced in evidence newspaper articles concerning the arrest, appearing to have been based on information from plaintiff, defendant and the sheriff, testimony in defendant's behalf as to the sources of the information upon which the articles were based, is competent to show that the information was not derived from defendant but from the sheriff.—Filer v. Smith, 102 Mich. 98.

¶ 124. In an action against the superintendent of an insane asylum for the detention of an inmate the broadest latitude should be allowed in showing the jury what the patient said and did and how she appeared when there as facts bearing on the question of her sanity.—Van Deusen v. Newcomer, 40 Mich. 90.

¶ 125. A patient who had been placed in an insane asylum as a pauper sued the superintendent for false imprisonment. Held, that evidence of what happened to the plaintiff before she was received at the asylum was inadmissible; so was evidence as to her worldly circumstances and what had been done with her goods; and it was inadmissible to show what the assistants, attendants or other inmates in the asylum had said or done to the plaintiff, unless it was said or done under the superintendent's directions; or that money sent to the plaintiff had not reached her, unless it is also shown that it came to the defendant or that he was instrumental in depriving her of it.—Van Deusen v. Newcomer, 40 Mich. 90.

¶ 126. In an action for false imprisonment it was shown that defendant had sought to obtain the rearrest of the plaintiff. Held, that the evidence was admissible, and as likely to aid the defendant as to injure him, if it was uncertain whether it was done in malice or in an honest belief of plaintiff's guilt.—Swart v. Kimball, 43 Mich. 443.

¶ 127. In an action by a street car motorman for false imprisonment, the detention being to prevent him from running his car, and to exact a promise not to do so again, it is not error to exclude evidence that he was subsequently complimented by his employer for his effort to run the car.—Mumford v. Starmont, 139 Mich. 188.

§ 28. ——Of malice and aggravation or mitigation.

See also ante ¶ 89.
Advice of counsel as mitigating circumstance, see also ante § 8.
In actions for malicious prosecution, see Malicious Prosecution, VI.

¶ 128. All circumstances tending to show the character and motives of persons who have caused an arrest are admissible to show whether their conduct was malicious or not in an action against them for false imprisonment.—Stensrud v. Delamater, 56 Mich. 144.

¶ 129. The action of defendant magistrate in assuming the dual capacity of magistrate and counsel in making an arrest may be shown not only as evidence of malice but also of his want of jurisdiction.—Stensrud v. Delamater, 56 Mich. 144.

¶ 130. Where plaintiff has introduced evidence to show that defendant caused the arrest complained of at the instance of a third person to get plaintiff out of the way so that he could not testify as a witness in a pending suit, defendant may give evidence as to con-

versations with such third person as to the arrest, tending to show that he was not induced to make the arrest for any such purpose.—Livingston v. Curtis, 33 Mich. 511.

¶ 131. Where an action for false imprisonment is based upon plaintiff's contention that a proceeding to compel him to give bail to appear as a witness was intended to annoy plaintiff, it is proper to admit evidence tending to prove all of the annoyances, vexations and humiliation suffered by plaintiff from the inception of the proceeding, and the petty nature of the charge made against defendant in the proceeding in which plaintiff was a witness may be shown.—Bates v. Kitchel, 166 Mich. 695.

¶ 132. The demeanor, at the time of his arrest, of a party arrested on a capias for false imprisonment, is not admissible as evidence of his malice at the time he caused the imprisonment. Statements having the effect of admissions bearing on the tortious proceedings would be admissible, but not conduct and language not having such reference or connection.—Josselyn v. McAllister, 22 Mich. 300.

¶ 133. Advice from counsel to client will not, though followed in good faith, necessarily justify a false imprisonment caused by the latter. If it showed facts indicating that the party believing them may have acted upon them without improper motives, those facts would be admissible upon the question of malice. What a party may himself say to his attorney in explanation of his conduct is inadmissible.—Josselyn v. McAllister, 22 Mich. 300.

¶ 134. The advice of one not an attorney, but who sometimes advises his neighbors for pay, is not admissible in evidence as advice of counsel in an action for false imprisonment.—Livingston v. Burroughs, 33 Mich. 511.

¶ 135. In action for false imprisonment evidence of a misunderstanding between plaintiff and a third person, whose claim that plaintiff had stolen certain articles led to acts upon which the action for false imprisonment was based, was inadmissible where it was not claimed that defendant had any knowledge of it; it would not tend to show any malice on his part, and for any malice on the part of such third person he was not responsible.—Moore v. Thompson, 92 Mich. 498.

¶ 136. Evidence that an agent, in defending his principal's possession against a former occupant's attempt to re-enter, drew a revolver on a policeman who approached, was held irrelevant in an action against such agent by such evicted occupant, where the act did not take place in the latter's presence. —Taylor v. Adams, 58 Mich. 187.

¶ 137. In an action for false imprisonment and assault and battery committed in arresting plaintiff for a felony under a warrant against an unknown party, statements made by the sheriff's informers before and at the time of the arrest are competent upon the question of reasonableness of the use of hand-cuffs.—Firestone v. Rice, 71 Mich. 377.

¶ 138. In an action for false imprisonment, it is not error to exclude evidence that it was the custom to search prisoners, which custom was not followed in this case.—Mumford v. Starmont, 139 Mich. 188.

¶ 139. Where plaintiff's ward, a girl, is detained in a charitable institution, it is proper to show the motive for which she was detained by introducing evidence that her relatives tried to find her; that they advertised in the newspapers and employed detectives, and that the institution employed her at labor profitable to itself.—Gallon v. House of Good Shepherd, 158 Mich. 361.

§ 29. Sufficiency of evidence.

Facts constituting a false imprisonment, see ante, I.

¶ 140. In an action against a magistrate for false imprisonment his own entries are not conclusive in his own favor.—Stensrud v. Delamater, 56 Mich. 144.

¶ 141. A guy-post for an electric light tower was put in front of a man's dwelling-house, upon the lawn between the sidewalk and the curb-stone. The man had unavailingly protested, and being advised by counsel that he had a right to remove the post, he sawed half through it. The president of the light company thereupon had him arrested; and though neither he nor the officer had seen the act, the arrest was made without a warrant. Held, that the act, if an offense at all, was no more than a misdemeanor, and the arrest was therefore illegal.—Ross v. Leggett, 61 Mich. 445.

¶ 142. In an action for false imprisonment against a sheriff and one H, it appeared that plaintiff's husband, father-in-law, and uncle were arrested at their home under a civil warrant issued on complaint of H under the forcible entry and detainer act; that, having served the warrant upon the three men, the sheriff arrested plaintiff without any warrant, and compelled all to accompany him to the office of the justice, three and a half miles distant; that H, who had accompanied the sheriff when the arrest was made, taking advantage of the fact that no one was left to guard the premises, immediately broke into the house and took possession of the same, throwing out and damaging plaintiff's furniture. Held, that the evidence raised a question for the jury as to whether the sheriff connived with H with respect to the acts subsequent to the arrest.—Hendricks v. Haskins, 114 Mich. 291.

¶ 143. In an action for false imprisonment against a sheriff and another, a finding

of the jury in favor of the latter is justified where there was testimony tending to show that he stated the facts fully and fairly to the proper officials and asked for protection merely without urging an arrest, though he was present when the arrest was made, this being at his own home.—Love v. Halladay, 139 Mich. 575.

¶ 144. Evidence held sufficient to go to the jury upon the question of whether defendant merchant was sufficiently shown to have been connected with the act of a collector in causing the arrest of plaintiff to be liable in an action for false imprisonment.—Curry v. Traver-Bird Co., 167 Mich. 17.

¶ 145. The plaintiff's ward, a girl, was induced to go to the defendant institution of charity. There was evidence that she was told she would be given employment in a private family; that she did not know the character of the institution when she entered; and that she sought to get away and was detained for a period of years. Held, there was sufficient evidence to go to the jury that she entered the institution involuntarily.—Gallon v. House of Good Shepherd, 158 Mich. 361.

§ 30. Questions of law and fact and instructions.

Sufficiency of evidence to go to jury, see ante § 29.

General law of instructions and province of jury, see Instructions; Trial, VI.

¶ 146. It is a jury question whether defendant's information justified his making a complaint, to wit, whether men of ordinary care would have acted on it.—Livingston v. Burroughs, 33 Mich. 511.

¶ 147. Probable cause, where the facts are conceded, is a question of law for the court. —White v. McQueen, 96 Mich. 249.

¶ 148. It is generally a question of law for the court whether the facts constitute probable cause such as justifies an officer in arresting a person without a warrant on information that a felony has been committed and an assumption that the person arrested is guilty thereof.—Filer v. Smith, 96 Mich. 347.

¶ 149. In an action for damages for false imprisonment where the facts are undisputed what constitutes probable cause is a question for the court.—Schneider v. Shepherd, 192 Mich. 82.

¶ 150. In an action for damages for false imprisonment by an officer where the facts are undisputed, the question of probable cause is a question of law for the court.—Larson v. Collins, 195 Mich. 492.

¶ 151. Whether resemblance to a photograph of the person alleged to have committed a felony sent by another sheriff to defendant was sufficient to justify an arrest without a warrant is a question for the jury in an action for false imprisonment.—Filer v. Smith, 96 Mich. 347.

¶ 152. In an action by a woman against a police officer for damages for illegal arrest and false imprisonment, in which the defense was that he made the arrest for the violation by the plaintiff in his presence of an ordinance of the city relating to soliciting for prostitution, held that it was a question for the jury whether plaintiff was violating the terms of the ordinance in the presence of the officer when the arrest was made. —Durham v. Feeney, 195 Mich. 318.

¶ 153. To the general rule that what constitutes probable cause to justify an arrest without warrant is a question of law for the court, the case of an arrest upon resemblance to a photograph of the person alleged to have committed the offense constitutes an exception.—Filer v. Smith, 102 Mich. 98.

¶ 154. A delay from the evening of Dec. 31 to that of Jan. 2, before giving to one arrested without a warrant on suspicion of felony an opportunity to secure bail, cannot be held as matter of law to be reasonable when based on the false assumption that January 1st is dies non juridicus.—Linnen v. Banfield, 114 Mich. 93.

¶ 155. It is error for the court to direct a verdict for the defendant in a case for false imprisonment where there was evidence on both sides of the question as to whether the plaintiff had committed an assault in the presence of the defendant officer, justifying his arrest without a warrant.—Tubbs v. Haessig, 149 Mich. 185.

¶ 156. Question of probable cause for an arrest for felony held to have been fairly submitted to the jury.—Firestone v. Rice, 71 Mich. 377.

¶ 157. In an action for false imprisonment, where the defendant stated the circumstances of a breach of the peace to a justice, who after consulting with the prosecuting attorney, drew up the complaint which was then signed by the defendant, and where the defendant had nothing to do with locking the plaintiff up, a verdict for the defendant should have been directed, although the warrant was defective, it appearing however that the plaintiff was convicted under a new complaint.—Doty v. Hurd, 124 Mich. 671.

¶ 158. In a suit for false imprisonment for causing plaintiff's arrest for breaking into defendant's barn and taking out goods belonging to defendant, a directed verdict is properly denied to defendant who claims it on the ground that plaintiff admitted he carried away defendant's goods, where plaintiff's testimony taken as a whole shows that

he denied that the goods taken belonged to defendant.—De Vos v. Caplan, 165 Mich. 77.

¶ 159. In a false imprisonment case, where the first of two arrests was made within the jurisdiction of the court issuing the process, but not in the presence of the officer having the warrant, and where the accused was subsequently taken into custody by such officer and pleaded guilty under the warrant, it was error to instruct the jury that because the first arrest was invalid the second one was also invalid; and the jury should have been instructed that plaintiff could recover damages only to the time of the lawful arrest.—McCullough v. Greenfield, 133 Mich. 463.

¶ 160. The instruction that the burden of proof was upon plaintiff, in an action for assault and battery, false imprisonment and malicious prosecution, to show that defendant acted without probable cause and with malice, refers to the issue of malicious prosecution, and the jury must have so understood. Such charge, therefore, was not erroneous as laying upon the plaintiff the burden of proof as to the lack of justification for the imprisonment, as well as to the absence of probable cause for making the criminal complaint.—Lansky v. Prettyman, 140 Mich. 40.

FALSE LABELS to FEMES SOLE.

Cross-References.

False Labels and Brands—
See Food § 3.
False Oaths—
See Crimes §§ 115, 116; Indictment.
Defense to insurer's liability, see Insurance, XV.
False Personation—
See Crimes § 76; Indictment.
False Pretenses—
See Crimes §§ 77-80; Indictment.
False Reports—
By corporations or officers, see Corporations §§ 178, 352.
As defamation, see Libel.
Fraud on creditors, see Fraudulent Conveyances, I.
Liability of principal or agent, see Agency, II, B, III; Master and Servant, IV.
False Representations—
As fraud and deceit, see Fraud.
As basis of estoppel, see Estoppel, III.
As libel or slander, see Libel.
False Return—
Liability of sheriff or constable, see Sheriffs, IV, C.
Impeachability of return, see Attachment, VI, E; Executions, IX; Process, II, D.
To writ of certiorari or mandamus, see Certiorari §§ 38, 56; Mandamus, V.
To appeal or certiorari by justice, see Justices of the Peace, V, C, VI, A.
False Swearing—
As crime, see Crimes §§ 115, 116; Indictment.
In proofs of loss as defense by insurer, see Insurance, XV.
False Tokens—
In crime of false pretenses, see Crimes §§ 77-80; Indictment.
False Warranty—
As deceit, see Fraud.
Defense to sale, see Sales, VI.
Liability to buyer, see Sales, VI.
False Weights and Measures—
See Weights and Measures.
Falsification and Surcharge—
See Accounting Suits § 13; Estates of Decedents, XII, C; Guardianship, V; Trusts, XI.
Falsus in Uno—
See applications of maxim in Witnesses, VI.
Family Allowances and Exemptions—
See Exemptions; Homesteads; Estates of Decedents, V, D.
Family History—
Material fact in insurance, see Insurance, VIII.
Family Relations—
See Husband and Wife; Parent and Child.
Family Settlements—
Of estates of decedents, see Estates of Decedents, I; Wills, VII.
Frauds on creditors, see Fraudulent Conveyances, I.
Trust arrangements, see Trusts.
Family Tradition—
Exception to hearsay rule, see Evidence § 323.
Fares—
See generally Carriers, I, IV, B; see also Public Service; Street Railways, I.
Farm Crossings—
See Railroads, III, IV, VIII, F.
Farm Fixtures—
See Fixtures; Landlord and Tenant, IV, E.
Farming—
As evidence of adverse possession or establishment of boundary, see Adverse Possession §§ 22, 47; Boundaries § 28.
Contracts for farming, see Contracts; Agriculture; Landlord and Tenant, IV.
Questions for experts, see Evidence § 268.
Fast Driving—
Liability for injuries to other drivers on highways, see Highways, XIII.
Fathers—
Relation of parent and child, see Parent and Child.
Paternity of illegitimate, see Bastards.
Right to custody of child, see Parent and Child, I; Divorce, IX; Habeas Corpus.
As heirs of children, see Descent, II, IV.
Favor—
Challenges of jury, see Jury, III.
Cross-examination of witnesses as to bias, see Examination of Witnesses, II; Witnesses, VI, D.

Favorable Construction—
Rules for construction of various writings in favor of one or other party, see Contracts, VI, A; Deeds, III, A; Insurance, V; Wills, VI, A; Statutes, V.
Favorable Error or Judgment—
Right of appeal or objection, see Appeal, IV; Harmless Error.
Favorable Termination—
Element in malicious prosecution, see Malicious Prosecution, V; and see also False Imprisonment § 2.
Fear—
Putting in fear as element in robbery, see Crimes § 126.
Putting in fear as element in duress, see Duress.
Federal Employers' Liability Act—
See Master and Servant, III.
Federal Government—
See United States.
Federal Practice—
Very little matter on federal practice is at all appropriate in a state digest, but see Courts §§ 30-32, as to following state decisions; Courts § 94, as to conformity to state practice: Removal of Causes; Admiralty; Bankruptcy.
Jurisdiction of federal courts and relative jurisdiction of state courts, see Courts, V, F; Indictment, III.
Feeble Mindedness—
See Incompetents; Insane Persons, I; Wills, II; Gifts, IV.
Feebleness—
Element in negligence by or towards feeble persons, see Negligence; and see Carriers, IV, E; Highways, XII, XIII; Street Railways, IV.
Making person susceptible to undue influence, see Wills, III; Gifts, IV.
Fee Damages—
For taking by eminent domain, see Eminent Domain, § 37 et seq.
Fee Ownership—
In highways, see Highways, X.
Fee Simple—
See generally Real Property; Wills, VI; Deeds, III; Life Estates; Tenants in Common.
Suspension of vesting or power to alienate, see Perpetuities.
Fees—
Of officers—see Officers, VIII; and topics treating of the specific Officers, e. g., Coroners; Sheriffs, III; Reference, VII.
Of personal representatives, see Estates of Decedents, X.
Of witnesses, see Witnesses, VII.
For particular services, see also specific topics treating of the service in question or of that to which the service relates, e. g., Attachment; Executions.
To counsel for services, see Attorneys, II, E; III.
To others for fees of their counsel, see Divorce, X; Estates of Decedents, X.
Fees taxable as costs, see Costs §§ 62-66.
Disposal of moneys received, rendition into county treasury, see Counties § 38.
Feigned Issues—
See Equity, VIII, B.
Fellow-Servants—
See Master and Servant, III, E; Workmen's Compensation Law.
Felonies—
See Crimes, I, A, II (nature and elements); Indictment (accusation and trial and punishment); Larceny; Homicide; Rape; Seduction.
Arrest without warrant, see Arrest, I; False Imprisonment.
Extradition of fugitives for trial for, see Extradition.
Females—
See Husband and Wife: and see cross-references under "Women."
Femes Sole—
Married women trading as sole, see Husband and Wife, IV.

FENCES.

TREATS of the law of inclosure of land by fences or other similar structures and of the public regulations concerning fencing or imposing liabilities relating thereto. It excludes the general law of domestic animals and the distraint of animals damage feasant (see Animals) and the statutory duty and liability of railroads or adjoining owners relative to fencing tracks and to animals injured while escaped or at large (Railroads, VIII, E.)

Analysis.

§ 1. In general.
§ 2. Duty to fence and liabilities dependent on fencing.
§ 3. ——Line or division fences.
§ 4. Persons required to fence.
§ 5. Remedies and actions.

§ 6. ——For trespass by animals.
§ 7. Statutory proceedings by fence viewers.
§ 8. ——Equitable relief.

§ 1. In general.

Establishing and maintaining fences as fixing boundaries, see Boundaries §§ 2-8.
Fences on supposed line as evidence of location of boundaries, see Boundaries §§ 28, 33.
Making fence and inclosure as act of adverse possession, see Adverse Possession § 21.
Use of unfenced land as basis for prescriptive easement, see Easements ¶ 53.
Right to build fence over drain, see Drains § 127, ¶ 401.
Fencing in land as revocation of dedication of it to public, see Dedication § 16.
Fences as fixtures, see Fixtures § 10.
Encroachments on highways, see Highways, XI.
Municipal regulations of fences, see Municipal Corporations, IX.
Crimes relating to fences and of which fences are the subject, see Crimes, II; Indictment.
General fence laws, see Comp. L. 1915, §§ 2206-2226.
Standards for sufficiency of fences and standard gauge for fence wire, see Comp. L. 1915, §§ 2206, 2231-2240.

¶ 1. The word "fence" as used in Comp. L. 1857, chap. 14, § 1, How. St., § 796, must be construed as including a mode of construction that will give the fabric, when completed, such reasonable strength as to confine or turn the animals usually restrained by fences in this country.—Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

¶ 2. The term "fence" has a well understood meaning, and an ordinary worm or Virginia fence is one that owners of farm lands may lawfully build, though it would require the use of a strip of land from three to five feet wide.—Rose v. Linderman, 147 Mich. 372.

¶ 3. Under Comp. L. 1897, § 2415, defining what shall be deemed legal fences, a stump fence, built in accordance with the common practice of a country or locality is one that may be lawfully built, and a neighbor cannot complain merely because such fence was not within the statute if it should meet the approval of the fence viewers.—Rose v. Linderman, 147 Mich. 372.

¶ 4. Under Comp. L. 1897, § 2415, defining what shall be deemed legal fences, an ordinary worm or Virginia fence, requiring the use of a strip of land from three to five feet wide, is one that owners of farm lands may lawfully build.—Rose v. Linderman, 147 Mich. 372.

¶ 5. A landowner in building his partition fence need not build it altogether on his own land but may build half of it on the land of his adjoining landowner, so long as the fence built is a legal fence within the meaning of the statute.—Rose v. Linderman, 147 Mich. 372.

¶ 6. A partition fence may be built upon the line and may occupy equal portions of land from the adjoining owners; and while an unequal occupancy does not necessarily deprive the structure of the character of a partition fence, a party is entitled to relief in ejectment if the fence occupies a disproportionate share of his land.—Rose v. Linderman, 147 Mich. 372.

§ 2. Duty to fence and liabilities dependent on fencing.

Effect of statutes on line fences, see post § 3.
Persons required to make fences, see post § 4.
Proceedings by fence viewers to apportion duty, see post § 7.
General liability for trespass on unfenced lands not dependent on Fence Law, see Animals § 6.
Applicability of Fence Law to partition fences, see also Animals ¶¶ 27, 28.
Liability of railroads for injuries to animals because of lack of fence or defective fence, see Railroads, VIII, F.
Duty and burden of fences and gates on right of way, see Easements § 19.
Liability dependent on failure to fence, see Comp. L. 1915, § 2227.

¶ 7. At common law one is under no obligation to fence against his neighbor's cattle, and such is the rule in Michigan.—Collins v. Lundquist, 154 Mich. 658.

¶ 8. At the common law one owning land adjoining a public highway was under no obligation to erect and maintain exterior fences, nor was the public, or a company occupying such highway, bound to construct fences along its sides.—Williams v. Michigan Cent. R. Co., 2 Mich. 259; Gardner v. Smith, 7 Mich. 410.

¶ 9. The act of March 17, 1847 (Comp. L. 1857, § 628) did not require individuals to fence their lands, but simply precluded damages for injuries done by animals on unfenced lands.—Williams v. Michigan Cent. R. Co., 2 Mich. 259; Wood v. LaRue, 9 Mich. 158.

¶ 10. The act of 1847 (Comp. L. 1857, § 628), precluding damages for injury done on unfenced lands, applies to such lands only

as are usually fenced.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

§ 3. ——Line or division fences.

Place to put fence with reference to line, see also ante ¶¶ 5, 6.
Burden of proof in action for trespass by animals, see post ¶¶ 22, 23.
Trespass by animals on nonadjoining open lands, see Animals § 6.
Statutory provisions, see Comp. L. 1915, § 2207 et seq.

¶ 11. By the common law one is not bound to fence against another's adjoining close unless by force of prescription or (perhaps) agreement.—Johnson v. Wing, 3 Mich. 163.

¶ 12. The act of 1847 (Comp. L. 1857, § 628) only applied to exterior fences; it made no change or requirement respecting fences between the occupied lands of adjacent proprietors.—Johnson v. Wing, 3 Mich. 163.

¶ 13. Comp. L. 1857, § 606, How. St., § 797 only imposes the duty upon a land-owner to build partition fences for the protection of the adjoining land-owner. Before the duty can become fixed so as to require him to keep in repair any particular portion of the partition fence it must appear, first, that the adjoining proprietor improves his land, and second, that either by consent or by the action of the fence-viewers a portion of the partition fence between them has been assigned to him to keep in repair. Adjoining proprietors, if they see fit, may dispense with any partition fence.—Aylesworth v. Herrington, 17 Mich. 417.

¶ 14. How. St., § 797, regarding maintenance of partition fences, does not apply where adjoining land is a strip used as a private way and not "inclosed" at the ends, though the lands on both sides of such way are improved and "inclosed."—Lantis v. Reithmiller, 95 Mich. 45.

¶ 15. The purpose of Laws 1861, Act No. 179, How. St., § 817, prohibiting recovery of damages for trespass on uninclosed lands, is to compel every person to discharge his duty (see Comp. L. 1857, chap. 14, How. St., §§ 797-800) in regard to partition fences at the peril of such losses as he may suffer from the depredations, committed in consequence of his neglect, by the beasts of those persons to whom the duty is owing.—Aylesworth v. Herrington, 17 Mich. 417.

§ 4. Persons required to fence.

Duty to fence lands, see ante §§ 2, 3.
Proceedings by fence viewers, see post § 7.
Railroad fences and duty to fence and make crossing guards, see Railroads, VIII, F.

¶ 16. None but the occupants of lands inclosed by fences are required to maintain partition fences between their own and adjoining inclosures.—Aylesworth v. Herrington, 17 Mich. 417.

¶ 17. No one can be held liable for failure to fence unless he is in such possession and control of the lands in question that he has a lawful right to fence them; a husband lodging with his wife on land of which she is the exclusive owner and manager cannot be held.—Carpenter v. Vail, 36 Mich. 226.

¶ 18. R. S. 1846, p. 97, § 2, How. St., § 797, requiring "the respective occupants of lands enclosed with fences" to "keep up and maintain partition fences between their owner and the next adjoining enclosures in equal shares, so long as both parties continue to improve the same," is inoperative until their respective shares or portions of the fence are ascertained either by assignment or according to the other provisions of the statute.—Johnson v. Wing, 3 Mich. 163.

¶ 19. Where the holder of a tax title made an agreement with an adjoining owner that he would build his part of a line fence when the validity of the tax title was settled, and he did not positively agree to build it at that time or at any other time and the tax title was subsequently held void, there was no agreement which would be binding on the owner of the land.—Hammond v. Tuttle, 139 Mich. 699.

§ 5. Remedies and actions.

Right to repel trespassing animals from unfenced lands, see Animals § 6.
Right to distrain as affected by neglect to fence, see Animals § 7.
Actions and persons liable in actions for recovery of money paid on illegal fence tax, see Taxes, X, C.
Statutory provisions, see Comp. L. 1915, § 2209 et seq.

¶ 20. A party claiming that a line fence should be moved 6 feet over on the land of the adjoining owner who is in possession up to the fence, should bring an action of ejectment rather than attempt by force to move the fence to the line claimed.—F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162.

¶ 21. A notice of a determination of fence viewers is not inadmissible in evidence in a suit between the parties to the dispute over the fence, on the ground that it has not been properly recorded, where the original notice was properly filed with the clerk and indexed, though not copied on the record, and the party objecting to its admission had actual notice of the determination.—Vincent v. Ackerman, 155 Mich. 614.

§ 6. ——For trespass by animals.

¶ 22. In an action between adjacent owners for trespass by cattle the plaintiff cannot recover if the responsibility for the support of the line fence has been divided under Comp. L. 1871, § 769, How. St., § 797,

and the cattle entered in consequence of his failure to keep up his share; but defendant has the burden of proving that such division was made.—East v. Cain, 49 Mich. 473.

¶ 23. The owner of land upon which cattle come from the adjoining premises of a third party may maintain trespass therefor without showing that the partition fence between himself and such third party was of lawful height, or that, if it had been apportioned, he kept up his part.—Aylesworth v. Herrington, 17 Mich. 417.

§ 7. Statutory proceedings by fence viewers.

Relief in equity by setting aside awards, see post § 8.

Police power to make award of fence viewers a lien on the land, see Constitutional Law § 100, ¶ 482.

Under general fence law, see Comp. L. 1915, § 2210 et seq.

Statutory provisions, see Comp. L. 1915, §§ 2224-2226, 4599, 4600, 4664.

Appointment in fourth class cities and villages, see Comp. L. 1915, §§ 2682, 3028.

¶ 24. Comp. Laws 1897, § 2419, providing for the settlement of controversies regarding partition fences by the determination of a board of fence viewers, is constitutional.—Vincent v. Ackerman, 155 Mich. 614.

¶ 25. A determination by fence viewers, under Comp. Laws, 1897, § 2419, of the rights of the respective parties in a partition fence, is valid although it specifies no time within which the parties shall erect or repair their respective shares, as provided in the statute, as, in such case, it becomes the duty of the parties to comply with the determination within a reasonable time.—Vincent v. Ackerman, 155 Mich. 614.

¶ 26. Comp. L. 1871, §§ 778, 779, How. St., § 807 provides that an adjoining owner who will not build his share of a line fence may be made to pay double the cost of it. But one who seeks to enforce this liability must show the existence of all statutory conditions precedent, such as that the fence viewer, in writing, had assigned defendant a reasonable time for building the fence. And if judgment goes against him on special findings the findings must also show the existence of the requisite conditions.—Carpenter v. Vail, 36 Mich. 226.

¶ 27. How. St., § 799, providing for an adjudication by fence viewers of the sum due one proprietor from another for constructing or repairing a line fence is not invalid for failing to make express provision for notice of the meeting of the viewers; that such notice must be given is necessarily implied.—Gilson v. Munson, 114 Mich. 671.

¶ 28. Proceedings by fence viewers under which the viewers lawfully acted and gave notice of their first meeting was not vacated because one of the parties had no notice of a subsequent meeting at which the apportionment was made; but the viewers were permitted to notify such party and set another day for the hearing.—Scofield v. Haire, 122 Mich. 265.

¶ 29. How. St., § 799, providing for an adjudication by fence viewers of the amount to be contributed to line fences is not invalid for making the award of the viewers a lien upon the land to be collected as a tax.—Gilson v. Munson, 114 Mich. 671.

§ 8. ——Equitable relief.

¶ 30. The jurisdiction of equity to entertain a bill to set aside and cancel a decision and proceedings of fence viewers for want of jurisdiction was passed without question in Scofield v. Haire, 122 Mich. 265.

¶ 31. In a bill to set aside proceedings as fence viewers, on the ground that at the time of the making of the application neither of the farms in question was inclosed with exterior fences and that therefore the proceedings did not come within Comp. L. 1897, chap. 83; evidence that the lands were used as farms, that fences had been maintained between parts of the lands; that the road fences around complainant's land had been taken down some 8 years prior to the application, and that the other farm was mostly inclosed with line and road fences, was sufficient to show an inclosure within the act.—Scofield v. Haire, 122 Mich. 265.

FENDERS to FERÆ NATURÆ.

Cross-References.

Fenders—
- On street cars, see Street Railways, III, IV.
- Curbs and barriers on streets and ways, see Highways, XII.

Feræ Naturæ—
- Property in wild creatures, see Fish and Game § 3.

FERRIES.

TREATS of conveyance of the public by boats plying to and fro on inland waters as a means of crossing as distinguished from the general business of navigation and carriage by water (see Shipping; Navigable Waters), and of public franchises and regulations of ferries.

Analysis.

§ 1. In general, franchises.
§ 2. License and regulation.
§ 3. Duties and liabilities.

§ 1. In general, franchises.

See also post ¶ 4.

General law of vessels and shipping, see Shipping.

General law of carriers, see Carriers.

Incorporation of ferry companies, see Comp. L. 1915, §§ 8753-8766.

Ferry landings as highways and right to use highways as landings, see Comp. L. 1915, §§ 4490, 4792.

¶ 1. The franchise of keeping a rope ferry is a transferable and valuable property, and the franchise can be forfeited only in a direct proceeding.—Billings v. Breinig, 45 Mich. 65.

§ 2. License and regulation.

Validity of state regulation of interstate ferry, see Commerce § 17.

General powers of municipalities, see Municipal Corporations, IX.

Status of registered vessel when used for ferriage without license as ferry boat, see Shipping, I.

Statutory provisions as to licenses and regulation, see Comp. L. 1915, §§ 4783-4792.

Powers of villages and fourth class cities, see Comp. L. 1915, §§ 2679, 3063.

Statutory requirements as to life boats, and life preservers, etc., see Comp. L. 1915, §§ 5387, 5388.

¶ 2. Persons keeping a boat for transporting persons and property from Detroit to the opposite shore, without the license required by the city ordinance, may be lawfully punished therefor under such ordinance, notwithstanding the boat is enrolled and licensed for the coasting and foreign trade under the laws of the United States.—Chilvers v. People, 11 Mich. 43.

¶ 3. The authority to establish and regulate ferries is not included in the federal power to regulate commerce; a license under the Act of Congress of a vessel for the coasting and foreign trade does not confer upon it the franchise of a ferry; and the Detroit ordinance prohibiting, under a penalty, the keeping of an unlicensed ferry between the city and the Canadian shore, and charging a license fee, is valid.—Chilvers v. People, 11 Mich. 43.

¶ 4. A license to conduct a ferry involves the transfer of a valuable franchise, which is a right of property and may be sold where nothing in the charter prevents.—Kitson v. Mayor, etc., of Ann Arbor, 26 Mich. 325; Billings v. Breinig, 45 Mich. 65.

§ 3. Duties and liabilities.

¶ 5. A ferry company organized under Comp. Laws, c. 175, 1897, §§ 6646-6659, for the purpose of running boats from Detroit to an island resort owned by it, is not a common carrier but a private enterprise, and may at its will refuse to carry any person as a passenger.—Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545.

Liability of ferryman for injury to person or property of passenger, see note, 15 N. C. C. A. 402-422.

FICTIONS to FIRE.

Cross-References.

Fictions—
- Falsification amounting to fraud, see Fraud, I.
- As cover for fraud or usury, see Fraudulent Conveyances; Usury.
- As cover for gambling or other illegal contract, see Gambling Contracts; Contracts, IV.
- In form of action, waiver of tort, see Assumpsit, I.
- False tokens as means of crime, see Crimes § 77.

Fictitious Names—
- Names in general, see Names.
- Making instruments in fictitious names as forgery, see Crimes § 83.
- Negotiable instruments in fictitious names, see Negotiable Instruments.
- Trade names, see Trade Marks and Trade Names.
- Pleading names, see Pleading, I, II; Indictment, I.

Fidelity Bonds—
- See Bonds; Indemnity, I; Guaranty; Suretyship.

Fiduciary Relations—
- See Agency; Trusts; Estates of Decedents; Guardianship; etc.

Of directors and officers to corporation, see Corporations, XVII.
Breach of duty as ground for capias, see Civil Arrest, I-III.
Exemption from discharge in bankruptcy of trust debts, see Bankruptcy.
Fraud arising out of relationship, see Fraud, II; and see specific topics treating of the relations, e. g., Husband and Wife, I; Parent and Child, IV; Estates of Decedents, X, A; Trusts, VIII; Guardianship, VI.

Fieri Facias—
See Executions.

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Figures—
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As description in tax rolls, see Taxes, V, B.
As description in delinquent tax proceedings, see Taxes, XI.
As description on assessments for local improvements, see Local Improvements, VI.
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Files and Filings—
See specific topics treating of the instrument or proceeding filed, e. g., Attachment; Chattel Mortgages; Executions; Appeal, VI; Pleading; Process; and the like.
Entry of judgment, see Judgments, III.
Recording instruments of title to land, see Notice and Record of Title.
Of depositions in court to which returned, see Depositions § 22.
Of claims of liens, see Forestry, III (log liens); Mechanics' Liens; Liens; Notice and Record of Title (mortgages); Chattel Mortgages, I.
Of corporate papers, records and reports, see Corporations, Foreign Corporations, I.
Of nomination and election papers, see Elections.
Of papers and records in improvement and highway or condemnation proceedings, see Drains, II; Eminent Domain, V; Highways, II; Local Improvements.
Of tax proceedings and papers, see Taxes.
Public records in general, see Records.
Filing marks and indorsements as documentary evidence, see Evidence § 535; Indictment, VIII, B.
Proof of judgments by means of files, see Evidence § 545.
Parol or secondary evidence of contents of files, see Evidence §§ 121, 122, 142, 198; Indictment, VIII, B.

Filiation Proceedings—
See Bastards.

Filling in Blanks—
As alteration, see Alteration of Instruments § 4.
In deeds and the like pending or after signing and delivery, see Execution of Instruments, I.
Writing in indorsements on bills and notes, see Negotiable Instruments, VII.

Filling Submerged Land—
See Navigable Waters, II, III; Waters, IV.

Filling Vacancies—
Constitutional allotment of powers, see Constitutional Law, II.
In public offices in general, see Officers, II.
In private corporate offices, see Corporations, §§ 112, 118.

Filum Aquæ; Filum Viæ—
As boundary, see Boundaries.
Abutters' rights in streams and highways, see Waters, IV; Highways, X; Navigable Waters, II.

Final; Finality—
See specific topics treating of thing to which finality is attributed, e. g., Appeal, III (reviewable judgments); Certiorari § 22; Former Adjudication (conclusiveness and bar); Judgments.
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Finality and irrevocability of election, see Election and Waiver; Dower, V; Wills, VII.
Final process, see Executions; Civil Arrest, III (capias ad satisfaciendum); Ejectment, § 59; Replevin, IV.
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Financial Standing—
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Finding Lost Goods—
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See generally Verdicts and Findings.
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Fire Arms—
Crime of carrying or carelessly using, see Crimes §§ 133, 134.
Actionable negligence with, see Negligence, II.
Use as qualifying assault or homicide, see Homicide.
Use in self defense and use by other as warranting resort to adequate means of defense, se Homicide, V.

Fire Department—
See Municipal Corporations, XV.

Fire Escapes—
See Buildings § 3.

Fire Insurance—
See Insurance.

FIRES.

TREATS of the civil duties and liabilities of persons setting fires or suffering them to exist or having or dealing with things or substances conducive to the spread of fire, also of public regulations for fire prevention. It excludes the crime of arson or burning (see Crimes, II; Indictment), the law relating to dangerous combustibles (see Explosives and Combustibles), liabilities of railroads and carriers for fires (see Railroads, VIII, G; Carriers), and insurance against loss by fire (see Insurance). Duties and liabilities of masters towards servants injured by fire are treated in Master and Servant, III.

Analysis.

§ 1. In general; public regulations.
§ 2. Duties, care and negligence.
§ 3. ——Use in engines, shops and mills.
§ 4. Proximate cause.
§ 5. Contributory negligence.
§ 6. Actions for injuries, pleading.
§ 7. ——Evidence and presumptions.
§ 8. ——Questions for jury or court.
§ 9. ——Instructions and direction of verdict.

§ 1. In general; public regulations.

Liability for want of fire prevention devices or noncompliance with preventive regulations, see post §§ 2, 3.
Offense of setting out or allowing fires to escape from control, see Crimes § 81.
Validity of law requiring fire screens on interstate vessels, see Commerce § 16.
Appealability of consent order entered on appeal from state fire marshal, see Appeal ¶ 151.
Certiorari to review order of fire marshal made by consent, see Certiorari ¶ 38.
Fire limits for wooden or inflammable buildings, see also Buildings §§ 2, 3.
Fire escapes on buildings, see Buildings § 3; Master and Servant, III, B (making place safe for work).
Mine regulations preventive of fires, see Mines, III; Master and Servant, III.
Regulative powers of cities and villages, see Municipal Corporations, IX.
Municipal fire departments, see Municipal Corporations, XV.
Fire Prevention Act of 1917, see Pub. Acts 1917, No. 300.
Provisions respecting fire prevention and state fire marshal, see Comp. L. 1915, §§ 9107-9123.
Prevention of forest fires and penal statutes respecting setting, see Comp. L. 1915, §§ 765-783, 15424-15429.
Provision for fire screens on stacks of vessels and portable engines, see Comp. L. 1915, §§ 7366-7370.

¶ 1. The setting of fires in this state in the process of fitting lands for cultivation is a lawful and proper act.—Rogers v. Parker, 159 Mich. 278.

¶ 2. Comp. L. 1897, § 11653, which provides for the punishment in a criminal action, and the assessment of penal damages in a civil action against one who negligently or wilfully permits a fire to escape from his premises to those of another to his injury, is not repealed by Pub. Acts 1903, No. 249, providing for the prevention and suppression of forest and prairie fires, and which contains a provision repealing all acts and parts of acts inconsistent therewith; since this act also provides that its enactment shall not affect any right of action for damages.—Allen v. Bainbridge, 145 Mich. 366.

§ 2. Duties, care and negligence.

Right to use fire in clearing land, see ante ¶ 1.
Unforeseen spread and injury, see post § 4.
Contributory negligence, see post § 5.
Pleading duty and negligence, see post § 6.
Court and jury questions, see post § 8.
Instructions and requests, see post § 9.
General law of negligence, see Negligence.
Accountability for loss of property by fire while in possession, see also Accounting Suits ¶ 37.
Liability of carrier for loss by fire, see Carriers §§ 43, 249, 253.
Liability of carrier for loss of baggage by fire, see Carriers § 249 et seq.
Measure of damages for injury to realty by negligent fire, see Damages § 103.
Double damages for allowing fire to escape, see Damages § 203.
Construction of double damage statute, persons liable, see also Damages ¶ 792.
Statutory liability for fires escaping to premises of another through negligence or wilful permission as a "taking," see Eminent Domain ¶ 76.
Who are independent contractors and liability for their negligence with fire, see Independent Contractors.
Nonliability of city for fires from sparks cast by road roller working streets, see Municipal Corporations, XII.
Duty and liabilities of railroad companies respecting fires originating on tracks or from locomotives, see Railroads, VIII, G.
Liability of railroad company for severing fire hose and preventing the saving of property, see Railroads, VIII.
Individual liability of members of association, see Associations ¶ 35.

¶ 3. In making use of fire a degree of care corresponding to the danger is required.—Needham v. King, 95 Mich. 303.

¶ 4. The basis of substantially all legal liability for damages caused by fire is negligence.—Alberts v. City of Muskegon, 146 Mich. 210.

¶ 5. One whose building takes fire from another which is negligently set on fire by defendant has an action for the injury.—Lillibridge v. McCann, 117 Mich. 84.

¶ 6. Under Comp. Laws 1897, c. 320, §§ 11653-11658, the owner of lands setting fires thereon to clear them is liable for injuries due to their escape upon adjoining lands only when the facts and circumstances are such as to warn him as a reasonable man of such danger.—Rogers v. Parker, 159 Mich. 278.

Liability for damage to property by fire communicated thereto from threshing engine, see note, 4 N. C. C. A. 365-376.
Liability for damage caused by sparks from stack or chimney, see note, 3 N. C. C. A. 65-78.
Liability of hospital, sanitarium, or asylum, for injury or death of patient or inmate by fire, see note, 10 N. C. C. A. 749-754.
Liability of electric company for fires caused by defective insulation or installation, see note, 12 N. C. C. A. 209-218.
Liability for personal injuries sustained while endeavoring to extinguish fire negligently started, see note, 9 N. C. C. A. 1046-1068.

§ 3. ——Use in engines, shops and mills.

Contributory negligence, see post § 5.
Evidence of customs of others and precautions by them, see post § 7.
Effect of general custom to dispense with spark arresters, see also post ¶ 31.
Evidence as to drunken habits of servants, see post ¶ 33.
Court and jury questions and instructions, see post §§ 8, 9.

¶ 7. Liability for neglect to have fire prevention appliances and watchmen to control fires in any event would not be governed by the practice in other mills at other places, necessarily under different conditions and surroundings.—McNally v. Colwell, 91 Mich. 527.

¶ 8. Where a steam sawmill is run in proximity to inflammable material and buildings, and the chimney is found to emit sparks so as to endanger the surrounding property, the operator must avail himself of such apparatus to arrest their escape as experience has shown to be reasonably adequate for that purpose.—Webster v. Symes, 109 Mich. 1.

¶ 9. The fact that it is not customary to employ spark arresters where there are no artificial drafts will not excuse the owner of a steam sawmill, operated with a natural draft, for his failure to provide them, if common prudence requires their use in the particular case.—Webster v. Symes, 109 Mich. 1.

¶ 10. If fire is liable to originate in a boiler and engine-room and the construction of the mill is such that the surroundings are inflammable, so that the fire is liable to spread rapidly when once ignited, it is incumbent upon the person operating the mill

to take care that the fire does not consume the mill and spread to other property. He should keep on hand not only persons to watch the fire and keep it within the furnace, but such appliances for extinguishing it, in case of its accidental escape and communication to the building, as an ordinarily prudent man would provide under like circumstances.—McNally v. Colwell, 91 Mich. 527.

¶ 11. Where a mill is surrounded by numerous wooden buildings which are endangered by the frequent escape of sparks, etc., from its chimney, the owner is bound to use the best well-known device for checking escape of sparks, whether it is expressly adapted to a mill chimney or not, if it can be used upon it; in erecting and operating the mill, he must use such precautions for lessening danger and preventing injury as a prudent man, conversant with the business, the danger, and all the surroundings, would have used, or he will be liable for loss arising from it. The fact that the mill had been used for a long time without doing injury is not of weight.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 12. The owner of a steam tug cannot be held liable for fire set by sparks from the tug, unless the want of the care ordinarily used by careful men in the conduct of such a vessel is shown.—Montgomery v. Muskegon Booming Co., 88 Mich. 633.

¶ 13. Plaintiff sued defendant for negligently permitting sparks to escape from his engine on the highway and thereby destroying complainant's buildings. Plaintiff alleged that defendant failed to use an efficient spark arrester. The defendant denied this. Held, the jury having found this issue for the plaintiff, the failure to use the fire arrester was negligence making defendant liable.—McFarland v. Sayen, 156 Mich. 426.

¶ 14. A trespasser is liable whether negligent or not for damages sustained through the burning of a blacksmith shop and adjoining buildings by a fire started by him in the forge.—Wyant v. Crouse, 127 Mich. 158.

§ 4. Proximate cause.

See also ante ¶ 5.
Pleading the cause, see post § 6.
Inferences as to cause, see post ¶ 34.
Court and jury questions and instructions, see post §§ 8, 9.
General law of proximate cause, see Negligence, III.

¶ 15. Where a fire, caused by the defendant's negligence, actually passes from one to another of the plaintiff's buildings without any contributory negligence on the plaintiff's part, or any fault of a third party, which could be regarded as a proximate cause, and for which the third party could be held liable, it is not error to hold defendant liable for the burning of the second as well as of the first building. If such a rule of damages is ruinous to him by whose negligence fires occur, it is better that he should suffer than that he should be allowed to ruin others who are innocent of neglect or wrong.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 16. If the spreading of fire from a defendant's fire-pit where he consumed mill refuse was caused by the sudden shifting of the wind and its increased violence, he is not liable for the consequences, unless it appears that he did not take the proper precautions to watch and guard the fire to prevent its escape, or that such a wind was blowing as rendered it imprudent to start the fire when started.—Polzen v. Morse, 91 Mich. 208.

¶ 17. The fact that the consequences of one's negligent act (allowing a barn to take fire) were more serious than would have followed under more favorable conditions of the atmosphere, does not relieve him.—Lillibridge v. McCann, 117 Mich. 84.

§ 5. Contributory negligence.

In general, see Negligence, IV.

¶ 18. In an action for injury caused by sparks from a burner contributory negligence cannot be predicated of the erection, in a customary, lawful and proper manner, of buildings constructed of the usual material upon the owner's premises, in the neighborhood of such burner from which there is risk of fire or damage. And the owner of such buildings is not bound to incur the expense of providing his buildings with extra safeguards.—Alpern v. Churchill, 53 Mich. 607.

¶ 19. In an action for the loss of a storehouse and contents destroyed by fire as a result of the negligent operation of a traction engine while being removed from plaintiff's premises, where the negligence relied upon was the propelling of the engine past plaintiff's building without the bonnet on the smokestack and with the damper open, the mere presence of the plaintiff, and his knowledge that the bonnet was off and the damper open, when the engine was first moved, did not amount to contributory negligence unless he was in some way responsible for the absence of the bonnet, or had the danger in mind.—Underwood v. A. W. Stevens Co., 149 Mich. 39.

§ 6. Actions for injuries, pleading.

General law of actions and procedure, see specific topics treating thereof, e. g., Pleading; Parties; Process; etc.; and especially Negligence, V.
Actions against railroads for fires, see Railroads, VIII, G.
Subrogation of insurer to cause of action of insured, see Insurance, XIX.

¶ 20. The improper use of proper appliances to prevent the escape of sparks from the smokestack of a steamboat must be distinctly averred in order to be available as a ground of recovery in a suit for the loss of property set on fire, as claimed, by sparks thus emitted.—Cheboygan Lumber Co. v. Delta Transp. Co., 100 Mich. 16.

¶ 21. In an action to recover for damages caused by fire escaping from a smokestack on defendant's saw mill, the declaration which alleged the duty to have used upon the smokestack a spark arrester which would have prevented escape of sparks, and charging a breach of such duty in that the top of the chimney was permitted to remain open without a suitable spark catcher thereon, did not confine defendant's alleged negligence to a failure to equip his mill with a proper arrester.—Wager v. Lamont, 135 Mich. 521.

¶ 22. In an action for the negligent destruction of plaintiff's buildings by fires lighted by defendant or not properly cared for by him, the plaintiff can give evidence of the presence of combustible material upon defendant's premises even though the fact is not counted on in the declaration.—Lucas v. Wattles, 49 Mich. 380.

§ 7. ——Evidence and presumptions.

Evidence that fire never spread before, see also ante ¶ 11.

Sufficiency of evidence as matter for jury, see post § 8.

Sufficiency on motion to direct verdict, see post § 9.

Judicial notice of operation and use of spark arresters, see Evidence ¶ 117.

Acts of reparation and precaution after the fact as evidence in negligence cases, see Negligence, V; and see Evidence §§ 399, 400.

Admissibility of evidence of conditions and acts prior or subsequent to time pleaded, see also Evidence § 94.

Evidence of other distinct fires to show want of spark arrester, see Evidence § 95.

Evidence of comparative efficiency of devices on other engines, see also Evidence § 96.

Opinions as to causes of fires, matter for lay or expert witnesses, see Evidence § 242.

Weight and sufficiency of expert testimony as to throwing of sparks, see also Evidence ¶ 2940.

¶ 23. In a landowner's action for damages for loss resulting from a fire set by the defendant on contiguous land, testimony as to the state of the weather during the time the fire existed prior to the injury was competent to enable the jury to determine the degree of care that defendant should have exercised.—Needham v. King, 95 Mich. 303.

¶ 24. Where, in an action for injury caused by sparks from a burner, there was evidence that warranted the inference that the burner was in a defective condition, it was proper to show that when a change had been made after the damage was done the dangerous emission of sparks ceased.—Alpern v. Churchill, 53 Mich. 607.

¶ 25. In an action to recover damages for the spreading of fire by negligence to other property from a burning saw-mill, it is error to admit testimony that a hanger in the boiler-room of the mill was charred by fire some years before.—McNally v. Colwell, 91 Mich. 527.

¶ 26. In an action for damages for the burning of the plaintiff's house because of the defendant's negligence in not having a proper fence around his fire-pit, evidence that after the fire the defendant erected a fence, and that no fire has since spread therefrom, is incompetent to show previous negligence.—Polzen v. Morse, 91 Mich. 208.

¶ 27. In a suit to recover for the loss of property by fire alleged to be due to the negligent driving of defendant's engine near plaintiff's barn, evidence that the same engine, immediately following the first fire, on the same trip and under the same weather conditions, set another fire, is admissible to show the lack of a suitable spark arrester.—Ainsworth v. Hover, 162 Mich. 135.

¶ 28. In a suit to recover for the loss of property by fire alleged to be due to the negligent driving of defendant's engine near plaintiff's barn, testimony that on the following day the defendant put on the stack a screen offered by a witness instead of the spark arrester lying on the water tank, is admissible to show the lack of a suitable arrester at the time of the accident in question.—Ainsworth v. Hover, 162 Mich. 135.

¶ 29. Plaintiff sued defendant for negligently setting a fire to débris in a slashing which spread and consumed plaintiff's pile of wood. Held, that evidence of the defendant's conversation with a third person, in which he stated it would be a good time to burn the débris in said slashing, and that he had been walking around looking at the same, was admissible, with other circumstances, to prove that defendant set the fire.—Howe v. Bregenzer, 161 Mich. 684.

¶ 30. Negligence may be inferred from the fact that defendant went into a barn smoking and laid down and went to sleep without other evidence of how the barn came to burn.—Lillibridge v. McCann, 117 Mich. 84.

¶ 31. The question of diligence or negligence always depends upon the circumstances peculiar to each particular case; the general neglect of mill-owners to use spark-catchers on their chimneys will not excuse such neglect in a particular instance, nor be pertinent evidence in an action for damages

caused by sparks from the chimney of one mill, at least without some showing that the other mills were similarly situated.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 32. Evidence of what is done in other mills in the way of providing appliances for extinguishing fire and for preventing the spread of fire is inadmissible in an action to recover damages for the negligent spreading of fire by a burning mill to other property. —McNally v. Colwell, 91 Mich. 527.

¶ 33. In an action to recover damages sustained by reason of fire which spread from defendant's burning mill, evidence that the engineer and fireman of the mill were in the habit of using intoxicating liquor, and were sometimes seen under its influence, is inadmissible, in the absence of proof that such liquor habit, or occasional intoxication, had any bearing whatever upon the origin of the fire or in any way prevented controlling it. —McNally v. Colwell, 91 Mich. 527; Cowley v. Colwell, 91 Mich. 537.

¶ 34. While negligence in providing proper means for the prevention of fires and in the management of the apparatus and fires may be inferred from the size and quantity of sparks or cinders emitted when those things are shown, it will not in any case be presumed from the mere fact of a fire, where the testimony as to its cause is purely circumstantial.—Montgomery v. Muskegon Booming Co., 88 Mich. 633.

Application of doctrine of res ipsa loquitur in action for injuries caused by fire getting beyond control, see note, 5 N. C. C. A. 54.

§ 8. ——Questions for jury or court.

Instructions to the jury, see post § 9.

¶ 35. Defendant's negligence in setting fire to his fallow land, and in maintaining it during a drought and up to the border of plaintiff's land which is covered with combustible matter, so that fire is communicated during a high wind to plaintiff's land, is for the jury.—Needham v. King, 95 Mich. 303.

¶ 36. Putting ashes in a wooden barrel in violation of a municipal ordinance is not negligence per se; it is a question of fact whether it is negligent in a particular case. —Cook v. Johnston, 58 Mich. 437.

¶ 37. It is a question for the jury whether one is negligent who enters a barn while smoking and lies down upon straw or other combustible material; and it is also a question for the jury whether a fire thereafter occurring originated from the lighted pipe. —Lillibridge v. McCann, 117 Mich. 84.

¶ 38. In an action to recover damages for fire alleged to have been communicated, during a violent wind, by sparks from defendant's steam sawmill, the question of whether the drafts in the furnace were open is properly left to the jury, where defendant has testified that sparks could not escape if the drafts were closed, and there is evidence that sparks did escape, and defendant's witness testified that certain drafts were partly open.—Webster v. Symes, 109 Mich. 1.

¶ 39. Where, on a calm morning, when there was a heavy dew on the ground, defendant's servant set fire to some grass, weeds, and brush, cut by him the day before and piled in a depression in defendant's land, which depression, although dry on its surface, was very wet just beneath, and where, three hours after the fire was set, and while the servant was on the ground with a bucket of water watching the fire, the wind began to blow violently, and took up some of the fire, and, carrying it over a furrow which the servant had plowed around the depression, set the stubble on fire, which, despite his efforts and those of others, ran to plaintiff's land and damaged his timber, the question of defendant's negligence in setting the fire was for the jury.—Bolton v. Calkins, 102 Mich. 69.

¶ 40. Where, in an action for damages for fire alleged to have been communicated by a traction engine, the allegations of negligence were that the engine was out of order, and that the spark arrester was not in use, evidence that fire was emitted, that the engine was run with an open damper to a point not far from a straw stack from whence the fire was communicated, and that one of the safety appliances designed to prevent the emission of sparks had been omitted, is sufficient to take the case to the jury.—Rogers v. Fowler, 151 Mich. 485.

¶ 41. In an action on the case brought to recover damages for the loss of a storehouse and contents destroyed by fire as a result of the negligent operation of a traction engine while being removed from plaintiff's premises by defendant who claimed the right of possession thereto by force of a chattel mortgage, held from the evidence that it was open to the jury to find that the plaintiff, on being told that all that was wanted was a chance to take the engine, had a right to go about his other business in the expectation that defendant's agents would use such precautions to prevent damage as were necessary, and that plaintiff was not negligent in failing to instruct them as to necessary precautions.—Underwood v. A. W. Stevens Co., 149 Mich. 39.

¶ 42. In an action to recover for damages caused by fire escaping from a smokestack on defendant's saw mill, testimony from which the escape of sparks in the morning in question might be inferred, presented a question for the jury.—Wager v. Lamont, 135 Mich. 521.

§ 9. ——Instructions and direction of verdict.

General law of instructions, see Instructions; and see also Negligence, V.

¶ 43. It is error to charge that the subsequent making of changes in a spark arrester on defendant's saw mill afforded evidence of its unsafe character in an action for allowing fire to escape.—Wager v. Lamont, 135 Mich. 52.

¶ 44. In an action for the loss of a storehouse and contents destroyed by fire as a result of the negligent operation of a traction engine while being removed from plaintiff's premises, there was no error in stating to the jury that plaintiff's claim was that he supposed that defendant's agents would put on the spark arrester and have the protection afforded by its use, although there was no direct evidence to that effect, where it is manifest from the evidence that he relied upon them to take the usual precautions which would according to the testimony include that.—Underwood v. A. W. Stevens Co., 149 Mich. 39.

¶ 45. An instruction that, if the violence of the wind and the dryness of the surrounding property endangered property by fire from a steam sawmill to the extent that a "prudent" man would have shut down the mill, the failure to do so was negligence, is not erroneous as requiring too high a degree of care,—especially where the jury is subsequently instructed that the operators of steam sawmills are only required to "use ordinary care to protect" surrounding property.—Webster v. Symes, 109 Mich. 1.

¶ 46. In a suit to recover for the loss of property alleged to be due to the negligent driving of defendant's engine near plaintiff's barn, the plaintiff introduced evidence to prove that sparks from the engine caused the fire. The defendant introduced evidence to show that plaintiff was accustomed to smoke in the barn. The court instructed the jury that plaintiff could not recover if the smoking was the cause of the fire, but to reach such result they must find as a matter of fact that the fire originated in that way. Held, the instruction was not erroneous as putting the burden of proof on defendant.—Ainsworth v. Hover, 162 Mich. 135.

¶ 47. In an action for negligently setting fire to plaintiff's property, where the fire was communicated from another fire first set by a spark from defendant's mill, an instruction that defendant is liable if plaintiff's property was burned without her fault, by the negligent operation of the mill, and "the injury was the result of a continuous succession of events, so linked together as to make a natural whole, and flowed naturally from such negligence," even though defendant could not have anticipated such injury, is not misleading as permitting a verdict for plaintiff although defendant could not have anticipated that any injury would result; but means under the circumstances that, even though the defendant's negligence did not, in the first instance, cause plaintiff's property to take fire, yet, if it ultimately did take fire as a result of defendant's negligence, she was entitled to recover. —Webster v. Symes, 109 Mich. 1.

¶ 48. Sparks from a steam-thresher set fire to some hay stored on the premises. The owner of the hay was plowing in the same field, but had made no protest against the use of the thresher. In an action by him for the negligent destruction of the hay, it was held that in the absence of proof that he had any special knowledge of the risk of using such machinery, or of the skill and competency of those who had charge of it, he was entitled to an instruction that if he did not consent to, or participate in, what was done, he was not guilty of contributive negligence.—Moomey v. Peak, 57 Mich. 259.

¶ 49. In an action for damages from the burning of the plaintiff's store and goods resulting from a fire negligently set by defendants upon their premises, on evidence that two of plaintiff's employees on the morning of the injury saw the fire spreading, but no notice was given to the defendants. The jury should not have been instructed that there was no question of contributory negligence in the case.—Richter v. Harper, 95 Mich. 221.

¶ 50. The question of negligence was properly presented to the jury in an action for damages done by fire, where the judge charged the jury that negligence is a "failure on the part of a person to observe, for the protection of another's interest, such care and precaution and vigilance as the circumstances justly demand, and the want of which causes the injury": and that it is a question of fact to be determined by the jury whether the defendant, "while setting fire and burning rubbish on his own premises, did exercise the usual precaution which a prudent man, under like circumstances, having a knowledge of the facts as they existed, and knowing the danger, would and should exercise and use"; and whether or not, under all the circumstances, the preponderance of evidence shows that defendant was careless in setting the fire and allowing it to escape from his premises to those of his neighbor.—Allen v. Bainbridge, 145 Mich. 366.

¶ 51. Plaintiff sued defendant for negligently permitting sparks to escape from his engine on the highway, thereby destroying complainant's buildings. A boy seven years old at the time of the fire testified that the spark arrester or hood was not on the smokestack, and other evidence was submitted to support him. Defendant produced evidence to the contrary. Held, the court properly refused to direct a verdict, as the question

whether there was a suitable spark arrester on the engine was for the jury.—McFarland v. Sayen, 156 Mich. 426.

¶ 52. In a suit against an unincorporated driving association for negligently permitting the spread of fire upon the plaintiff's premises, the evidence indicated that defendants took control and possession of the lands where the fires were built, and caused them to be cleared; that the season was the dryest ever known, and great care and caution were necessary to protect and guard against fires; that many of the individual defendants composing the association were personally notified of this danger and requested by plaintiff to exercise care; and that no attention was paid to the warnings given, but the brush and trees were cut, piled and fired when a strong wind was blowing towards plaintiff's property. Held, the court was in error in directing a verdict for defendant on the ground that the plaintiff presented no evidence of defendant's liability.—Inglis v. Millersburg Driving Ass'n, 169 Mich. 311.

FIRM ASSETS to FISCAL AFFAIRS.

Cross-References.

Firm Assets and Firm Name—
See Partnership.
Registration of fictitious names, see Trade Marks and Trade Names.
First Day and Last Day—
Inclusion and exclusion in computing time, see Time.
First Liens—
See Chattel Mortgages; Mortgages; Liens; Notice and Record of Title; etc.
First Objecting on Error or Appeal—
Rule excluding objections not made below, see Saving Questions; Indictment, XIV.
First Payment on Stock—
See Corporations § 50.
Fiscal Affairs—
Of state or its divisions, see Counties, V; Municipal Corporations, XIII; Townships, VI; Schools, IV; State of Michigan, IV.

FISH AND GAME.

TREATS of the right to fish and hunt, of fish and game regulations, and of the rights of the state and the citizens in wild animals and fish.

Analysis.

§ 1. Right to fish and hunt.
§ 2. ——Rights of landowners.
§ 3. Property in fish and game.
§ 4. Licenses and public regulation.
§ 5. ——As to nets and seines.
§ 6. ——As to size or kind of fish or game.
§ 7. ——Private ponds and preserves.
§ 8. ——As to sale, shipment or transportation.
§ 9. Prosecutions, seizure and confiscation.

Fishing rights as an incident to riparian ownership, see Waters, IV, A.
Fishing and fowling rights in navigable waters, see also Navigable Waters, II.
Construction of fishways in waters, see Waters, IV, B.
County duty to maintain fishways, see also Counties § 24.
Fish and game officers as public officers, see Officers.

§ 1. Right to fish and hunt.

Rights in the fish or game itself, see post § 3.
Right to fish in navigable waters as justification for trespass, see Trespass, I.

¶ 1. To fish is a privilege accorded by the State, and the question of individual enjoyment is one of public privilege and not a private right.—People v. Collison, 85 Mich. 105.

¶ 2. The right to fish is a public right, like the right to navigate, and extends to all portions of the lakes.—Stuart v. Greanyea, 154 Mich. 132.

¶ 3. Every person has a right of capturing and shooting wild fowl in any place where he has a right to be, if it does not infringe on another's superior rights.—Sterling v. Jackson, 69 Mich. 488.

§ 2. ——Rights of landowners.

Permissible modes of fishing, see post § 7.
Right of owner of flowage easement to prevent fishing, see Easements ¶ 111.

Licenses to enter and fish or hunt, see Licenses to Enter.
Trespasses in entering to fish or hunt, see Trespass.

¶ 4. Fish, like other animals feræ naturæ, are open to capture by those who have a right to be where they are captured. Fishing with lines from boats, even in narrow streams, cannot be complained of by riparian owners.—Lincoln v. Davis, 53 Mich. 375.

¶ 5. Prior to the enactment of Laws of 1869, Act No. 94, the riparian rights of abutting proprietors did not include an exclusive right to set nets in the waters included in what are ordinarily denominated riparian waters.—Stuart v. Greanyea, 154 Mich. 132.

¶ 6. The owner of the fee has the exclusive right of fowling in navigable waters overlying his land.—Sterling v. Jackson, 69 Mich. 488.

¶ 7. How. St., § 2172, in protecting the rights of riparian owners along the great lakes and in the adjacent bays and inlets to exclusive fishing with stationary nets for one mile from low-water mark, establishes a valid rule. But beyond that limit one has no right, as riparian owner merely, to interfere with stake-fishing by others.—Lincoln v. Davis, 53 Mich. 375.

¶ 8. Comp. L. 1897, § 5857, making it unlawful to put in waters fronting land where fish are taken by the owner or occupant of the land any seines or trap nets was no doubt designed to protect littoral landowners against the use of nets by other fishermen, and such landowners are plainly entitled to the benefits of the statute.—Hilborn v. Smith, 148 Mich. 474.

¶ 9. Under Pub. Acts 1905, Act No. 122, prohibiting any person, for the purpose of fishing, from driving any stakes or setting or placing any nets in the waters of Saginaw Bay contiguous or adjacent to the shores of Arenac and Iosco Counties, for a distance of two miles from said shores, unless such person is the lawful owner or occupant of the shore frontage opposite to which said stakes are driven or nets set or placed, the rule to be adopted for the purpose of division of rights between shore owners should be the general rule for the ascertainment of access to navigable water, and where shore lands abut upon a bay the shore of which is longer than the distance between the headlands at the entrance thereof, a base line for the purpose of division, and from which the lines shall converge, is to be established by running a line between the headlands; and where there are shore lands from the termini of the boundaries of which lines could not intersect the base line, other base lines should be established by running lines from the termini of the first base line to the center of the shore line of the bay; and in determining the fishing rights, lines from the shore should be run to these inner base lines, striking them at points proportionately the same distance apart as on the shore lines, and the same process repeated in running the lines between the base lines.—Stuart v. Greanyea, 154 Mich. 132.

§ 3. Property in fish and game.

Police power over, see Constitutional Law § 100.

¶ 10. The ownership of fish in a lake connected with other waters is, by reason of their migratory habits, in the people of the state, and the riparian owner has no property right in them until they have been subjected to his control.—People v. Collison, 85 Mich. 105.

§ 4. Licenses and public regulation.

As to nets and seines, see post § 5.
As to size and kind of fish or game, see post § 6.
Applicable to private ponds or preserves, see post § 7.
As to shipment and transportation, see post § 8.
Licenses to enter on others' lands, see Licenses to Enter.
Class legislation affecting fish and game, see Constitutional Law § 220.
Discrimination or regulation obnoxious to commerce clause, see Commerce § 11.
Loss of rights through fish and game laws as a "taking," see Eminent Domain § 31.
Fish and game laws, see Comp. L. 1915, chaps. 142, 143; and see Pub. Acts 1917, pages 181-184, 189-191, 194, 199, 292, 293, 350, 351, 722, 723, 855-857, 884, 890-892, 909. [Note. Owing to the multiplicity of statutes on this subject, any attempt to make detailed references would be confusing and unserviceable.]

¶ 11. The right of the state to exclude nonresidents altogether from fishing privileges in its waters is established.—People v. Setunsky, 161 Mich. 624.

¶ 12. If Laws 1855, Act No. 10, to protect fish and preserve fisheries was repealed by Act 61 of 1885, or if it were invalid, Laws 1879, Act No. 208, would be still in force and substantially corresponds with its provisions.—People v. Kirsch, 67 Mich. 539.

¶ 13. Pub. Acts 1897, No. 159, revised and amended the game laws and repealed inconsistent acts, but expressly excepted from the repeal Pub. Acts 1893, No. 196. Pub. Acts 1901, No. 217, again revised and amended the game laws and expressly repealed the Act of 1897. Held that the repeal of the latter act did not repeal the Act of 1893.—People v. Van Pelt, 130 Mich. 621.

¶ 14. The Grand river, three miles up from its mouth and beyond where vessels

navigate is not a "harbor" within the meaning of Laws 1885, Act No. 10, and fishing there is within the prohibition of the statute. —People v. Kirsch, 67 Mich. 539.

¶ 15. The Quanicassee river does not come within the enumeration of the waters excepted by Comp. L. 1897, § 5865, prohibiting the taking of fish by nets within certain waters.—People v. Neal, 143 Mich. 271.

¶ 16. Comp. L. 1897, § 5865, prohibiting the fishing with nets "in any of the waters of this state except lakes Michigan, Superior, Huron and Erie, and the bays and harbors connected with said lakes, Saginaw Bay and the Sault Ste. Marie, St. Clair, Saginaw, and Detroit Rivers" permits fishing in the bays and harbors of the Great Lakes mentioned but not in those connected with Saginaw Bay and the rivers mentioned.—People v. Neal, 143 Mich. 271.

§ 5. ——As to nets and seines.

Rights of riparian or littoral owners and others, see ante ¶¶ 5, 7-9.
Use of spears, see post ¶ 28.
Prohibition of use of nets or implements as denial of due process, see Constitutional Law § 167.

¶ 17. Under How. St., § 2197f, declaring that it shall be unlawful for any person to take or catch, or attempt to take or catch, any fish in certain waters by means of nets, "provided that the use of dip nets in catching mullet, redsides, and suckers shall not be unlawful," one who sets a net for the purpose of catching turtles without intent to catch fish is not guilty of a violation of the statute, although fish are accidentally imprisoned therein, they being returned alive to the water so far as possible.—People v. Deremo, 106 Mich. 621.

¶ 18. Pub. Acts 1895, No. 200, § 2, prohibiting the use of "any pound, trap, stake, gill, or set nets or seines, or any device of any kind, for taking fish," etc., uses the words "or any device of any kind" in the sense of any like kind; and does not prohibit fishing entirely, especially in view of other sections of the act which contain special prohibitions rebutting any such general prohibition.—In re Yell, 107 Mich. 228.

¶ 19. The provisions of Pub. Acts 1897, No. 151, prescribing the minimum extension measure of the meshes of nets, and forbidding the use after April 1, 1900, of any but those prescribed, construed as allowing use until 1900 of any net previously lawful, as requiring newly acquired nets to be of prescribed size, and as requiring return to the water of all fish below size in whatever net taken except nets of lawful mesh.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 20. Under Comp. L. 1897, § 5844, prohibiting the use of nets with mesh less than four inches extension measure "as manufactured," and section 5846 prohibiting the use of nets during certain seasons "provided however, two and one-fourth inch mesh in pots" may be used in certain places, the two and one-fourth inches relates to the net as manufactured and it is not a violation to use such nets though the mesh may be less than two and one-fourth inches due to shrinkage. —People v. Gillingham, 131 Mich. 105.

¶ 21. Under the title "an act to regulate catching of fish in the waters of this state by the use of pound or trap nets, gill nets, seines or other apparatus" Pub. Acts 1899, § 2, declaring it unlawful to market or have in possession fish of various species less than the weights there enumerated, applies also to persons other than fishermen having such fish in possession.—People v. Dornbos, 127 Mich. 136.

¶ 22. Plaintiff, being the owner of fishing nets set in the St. Mary's river, sued the owners of a tug for injuries caused his nets by the tug carelessly running into them. Held, the contention that the plaintiff had no right to fish with these nets in the waters of St. Mary's river, because Comp. L. 1897, § 5865, makes it unlawful to catch fish with pound nets in any waters of the state except those specified in the statute, and the statute names the "Sault Ste. Marie," St. Clair, Saginaw and Detroit rivers, cannot be sustained, the "Sault Ste. Marie" being the St. Mary's river; and it is not to be supposed that the defendants knew of the misnomer, or supposed it to be unlawful to use such nets in those waters.—Bishop v. Baldwin, 147 Mich. 22.

¶ 23. Under Comp. L. 1897, § 5857, making it unlawful for any person to put in any of the waters fronting on land where fish are taken by the owner or occupant of the lands "any species of seines or continuous trap nets" gill nets are held to be within the prohibition of the statute.—Hilborn v. Smith, 148 Mich. 474.

§ 6. ——As to size or kind of fish or game.

See also ante ¶ 21.

¶ 24. Pub. Acts 1899, No. 88, § 2, making it unlawful to have in possession fish under prohibited weights, applies to fish imported from another state.—People v. Dornbos, 127 Mich. 136.

¶ 25. Pub. Acts 1899, No. 88, providing that it shall be unlawful to market or have in one's possession certain kinds of fish weighing less than one pound, is not limited to fish caught in the waters of this state, even though the title of the act is "An act to regulate the catching of fish in the waters of this state."—People v. Lassen, 142 Mich. 597.

¶ 26. Under Pub. Acts 1899, No. 88, § 2, making it unlawful to have in possession

fish of prohibited weight "in the round," the weight of the fish at the time they were taken governs and it is unnecessary that they remain "in the round" or uncleaned in the possession of the party charged.—People v. Dornbos, 127 Mich. 136.

¶ 27. Under Pub. Acts 1899, No. 88, § 2, making it unlawful to market or have in possession certain fish of less than a prescribed weight "provided that it shall be lawful to transport or sell any of said described kinds of fish legally caught during any season of the year," fish under the prescribed weight cannot be retained in possession or marketed although they are caught in a net of legal mesh; the proviso refers only to fish above the prescribed weight.—People v. Coffey, 155 Mich. 103.

§ 7. ——Private ponds and preserves.

¶ 28. Spearing fish, with the owner's consent, in a private pond isolated from public waters is not a violation of Comp. L. 1897, §§ 5849-5851 (Pub. Acts 1891, No. 159), making it unlawful to take fish in inland lakes by spear or device other than hook and line.—People v. Conrad, 125 Mich. 1.

¶ 29. Under Comp. L. 1897, § 5849, which prohibits the taking of fish in inland lakes by any other means than hook and line, a person may be punished for taking fish in violation of its provisions from a lake connected with the river at certain seasons of the year so that fish may enter therefrom and return, though the lake is located wholly on defendant's land and he has stocked it with fish from private sources and has posted notices to the public that it was private property, and that no fishing was allowed therein.—People v. Horling, 137 Mich. 406.

§ 8. ——As to sale, shipment or transportation.

Manner of taking for sale, see ante § 5.
Permissible sizes and kinds possessed or offered, see ante § 6.
Possession of fish caught beyond state, see ante ¶ 25.
Privileges and immunities of citizens as to transportation of game, see Constitutional Law § 228, ¶ 983.

¶ 30. Laws 1881, Act No. 251, § 2, prohibits the killing of colin or quail except in November and December, and section 5 prohibits the selling or exposing for sale any of the kinds or species of birds protected by the statute after the expiration of eight days next succeeding the times limited for the killing thereof. Laws 1887, Act No. 68, enacts that in all prosecutions for violations of laws for the protection of game, proof of its possession at any time when the killing, taking or having in possession any such game is by law prohibited, shall be prima facie evidence of a violation of the law. Held, that quail or other wild fowl or birds come within the meaning of the word "game" in the latter statute, and that the former one when construed with it does not prohibit the possessing and exposing for sale at any time quail killed in another state and afterwards brought into this state.—People v. O'Neil, 71 Mich. 325.

¶ 31. A provision in a subsequently enacted statute that packages in which game or game birds are shipped must be marked in a specified way is not inconsistent with an earlier statute prohibiting the shipment of game or game birds out of the state, and the latter is not repealed by a clause in the former repealing all inconsistent acts.—People v. Van Pelt, 130 Mich. 621.

§ 9. Prosecutions, seizure and confiscation.

Matters of indictment or complaint, evidence and trial common to all prosecutions, see Indictment; and see also Penalties.
Criminal jurisdiction, see Indictment, III.
Issues, strictness of proof and variance, see Indictment, I, E.
Due process in fish and game laws for seizure of implements, see Constitutional Law § 167.
Loss of rights through fish and game laws as a "taking," see Eminent Domain § 31.

¶ 32. Under Comp. L. 1897, §§ 5754 and 5755, a docket entry reciting that the defendant was arraigned in open court and pleaded guilty to the charge of illegal fishing set forth in the complaint and warrant of arrest, that after hearing the evidence the court finds him guilty as charged and fined him and adjudged that the nets seized from defendant be condemned and confiscated, etc., does not justify the seizure and sale of the nets in the absence of anything to indicate that the defendant had a day in court on the question of unlawful use of the nets, there being no pleading or evidence shown on that matter.—Neal v. Morse, 134 Mich. 186.

Seizure of goods in transit for violation of game laws, see note, 6 N. C. C. A. 739-740.

FISHERIES to FIXING RATES.

Cross-References.

Fisheries—
See Fish; Navigable Waters, II; Waters, IV.
Fishing Bills—
See Discovery.
Fitness for Use—
Warranty of goods sold, see Sales, VI.
Fixed Price Agreements—
Validity and policy of law, see Contracts § 83.
Brokerage or selling agency agreements for minimum net price, see Brokers.
Unlawful combinations, see Combinations.

Fixing Liability—
The term "fixing liability" is often used to denote the act or occasion by which a liability which is secondary or contingent is made absolute and mature. See generally topics treating of the liability in question, e. g., Bailments; Conversion; Guaranty; Indemnity; Insurance; Suretyship.

On bail bonds, see Arrest, X; Civil Arrest, IV.
Of stockholders for debts of corporation, see Corporations, XXIV, E.
Fixing Rates—
See generally Public Service; and see also Carriers, I; Street Railways, I; Gas; Electricity; Waters, VI.

FIXTURES.

TREATS of chattels affixed to land and regarded by reason thereof as part of the land or as retaining their legal character as movables notwithstanding such affixation.

Analysis.

I. In general; what constitute fixtures.

§ 1. In general.
§ 2. Fixtures as accessions to the property.

II. Annexation and other indicia of character and intent.

§ 3. In general; intent of parties.
§ 4. Manner or mode of annexation.
§ 5. Buildings and building materials.
§ 6. Dwelling house fixtures and appliances.
§ 7. Office and business equipment.
§ 8. Partitions.
§ 9. Machinery and power plants.
§ 10. Fences and materials for fencing.
§ 11. Manure produced on farm.
§ 12. Leasehold or partial interest as rebutting intent to annex.
§ 13. ——Improvement by life tenant or remainderman.
§ 14. Buildings or improvements by vendor or purchaser.
§ 15. Improvements by persons without title or land interest.
§ 16. Severance and restoration of movability.
§ 17. Effect of physical severance.
§ 18. Estoppel to question affixation or severance.
§ 19. Presumptions and evidence.
§ 20. Questions of law and fact and instructions.

III. Agreements affecting character of thing or right to remove.

§ 21. Agreements in general.
§ 22. Mortgaging or selling as chattel.
§ 23. Sale with reservation of title.
§ 24. Between lessor and lessee or life tenant and remaindermen.
§ 25. By mortgagor or mortgagee.

IV. Rights of third persons.

§ 26. In general; seller or buyer of affixed chattels.
§ 27. Rights of mortgagees or subsequent takers.
§ 28. Effect of merger of leasehold and fee.
§ 29. Retention or use as a conversion.

I. IN GENERAL; WHAT CONSTITUTE FIXTURES.

§ 1. In general.

[Note. The word "fixtures" is used in the books as having different meanings, to wit, (a) chattels become part of the land by affixation thereto, (b) chattels physically fixed but legally remaining movable, (c) chattels used by merchants in trade usually annexed to the premises for handling and displaying merchandise. In reading the cases these different meanings must be kept in mind.]

Character of thing determined by intent and annexation, see post, II.

Character of thing determined by agreement, see post, III.

Rights of third persons, i. e., those other than the improver and the person directly opposing his claims, see post, IV.

Restoration of movability by severance of fixture, see post § 16.

Buildings and other fixtures as passing with deed of land, see Deeds § 63.

Real or personal nature of sheds on land as affecting right to have summary proceedings, see Forcible Entry ¶ 39.

Rights of removal of trade fixtures by lessee, see Landlord and Tenant, IV, E.

Fixtures within meaning of the Bulk Sales Law, see Fraudulent Conveyances, I, A.

Mode of levy on heavy machinery bolted to building, see Attachment ¶ 130.

¶ 1. To constitute any chattel that has been attached to the freehold a trade fixture, it is only necessary that it be devoted to what is known in the law of fixtures as a trade purpose.—Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92.

§ 2. Fixtures as accessions to the property.

Improvements on another's land as accession thereto, see also Accession § 5.

¶ 2. One who makes improvements on the land of a person who has not been in fault about it does it at the risk of losing both his property and his labor; so held where a dealer in gas machines placed one in a house which he afterwards found belonged to the wife of the man who contracted that the machine should be placed there.—Morrison v. Berry, 42 Mich. 389.

¶ 3. Where a person without permission from the owner knowingly enters upon his lands and annexes permanent structures to the freehold, such structures belong to the owner of the soil of which they are annexed or upon which they are erected.—Harrington v. City of Port Huron, 86 Mich. 46.

II. ANNEXATION AND OTHER INDICIA OF CHARACTER AND INTENT.

§ 3. In general; intent of parties.

Manner or mode of annexation as indicia of intent, see post § 4.

Particular structures and things as intended fixtures, see post §§ 5-11.

Leasehold or other limited interest of improver as index of intent to remove, see post §§ 12, 13.

Improvement by vendor or purchaser as index of intent, see post § 14.

Improvements by stranger to title or wrongdoer, see post § 15.

Annexation knowingly to land of another, see ante ¶ 3.

Presumptions and evidence as to intent, see post § 19.

Intent as law or fact question, see post § 20.

Agreements fixing character of the annexation or improvement, see post, III.

¶ 4. The controlling principle in determining whether chattels annexed to real estate have become fixtures is the intention of the parties between whom the question arises; and the mode of annexation and manner of use are not necessarily conclusive, but yield to such intent.—Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413.

¶ 5. Whether personal property in use about a mine is a fixture is a question of the intent with which it was annexed to the freehold.—Scudder v. Anderson, 54 Mich. 122.

¶ 6. There is no universal abstract test to determine whether an article is a fixture; it must usually depend on the express or implied understanding of the parties concerned. —Manwaring v. Jenison, 61 Mich. 117; Stevens v. Rose, 69 Mich. 259.

¶ 7. Whether an article attached to a freehold becomes a fixture depends largely upon the intention of the parties.—Aldine Mfg. Co. v. Barnard, 84 Mich. 632.

¶ 8. The intentions of the parties must control in determining the character of the property which is claimed to be a fixture.—First Commercial & Sav. Bank v. Trenton Milling Co., 144 Mich. 188.

¶ 9. Whether or not certain articles used in operating a brewery were covered by a mortgage is to be determined not by the manner in which they were attached to the realty but to the intent of the parties.—Dehring v. Beck, 146 Mich. 706.

¶ 10. Intent, under the law governing fixtures, chiefly determines whether a chattel annexed to the realty for use becomes part of it where it is not shown that it was specially adapted for use there, or that the freehold is injured by its annexation and removal.—Ferris v. Quimby, 41 Mich. 202.

¶ 11. While the intent of the owner is important in determining whether or not a fixture is part of the realty, such intent must relate either to the time of annexation or to some actual or constructive severance, and evidence that the owner had in mind

the removal of the fixture at some indefinite time does not affect its character as real property.—People v. Jones, 120 Mich. 283.

¶ 12. B., a purchaser of land under a partly performed parol contract, built a house thereon which he occupied for some years and then rented to a tenant, who was ousted by M. under claim of title. Held, that B. could not at the same time treat the building as realty and personalty; that when he rented it he necessarily rented it as a tenement; and that he could not recover against M. in trover as for a conversion.—Bracelin v. McLaren, 59 Mich. 327.

¶ 13. An intention on the part of a claimant of land, in constructing a building thereon, so to construct it as to permit of its removal as personalty in case his title to the land should be defeated, is immaterial in determining the character of the building, as a part of the realty or otherwise, in a subsequent controversy between adverse claimants under the same chain of title.—Miles v. McNaughton, 111 Mich. 350.

§ 4. Manner or mode of annexation.

Intent rather than manner of annexation as test, see ante § 3.
Of particular buildings or things, see post §§ 5-11.
Manner of affixing machinery and power plants, see also post § 9.
Agreements controlling manner and effect of annexation, see post § 21.

¶ 14. Ordinarily, that which is permanently attached to the freehold is a fixture, and is to be regarded as a part of the land.—Curtis v. Leasia, 78 Mich. 480.

¶ 15. The mode either of annexation or of use is not always conclusive as to whether an article is a fixture.—Wheeler v. Bedell, 40 Mich. 693; Manwaring v. Jenison, 61 Mich. 117.

¶ 16. Whether a building or other erection is a part of the realty, and a fixture, depends upon no fixed rule; neither the mode of annexation nor the manner of use is conclusive; it must usually depend on the understanding of the parties.—Stevens v. Rose, 69 Mich. 259.

¶ 17. Where permanent annexation to the freehold is intended, an article lawfully annexed becomes a fixture and part of the realty, whether its removal would injure the freehold or not.—Morrison v. Berry, 42 Mich. 389.

§ 5. Buildings and building materials.

Character as affected by agreements between lessor and lessee, see post § 24.
Partitions in buildings, see post § 8.
Rebuttal of intent by leasehold or other limited interest of improver, see post § 12.
Improvements by life tenant or remainderman, see post § 13.
Erection by vendor or purchaser as index of intent, see post § 14.
Restoration of movable character by severance, see post § 16.
Court and jury questions, see post § 20.

¶ 18. Buildings permanently annexed to the freehold are regarded as realty.—Pangborn v. Continental Ins. Co., 62 Mich. 638.

¶ 19. Cut stone and structural iron located on lots conveyed and on adjacent lots and intended specifically for a partially completed building on the lots conveyed passes with a warranty deed as part of the real estate.—Byrne v. Werner, 138 Mich. 328; Moore, C. J. and Hooker, J., dissenting.

§ 6. Dwelling house fixtures and appliances.

Heating boilers and appliances as movables by agreement, see post ¶ 81.

¶ 20. Where grates affixed to defendant's house are removable without injury to the building, and defendant, when sued for the price, offers to return them to plaintiff, claiming that they do not meet the latter's warranty, they do not become fixtures as between the parties.—Aldine Mfg. Co. v. Barnard, 84 Mich. 632.

§ 7. Office and business equipment.

Built-in machinery and power plants, see post § 9.
Court and jury questions, see post § 20.

¶ 21. Ordinary movable office furniture and ordinary vehicles are not fixtures, and the question whether personal property in use about a mine can be so regarded is a question of the intent with which it was attached to the freehold.—Scudder v. Anderson, 54 Mich. 122.

¶ 22. Steam pipes for radiation, arc lights and electric elevator motors installed by a merchant as tenant in a business building are fixtures which the tenant has the right to remove at the expiration of his lease, and do not pass to another tenant under a subsequent lease.—Lovett v. Bermingham-Seaman-Patrick Co., 192 Mich. 372.

¶ 23. Piles in a milldock, to which booms for the storage of logs are attached, are real estate, and a wilful injury to them constitutes a trespass to real property.—John Spry Lumber Co. v. Steam Barge C. H. Green, 76 Mich. 320.

§ 8. Partitions.

¶ 24. A wooden half partition, nailed at the ends to blocks let through the plastering and at the bottom to a strip of board nailed to the floor, put up by a landlord's consent and afterwards sold to him by the tenant, is a fixture and not subject to levy as person-

alty, nor to replevin as goods and chattels. —McAuliffe v. Mann, 37 Mich. 539.

§ 9. Machinery and power plants.

Machinery installed by one not owner but lessee or licensee, see post § 12.

Machinery installed by purchaser, see post § 14.

Machinery placed by firm on land owned by members as individuals, see also post ¶ 54.

Evidence as to intent of parties and character of the machinery, see post § 19.

Effect of agreements as to character of machinery, see post §§ 21-25.

Effect of chattel mortgage or reservation of title to secure purchase price, see post §§ 22, 23.

Character as affected by lease or other agreement between lessor and lessee, see post § 24.

Making machinery partnership realty by annexation to partnership lands, see Partnership.

¶ 25. Machinery annexed in a substantial manner to a building is not a fixture unless there is such unity of title to the realty and the machinery that a conveyance of the realty would of necessity convey the fixture also. If one owns unlike interests in the land and in the machinery, the latter must be considered personal estate. A thing cannot, as to an undivided interest therein, be real estate, and as to another undivided interest be personalty.—Adams v. Lee, 31 Mich. 440.

¶ 26. Where land and machinery put upon it are held by different titles, and a steam-engine is afterwards put in to run the machinery, the engine partakes of the character of the machinery, and does not become part of the realty.—Robertson v. Corsett, 39 Mich. 777.

¶ 27. Machinery not made expressly for use in the building in which it is placed, but capable of beneficial use if removed or set up in some other building, is personalty or realty according to the intent or understanding fairly deducible from the circumstances.—Robertson v. Corsett, 39 Mich. 777.

¶ 28. Machinery specially adapted for use in connection with the realty, and put up for use and actually used on it and owned in common with the realty, is a fixture, however the parties may regard it. So held where the machinery of a woolen factory, propelled by a water-wheel with shaft and belting, had been included as personal property in a mortgage of the land on which it was placed.—Lyle v. Palmer, 42 Mich. 314.

¶ 29. Machinery was set up in a building as follows: A boiler was erected in a brick arch, an engine fastened on timbers let into the ground and resting on a foundation of masonry, and a saw-mill placed over the engine, connected with it by belts and chains and fastened by bolts or screws to the framework of the building. Held, that the mode and degree of annexation were enough to convert these chattels into realty.—Coleman v. Stearns Mfg. Co., 38 Mich. 30.

¶ 30. A saw-mill and its appointments are prima facie part of the realty and should be so treated if no agreement, understanding or intent is shown to change their character.—Robertson v. Corsett, 39 Mich. 777.

¶ 31. A boiler, engine and saw-mill placed in a building by a tenant and fastened to a floor by cleats or bolts and hooks in such a manner as to be removable without injury to the building does not become part of the realty and is not covered by a mortgage given on the land while the tenant is in possession. —Bartlett v. Haviland, 92 Mich. 552.

¶ 32. Heavy machines used in a foundry and machine shop need not be fastened to the soil or building in order to constitute them fixtures so that they would be covered by a mortgage upon the realty, especially where the parties understand they are so covered.—Smith v. Blake, 96 Mich. 542.

¶ 33. A stationary engine resting on a brick foundation inclosed in a frame building in such way that it cannot be removed without taking out a side of the building, there being unity of title as to the land and the engine both having passed by deed of the land, is real property.—People v. Jones, 120 Mich. 283.

¶ 34. A cupola and crane bricked up, built into and permanently attached to a building by the owner and without which the building would not be in condition for immediate use, it also appearing that the cupola and crane would be injured by their removal, are part of the realty and pass to the purchaser of the premises under foreclosure proceedings.—Lord v. Detroit Sav. Bank, 132 Mich. 510.

§ 10. Fences and materials for fencing.

Fences made by wrongful claimant, see post ¶ 53.

Effect of agreements to fix character, see post § 21.

Estoppel to claim as personalty, see post ¶ 64.

¶ 35. Rails placed in a line fence, but upon the land of the adjoining owner, with no intention of leaving them permanently, are personal property.—Curtis v. Leasia, 78 Mich. 480.

¶ 36. Fence rails piled upon land do not pass by a deed of such land though for 50 years previously they had been part of a fence upon the premises.—Harris v. Scovel, 85 Mich. 32.

§ 11. Manure produced on farm.

¶ 37. Where manure is made not from the products of a farm, but substantially like making it in a livery stable, it belongs to the tenant.—Taylor v. Newcomb, 123 Mich. 637.

¶ 38. As between landlord and tenant, manure made on the farm by the cattle of the tenant, which is made from the products of the farm, and as a result of the consumption of its produce thereon, becomes a part of the realty.—Taylor v. Newcomb, 123 Mich. 637.

¶ 39. Manure belongs to a tenant and he is entitled to remove it from a farm of which he was the former owner and which he sold taking back a lease including buildings, barnyard, etc., and where he had stored hay, cornstalks and straw in the barn, and during the following winter made the manure by feeding such fodder to his stock. In that case it was not a product of the farm.—Taylor v. Newcomb, 123 Mich. 637.

§ 12. Leasehold or partial interest as rebutting intent to annex.

Improvement by life tenant or remainderman, see post § 13.

Effect of reservation of title by seller to husband, where thing is annexed to land owned by entirety, see post ¶ 82.

Right of representative of deceased lessee to value of sawmill frame built by decedent on land sold by lessor, see Estates of Decedents ¶ 281.

¶ 40. Personal property that can be removed from the land cannot be part of the realty when the owner does not also own the land.—Scudder v. Anderson, 54 Mich. 122.

¶ 41. Machinery was put up in a drill-house on another's land for the temporary purpose of boring a salt well, and was removable without injuring the freehold. Held, that it was not a fixture and was not covered by a conveyance of the land.—Bewick v. Fletcher, 41 Mich. 625.

¶ 42. As between landlord and tenant of a mining lease, engines and boilers erected by the tenant on brick and stone foundations, and bolted down solidly to the ground, and walled in with brick arches; and dwellings erected by the tenants for miners to live in, standing on posts or dry stone walls piled together—where such machinery and buildings were intended to be merely accessory to the mining operations under the lease, and when there was no intention in affixing them to the realty to make them accessory to the soil, and where they can be removed without material disturbance to the land—are regarded as "trade fixtures," and may be removed at or before the termination of the lease.—Conrad v. Saginaw Min. Co., 54 Mich. 249.

¶ 43. Where real estate is owned in undivided interests by the individuals who compose a partnership which has only the use of it, trade fixtures set up by the partners do not become realty, and when their occupation ceases the partners may remove them. They are not covered by mortgages on the premises if their owners did not plainly mean them to be so.—Robertson v. Corsett, 39 Mich. 777.

¶ 44. It must be presumed that where a frame building, supported only by posts, with no partitions, and without a cellar, is erected on premises by a tenant from month to month the lessee did not intend that the building should become a part of the realty.—Higginbotham v. Phillips, 192 Mich. 49.

§ 13. ——Improvement by life tenant or remainderman.

Under agreement between parties, see post § 24.

¶ 45. Permanent improvements made by a life tenant inure to the benefit of the remainderman.—Curtis v. Fowler, 66 Mich. 696.

¶ 46. A building erected by the remainderman with the life tenant's consent and with the intention to make it part of the freehold becomes such.—Stevens v. Rose, 69 Mich. 259.

§ 14. Buildings or improvements by vendor or purchaser.

¶ 47. A house erected upon land by one in possession under a contract of purchase is part of the realty.—Hogsett v. Ellis, 17 Mich. 351.

¶ 48. Buildings erected by the grantor after conveying the land belong to the grantee in absence of any agreement.—Kruger v. LeBlanc, 75 Mich. 424.

¶ 49. A house erected upon land under contract of sale becomes part of the realty, and as such the property of the owner of the land, subject only to the vendee's rights therein.—Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49.

¶ 50. A house erected upon land under contract of sale does not become a fixture upon a third person's land to which it is tortiously removed.—Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49.

¶ 51. A mill and milling machinery placed upon premises held under a contract of purchase become part of the realty and are included in a mortgage of the premises.—Morley v. Quimby, 132 Mich. 140.

¶ 52. Mill machinery ordered by mortgagors in possession of an old mill that had been run 40 years and whose machinery was worn out, which was to be put into the mill for the purpose of increasing its capacity,

and negotiated for on the representations of the milling company relying on an agreement with complainant to discontinue foreclosure proceedings and extend the time for payment of the mortgage if improvements were put upon the property, and not to be accepted and paid for until after installation and trial, the title as between seller and purchaser has not passed, and the property cannot be said to have become a fixture and liable for the mortgage.—First Commercial & Sav. Bank v. Trenton Milling Co., 144 Mich. 188.

§ 15. Improvements by persons without title or land interest.

Buildings removed to another's land tortiously, see ante ¶ 50.

¶ 53. Fences built upon, and a cellar built in, another's land, by one who has fraudulently acquired colorable title, were regarded as permanently annexed in his own wrong, and he was refused indemnity therefor.—McCredie v. Buxton, 31 Mich. 383.

¶ 54. Where the individual members of a copartnership owned land used for partnership purposes, and bought as a firm, under a contract of conditional sale, an engine, boilers, and other milling machinery, and annexed them to the realty, there was sufficient unity of title to the land and machinery to support the contention of a mortgagee of the land that the machinery had become fixtures, and was covered by his mortgage.—Wickes Bros. v. Hill, 115 Mich. 333.

§ 16. Severance and restoration of movability.

Intention at time of affixation, see ante § 3.
Agreement with mortgagor in possession for severance, see post ¶ 89.
Chattel mortgage as agreement of severance, see also post ¶ 99.
License to remove by mortgagor in possession after foreclosure, see also post ¶ 97.

¶ 55. A deed or mortgage which specifically mentions buildings or other fixtures in the description does not thereby sever them and make them personalty.—Lyle v. Palmer, 42 Mich. 314.

¶ 56. House erected on land under contract of purchase becomes part of realty, but is personalty when severed, and so remains though wrongfully set upon third person's land.—Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49.

¶ 57. A personal character is not impressed on fixtures by chattel mortgaging them, where it was done out of caution lest they should be held to be personalty and therefore not covered by a contemporaneous real estate mortgage.—Studley v. Ann Arbor Sav. Bank, 112 Mich. 181.

¶ 58. If a tenant sell fixtures as personalty and takes back a chattel mortgage on them, he is not thereby invested with any new rights as against his landlord, unless it appears that the latter has waived or relinquished his own right derived from their annexation, or has precluded himself from asserting it against the tenant.—O'Brien v. Kusterer, 27 Mich. 289.

¶ 59. A building so constructed as to be a part of the realty, and which is treated as such by the parties to a real-estate mortgage, will not be deemed to have been severed from the realty, and made personalty, as against the mortgagee, in favor of one who accepts a subsequent mortgage of the premises described in the first mortgage, "together with the building and its appurtenances," merely because the first mortgagee, to make sure of his security, takes, in addition to the real-estate mortgage, a chattel mortgage covering the building.—Miles v. McNaughton, 111 Mich. 350.

¶ 60. A verbal agreement by the agent of the purchaser at a foreclosure sale with the mortgagor just before he yielded possession of the premises, that the mortgagor might remove a certain cupola and crane annexed to the premises, and a later agreement that they might remain and be sold to the incoming tenant, have no legal effect to change property which in its nature is realty, into personalty.—Lord v. Detroit Sav. Bank, 132 Mich. 510.

¶ 61. A verbal agreement by the agent of the purchaser at a foreclosure sale, with the mortgagor just before he yielded possession of the premises, that the mortgagor might remove a certain cupola and crane annexed to the property, and a later agreement that they might remain and be sold to an incoming tenant, do not tend to show that the mortgagees and the purchasers considered the property personalty at the time it was annexed.—Lord v. Detroit Sav. Bank, 132 Mich. 510.

§ 17. Effect of physical severance.

Constructive severance by agreement, see ante § 16.
Injurious effect of severance as indicia of intent to annex permanently, see also ante § 4.
Injurious consequences of removing machinery as index of intent to affix permanently, see also ante ¶¶ 33, 34.

¶ 62. A gang edger in a sawmill was held to be a trade fixture which a tenant who put it in might remove during the term of his lease, but not afterwards against the landlord's consent; and if he left it in the mill and the landlord detached it the tenant did not for that reason recover title to it as a personal chattel.—Stokoe v. Upton, 40 Mich. 581.

§ 18. Estoppel to question affixation or severance.

See also ante ¶ 12.

Estoppel to assert removable character by having witnessed inconsistent mortgage, see also Estoppel § 34.

¶ 63. One who builds a house on land held by him under a partly-performed parol contract for purchase, and who rents it to a tenant, cannot treat it as personalty and bring trover as for conversion against a third party who ousts the tenant under claim of title.—Bracelin v. McLaren, 59 Mich. 327.

¶ 64. A deed describing the premises as the same which were assigned to the grantor by commissioners in partition, together with the hereditaments and appurtenances, does not estop the grantor from claiming, as personal property, rails which at the time of the partition were in a fence on the land, but which before the deed were taken out and piled up.—Harris v. Scovel, 85 Mich. 32.

¶ 65. Plaintiffs sold mill machinery to a millwright, knowing that he had contracted with defendant that the machinery should be attached to defendant's realty. The sale was conditioned so that title should not pass nor should the machinery become a fixture until payment of the purchase price. Without notifying defendant of this retention of title, plaintiffs guaranteed to defendant that the property should be shipped to him upon his paying an amount stated, on the millwright's order. Held, that plaintiffs were estopped from claiming that the title to the property did not pass to defendant under his contract with the millwright.—Jenks v. Colwell, 66 Mich. 420.

¶ 66. The owner of a fixture attached to his freehold, but improperly levied upon as a chattel, is not estopped from claiming it as part of the realty by bidding for it at the execution sale, and allowing it to be struck off to another without giving notice of his ownership or of its character as realty.—McAuliffe v. Mann, 37 Mich. 539.

§ 19. Presumptions and evidence.

Intention as test and manner or mode of annexation as indicia of intent, see ante §§ 3, 4.

Inconclusiveness of evidence afforded by manner of annexation, see also ante § 4.

Sufficiency of evidence to go to jury, see post § 20.

Effect of agreements, mortgages and the like to fix character of the improvement, see post, III.

General law of evidence and presumptions, see Evidence.

Judicial notice as to customary annexation of engines and boilers, see Evidence ¶ 118.

Nonassertion of reserved title as admission against vendor's interest in machinery, see also Evidence ¶ 2076.

¶ 67. Machinery owned by tenants in a mortgaged building was sold with the building by bill of sale apart from the deed of the realty. The assignee of a purchaser removed it after foreclosure but before possession was taken, and the foreclosure purchaser sued him in trover. Held proper to show that it had always been treated as personalty by the owners, who had a right to keep it apart from the realty and free from the mortgage, which was not taken in reliance on it.—Ferris v. Quimby, 41 Mich. 202.

¶ 68. The fact that the owner transferred a certain cupola and crane as personal property after the commencement of foreclosure proceedings against the real estate to which they were annexed is inadmissible as evidence of the intent with which they were so annexed, since if they were part of the realty they became so at the time they were annexed.—Lord v. Detroit Sav. Bank, 132 Mich. 510.

§ 20. Questions of law and fact and instructions.

General law of instructions, see Instructions.

¶ 69. Defendant erected a building on mortgaged premises owned by him, and, after default, deeded the property to plaintiff, the mortgagee, in satisfaction of the mortgage, taking back a lease for one year, with an option to purchase. Within the year he removed the building to other land owned solely by him, and, in replevin by plaintiff, claimed that the building was erected for partnership purposes by a firm of which he was a member, and was to be removable at their option. Plaintiff testified that defendant assured her, when the deed was given, that the building would become her property, and that he had first tried to borrow more money because of the additional security. There was also testimony that defendant had made contradictory statements with respect to his reasons for removing the building. Held, that the evidence raised a question for the jury as to whether the building was personal property as claimed by defendant, or was in fact a fixture.—Byrnes v. Palmer, 113 Mich. 17.

¶ 70. Whether ice houses erected for the purpose of carrying on the ice business were trade fixtures, or improvements within the meaning of Comp. L. 1897, § 10995 which permits an unsuccessful defendant in an action of ejectment who has occupied the premises in good faith, to recover for improvements, is properly for the jury under proper instructions.—Thomas v. Wagner, 131 Mich. 601.

III. AGREEMENTS AFFECTING CHARACTER OF THING OR RIGHT TO REMOVE.

§ 21. Agreements in general.

Agreements effecting severance and restoration of movability, see ante § 16.

Subsequent sale as land or chattel as an index of intent, see also ante ¶ 68.
Agreements preserving personal character of machinery as characterizing engine installed to drive it, see also ante ¶ 26.
Rights of vendors and purchasers as to chattels on the land, see Vendors and Purchasers, VIII-X.
Right to value of buildings constructed on land under agreement that land was to be devised as security where will is revoked, see Estates of Decedents ¶ 219.

¶ 71. There is no inflexible rule of law which will make chattels which have been attached to the soil a part of the realty where they are capable of being severed without injury to the freehold. The general rule respecting such annexation is always open to variation by agreement of parties.—Crippen v. Morrison, 13 Mich. 23.

¶ 72. A mortgage of a brewery also covers storage tanks, fermenting tubs, chip casks, kettle, pipes for cooling beer, and for passing beer from the kettle to the casks and from the casks to the storage tanks, because it is impossible to believe that the mortgagor and mortgagee intended to exclude from its operation these articles without which the brewery could not be operated, and which could not be removed except by being taken to pieces.—Dehring v. Beck, 146 Mich. 706.

¶ 73. Fence-rails are not of necessity part of the realty unless they are in a fence, and even then they may remain personalty, if such was the agreement of the parties interested at the time the fence was built.—Harris v. Scovel, 85 Mich. 32.

§ 22. Mortgaging or selling as chattel.

See also ante ¶ 28.
Mortgaging as chattel as effecting conversion to movable, see ante § 16.
Recordation of mortgage, see Chattel Mortgages, I, C, D.
Filing of conditional sale agreement, see Sales, XII.
Bill of sale of building as chattel mortgage in effect, see Chattel Mortgages ¶ 16.

¶ 74. A planing-machine, weighing three tons, introduced through the doorway and fastened to the floor by cleats, bolts, screws and rivets, but removable without injury to the building, was mortgaged as a chattel after a mortgage had been given on the premises, describing them as land without mentioning buildings or referring to its uses. There was nothing which necessarily showed that the mortgagee of the realty had been induced to rely upon the machine as security. Held, that the presumption was that it remained a chattel.—Wheeler v. Bedell, 40 Mich. 693.

¶ 75. A portable sawmill, subject to a chattel mortgage, was moved by its owner upon land held by him under a contract of purchase which provided that the buildings and improvements placed or made on the premises should remain thereon as further security for the execution of the covenants therein contained, unless the removal of such buildings or improvements should be consented to in writing by the owner of the land. It was needed there only to saw the timber on the land, which would last about five years. Held, that it was not annexed to the land, and that its character as personalty was fixed when the mortgage, of which the vendor of the land had notice, was made.—Burrill v. Wilcox Lumber Co., 65 Mich. 571.

¶ 76. Machinery attached permanently to the realty, and intended to be used with the premises, and included in a real-estate mortgage on the land, will be treated as fixtures covered by such mortgage, although a chattel mortgage is given thereon at the same time to insure against any possible contingency that such machinery might be held to be personal property.—Studley v. Ann Arbor Sav. Bank, 112 Mich. 181.

§ 23. Sale with reservation of title.

Rights of seller where title is not reserved, see post § 26.

¶ 77. Machinery in the possession of a vendee under a contract for its purchase, which retains the title in vendor until the machinery is paid for, cannot be attached to a mill by a purchaser from the vendee, before such payment, so as to make it a part of the realty.—Gill v. DeArmant, 90 Mich. 425.

¶ 78. Machinery which, by the terms of a lease, is to be regarded as personalty, continues such though attached to the buildings by masonry, and cannot be considered as a trade fixture removable only during the tenancy.—Lake Superior Ship Canal, R. & I. Co. v. McCann, 86 Mich. 106.

¶ 79. A portable sawmill, paid for only in part and the title of which remains, under the contract of sale, in the vendor until full payment, does not, although fixed to his land by the vendee, become part of such land so as to pass by a conveyance thereof by him.—Lansing Iron & Engine Works v. Walker, 91 Mich. 409.

¶ 80. Plaintiff sold to W an engine and boiler under a contract by the terms of which the title was retained by plaintiff until the property should be fully paid for. W set up the machinery, in a substantial manner, on land held by B under a contract with a land company for its purchase. The engine was bolted to a stone foundation, and the boiler arched over with brick, and connected by rods with the outer walls of the building. B forfeited his contract to the land company, which had previously obtained a bill of sale of the boiler and engine from W. Defendant, who held a chattel mortgage given by W upon the property in question, purchased the

realty, supposing that she would thereby acquire title to the machinery as fixtures. Held, that the property retained its character as personalty, the title to which was in plaintiff.—Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413.

¶ 81. Boilers placed in basements of buildings for heating purposes which can be detached without injury to the boilers or to the buildings, and which are sold with reservation of title in the vendor, do not become part of the realty by annexation but remain personalty.—Schellenberg v. Detroit Heating & Lighting Co., 130 Mich. 439.

¶ 82. Boilers purchased by the husband under a contract reserving title in the vendor, and placed in buildings on real estate owned by him and his wife jointly by the entirety, do not become fixtures there being no unity of title in the boilers and the real estate.—Schellenberg v. Detroit Heating & Lighting Co., 130 Mich. 439.

¶ 83. A bona fide purchaser of a farm with a distillery thereon, acquires title to a steam pump attached to the drivewheel and connected with the boiler of the distillery and fastened to a plank resting on timbers set in the ground, all in a permanent building, though the pump had been sold to his vendor on credit, title to remain in the seller until paid for, all of which was unknown to the purchaser of the farm.—Watson v. Alberts, 120 Mich. 508.

§ 24. Between lessor and lessee or life tenant and remaindermen.

Mutual rights of lessor and lessee in fixtures and movables, including right of severance and removal, see Landlord and Tenant, IV, E.

¶ 84. Where the parties to a lease have agreed to treat as personalty machinery attached by the lessee to the realty, the manner of its attachment is immaterial, and it is subject to chattel mortgage by the lessee.—Booth v. Oliver, 67 Mich. 664.

¶ 85. A building erected by the remainderman and others with the life-tenant's consent, for keeping wild animals of a menagerie during the winter, the intention being to make it a part of the freehold when erected, becomes a part thereof, and the tenant cannot remove it.—Stevens v. Rose, 69 Mich. 259.

¶ 86. Where a lease provided that at its expiration the leased premises should be surrendered with all the improvements and erections, "engines, boilers, machinery, tools, implements and other movable personal chattels excepted," the lessor being given a lien upon "all machinery, implements and personal chattels" of the lessee as security for rent, etc., held, that it was the intention of the parties to make the engine and boiler and their attachment personal property; and that under such circumstances it became immaterial how they were fastened to the soil or to buildings.—Lake Superior Ship Canal, R. & I. Co. v. McCann, 86 Mich. 106.

¶ 87. Under mining lease providing that lessees might erect buildings and put in engines and machinery, which should become part of realty, but might be removed within sixty days after termination of lease if conditions had been performed by lessees, but not otherwise, an engine and hoisting drum purchased of the lessors by the lessees were held to have become part of the realty.—Pendill v. Maas, 97 Mich. 215.

¶ 88. A, having bought from B a building erected by the latter upon leased ground under a lease from C which gave B an option of purchasing the land during the term, went into possession with C's knowledge, C agreeing to give him a new lease, which she did when the old one expired. This lease provided that A might remove any buildings at the expiration thereof. Subsequently A sublet the land and building, and C conveyed the land to D, to whom A paid ground rent. In trover by A, who at the expiration of his lease asked permission to remove the building, it was held that the latter never became part of the realty.—Osborn v. Potter, 101 Mich. 300.

§ 25. By mortgagor or mortgagee.

¶ 89. The mortgagor being rightfully entitled to the possession of mortgaged land until foreclosure, he may make such arrangements for the use of the property, and for attaching and severing fixtures, as any other person might during his term.—Crippen v. Morrison, 13 Mich. 23.

IV. RIGHTS OF THIRD PERSONS.

§ 26. In general; seller or buyer of affixed chattels.

[Note. The right of a person other than the improver or the person directly opposing him usually depends on whether as between the immediate parties the chattel has become a fixture or remains a movable. As to this see ante, II, III.]

Mortgagee's rights in the affixed chattel, see post § 27.

Rights of land owner as against execution purchaser of the fixture levied on as a chattel, see ante ¶ 66.

Accession of fixture to building belonging to buyer's wife, see ante ¶ 2.

Estoppel to dispute that conditionally sold chattel has become a fixture, see ante ¶ 65.

Rights depending on the validity of chattel mortgages or conditional sales, or on recordation thereof, see Chattel Mortgages, I, D; Sales, XII.

Rights of parties under chattel mortgages and conditional sales, see also Chattel Mortgages, I, II; Sales, XII.

¶ 90. Chattels may be converted into realty by the purchaser, even though he has not paid for them, if they were sold to him with-

out conditions.—Coleman v. Stearns Mfg. Co., 38 Mich. 30.

¶ 91. The rights of a lessor to mining machinery which had become part of the realty before the lessor had any notice of a chattel mortgage on the machinery are superior to those of the chattel mortgagee, though by terms of the lease the lessee may under certain executory conditions become entitled to remove fixtures.—Pendill v. Maas, 97 Mich. 215.

¶ 92. A bar, bar-fixtures, cupboards, bowling alley, ways and racks substantially attached by a tenant to a building occupied by him as a saloon under a lease, are permanent fixtures, so annexed to the freehold as to belong to it and become the property of the landlord, and are not removable by the tenant's vendees.—O'Brien v. Kusterer, 27 Mich. 289.

¶ 93. A lessee of premises may purchase trade fixtures or amusement devices from a sublessee under a prior lease.—Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92.

¶ 94. Where a frame building is erected upon premises by a subtenant, but he has the right of removal under an agreement with the owner, and the building is sold to another, who attorns to his landlord, and this purchaser also sells the building, but is thereafter treated as a tenant of the original lessor, the latter refusing to recognize the last purchaser as tenant, and subsequent purchasers of land might have learned, by inquiry, that the building was considered as a chattel by the former owner of the land and by the various purchasers of the building, such last purchaser may remove the building.—Higginbotham v. Phillips, 192 Mich. 49.

§ 27. Rights of mortgagees or subsequent takers.

See also ante ¶ 31.
In machinery placed on land by purchaser, see ante ¶¶ 51, 52.
Effect of chattel mortgage by tenant as affecting landlord's claim of fixtures, see also ante ¶ 58.
Rights of land mortgagee as dependent on whether chattel has become part of the land, see ante, II.

¶ 95. Trover for conversion will not lie against one who without notice has purchased real property, a part of which had been sold to the lessees of his vendor as personalty, with a stipulation that title should not pass until it was paid for, but which had been allowed to be made a part of the realty. So held where a man bought a mill without notice that the water-wheels were subject to such an arrangement.—Knowlton v. Johnson, 37 Mich. 47.

¶ 96. Where, at the time a mortgage is taken, buildings on the land appear to be part of the realty, and the mortgagee—the mortgagor being the owner in reversion and being also in possession of the premises—has no knowledge to the contrary, such mortgagee is in the position of a bona fide purchaser, and a tenant under a life lease must be confined to his record title, and cannot set up any latent equities or parol agreement whereby the buildings are personal property and removable as trade fixtures or otherwise.—Stevens v. Rose, 69 Mich. 259.

¶ 97. After a mortgage had been assigned the mortgagor bought machinery which he affixed to the soil, and went into partnership with his son, who was to have an equal interest with him. The machinery was not paid for, however, and after foreclosure of the premises was decreed, and also after the firm had dissolved, the mortgagor, acting in the firm name, released the firm's interest in the machinery to the vendor, whom he licensed to enter and remove it. Held, that the assignee of the mortgage could insist that the machinery was reduced to realty subject to the mortgage, and unremovable as against his objection.—Coleman v. Stearns Mfg. Co., 38 Mich. 30.

¶ 98. One who puts a steam-engine and its appurtenances in a mill on the land of another, on the agreement that they shall remain his until the owner of the land shall secure him the payment of the price thereof by chattel mortgage, and who receives the mortgage accordingly, is entitled to claim and hold them under such mortgage as against one who held a prior mortgage upon the land.—Crippen v. Morrison, 13 Mich. 23.

¶ 99. Machinery attached to a building and constituting with it a steam stave and heading mill, but being equally adapted for similar use in any other building, was mortgaged as personalty by the owners of the property. Held, that this was in law such a severance as would make the machinery, as between the owners and the mortgagees, personal property, no other person's rights then intervening, and that subsequent execution purchasers of the real estate with notice of the mortgage could claim no rights in the machinery.—Manwaring v. Jenison, 61 Mich. 117.

¶ 100. One who makes an unrecorded conditional sale of milling machinery, knowing that it is likely to be so attached to the realty as to become a part thereof, cannot maintain his title to the property, after it has been so attached, as against a good-faith mortgagee of the land, even though the original contract of purchase expressly provided that the machinery should not become a fixture by reason of its being annexed to the realty.—Wickes Bros. v. Hill, 115 Mich. 333.

¶ 101. A lease of chattels for a given term, at a fixed rental, with an option in the lessee to purchase at a specified price, stands upon the same basis as a contract of conditional

sale, so far as the rights of third persons are concerned, where the property has been attached to real estate in such manner as, under ordinary circumstances, to become a part thereof.—Wickes Bros. v. Hill, 115 Mich. 333.

§ 28. Effect of merger of leasehold and fee.

¶ 102. A mortgage included with the real estate the manufacturing establishment and buildings for the purpose to be erected thereon. The lessees of the factory, after putting in machinery, purchased the reversion of the land on which it stood, subject to the mortgage. Held, that they united the title to the realty and fixtures in one person, and the fixtures became subject to the mortgage. —Jones v. Detroit Chair Co., 38 Mich. 92.

§ 29. Retention or use as a conversion.

General law of conversion, see Conversion.

¶ 103. Trover does not lie on the refusal of a landowner to surrender personal property which plaintiff himself has annexed to the freehold intending it to be a fixture. So held where a dealer in gas-manufacturing machines had caused one to be placed in a house which he afterwards found belonged to the wife of the man who contracted that the machine should be placed there.—Morrison v. Berry, 42 Mich. 389.

¶ 104. Where ties were taken and used by the subcontractor for building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become realty, cannot bring trover against the company as for their conversion.—Detroit & B. C. R. Co. v. Busch, 43 Mich. 571.

¶ 105. Where machinery is sold to be set up in a mill, but with a stipulation that title shall not pass until it is paid for, and without the vendor's knowledge it is so attached to the realty as to make it, under ordinary circumstances, a fixture, and before it is paid for the property is sold to some person who had sufficient knowledge of the owner's claim to put him on inquiry, trover will lie for the conversion of the machinery.—Ingersoll v. Barnes, 47 Mich. 104.

FLAGMEN to FOLLOWING TRUST PROPERTY.

Cross-References.

Flagmen—
Duty of railroad master towards, see Master and Servant, III.
As fellow-servants, see Master and Servant, III.
At crossings, see Railroads, VIII, D.

Flats—
Building regulations and restrictions, see Buildings.
Rights of landlord and tenants, see Landlord and Tenant.

Fleeing from Justice—
Extradition of fugitives, see Extradition.

Flight—
As act evincive of guilty knowledge, see Indictment, VIII, B.
Abstaining from flight when feasible as self serving act, see Indictment, VIII, B.

Floatage—
Use of streams and lakes for log floating, see Forestry, II.
Navigability of waters, see Navigable Waters.

Floods and Flowage—
See Waters, II, IV, and see also Mills and Milling.
Condemnation of dam sites, see Eminent Domain.
Creation and loss of easements of flowage, see Easements; Waters, IV.

Fluctuating Investments—
Proper and legal trust investments, see Trusts, VI, C.
Directions in will as to investments, see Wills, VI.

Flues—
Rights and liabilities of lessors and lessees in flat and apartment buildings, see Landlord and Tenant, IV.

Flying Objects—
Master's liability to servant, see Master and Servant, III.

Flying Switches—
Liability to servants for resultant injuries, see Master and Servant, III.
Injuries to persons at crossings, see Railroads, VIII, D.

Foeticide—
See Crimes § 40; Homicide; Indictment.

Fogs—
As condition affecting care and negligence, see Shipping, V; Railroads, VIII; Street Railways, IV; Carriers, IV (injuries to passengers); Master and Servant, III (injuries to servants).

Folios—
Basis for allowing costs, see Costs, III, V, B.

Following Precedents—
See Courts, IV.

Following Trust Property—
See Trusts, XIII.

FOOD.

TREATS of the laws and regulations for the manufacture, keeping and sale of food, excluding adulteration, which see.

Analysis.

§ 1. In general; public regulation and inspection.
§ 2. Deceptive form or coloration.
§ 3. False branding or labeling.
§ 4. Knowledge or intent as element in offenses.
§ 5. Prosecutions and actions for penalties.
§ 6. Liability and actions for injuries to consumers.

§ 1. In general; public regulation and inspection.

Amendment and repeal of oleomargarine law, see also post ¶ 8.
Police power of the state, see Constitutional Law § 101.
Police power to establish standards for sausage, see Constitutional Law § 101.
Police power as to oleomargarine, see Constitutional Law § 101.
Due process in food laws, see Constitutional Law § 156.
Municipal powers of licensing and regulation in general, see Municipal Corporations, IX.
Municipal regulation as to weight of loaves of bread providing seizure of short-weight bread as a "taking," see Eminent Domain ¶ 83.
Regulations of medicine and standards thereof, see Medicine and Surgery.
Prisons and jails as subject to inspection under dairy and food laws, see Prisons.
Pure food laws, see Comp. L. 1915, chap. 124.
Statutes defining offenses against the public health in handling, manufacture, sale, or possession of food and drink, see Comp. L. 1915, chap. 254, § 15122 et seq.
Statute against frauds and deception in sale of Michigan grown fruits and vegetables, see Comp. L. 1915, § 15365 et seq.

¶ 1. Local L. 1879, Act No. 351, as amended in 1881 (Local L. 1881, Act No. 419), to prevent the sale of unsound meat or provisions in Detroit, was repealed by the provisions of the city charter of 1883 (Local L. 1883, Act No. 326), relating to the same subject.—People v. Bussell, 59 Mich. 104.

¶ 2. The pure food law (Pub. Acts 1895, No. 193 as amended) is a penal statute and should receive a strict construction.—People v. Jennings, 132 Mich. 662.

¶ 3. A preparation sold as a "food" which is claimed to be a regulator "to be used according to directions, and is not sold as a feeding stuff, nor is it to be fed in place of grain or any other feed," and for which in addition to claims of medicinal properties, it is stated in the labels "It fattens both cattle and hogs quickly, makes them grow larger and healthier, and makes their meat tender, more juicy, and better eating." is subject to regulation under Pub. Acts 1905, No. 12, § 18, which applies to "all condimental stock foods, patented and proprietary stock foods, claimed to possess nutritive properties and all other materials intended for feeding to domestic animals."—Pratt Food Co. v. Bird, 148 Mich. 631.

¶ 4. The Detroit House of Correction is, under Act No. 167, Public Acts 1899, How. St., 2nd Ed., § 3345, subject to inspection by the State Dairy and Food Commissioner, since, by reason of the fact that such institution receives and boards prisoners under contract with various counties of the state, it is a place where "food or drink is made, stored, sold or offered for sale."—People v. Jacobs, 184 Mich. 77. (Equally divided court.)

¶ 5. An agent who in good faith takes an order for pure pepper is not guilty of violation of the pure food law (Pub. Acts 1895, No. 193), because his principal, in filling the order, sends impure pepper.—People v. Morse, 131 Mich. 68.

§ 2. Deceptive form or coloration.

Element of knowledge or intent, see post § 4.

¶ 6. The provision of the pure food law (Pub. Acts 1895, No. 193, as amended), prohibiting the coloring of an article whereby damage or inferiority is concealed, has no application where there was no damage or inferiority and the coloring matter used was not injurious to health in any way.—People v. Jennings, 132 Mich. 662.

¶ 7. The fact that the use of coal-tar dye in the coloring of extract of vanilla was harmless did not excuse respondent in a prosecution for adulteration, where no other object was apparent from such use than to make the article appear of a quality better than it really was.—People v. Hinshaw, 135 Mich. 378.

¶ 8. Pub. Acts of 1913, No. 63, entitled an act to regulate the manufacture and sale of oleomargarine, and defining what constitutes oleomargarine, does not repeal Pub. Acts of 1901, No. 22, How. 2nd Ed., §§ 3232, 3233, entitled an act to prevent deception in the manufacture and sale of imitation butter and prohibiting the manufacture of a compound in which coloring matter is used, as the two acts are not conflicting.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

¶ 9. Pub. Acts 1913, No. 63, entitled an act to regulate the manufacture and sale of oleomargarine, defines what constitutes oleomargarine and excludes coloring matter.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

¶ 10. "Yellow butter," as used in the statute prohibiting deception in the manufacture and sale of imitation butter, means any butter produced from pure, unadulterated milk or cream of the same, having a yellow color.—People v. Phillips, 131 Mich. 395.

¶ 11. Pub. Acts 1901, No. 22, § 1, prohibiting the sale of oleaginous substances in imitation of yellow butter does not apply to the sale of a mixture of oleomargarine and other necessary ingredients without the use of artificial coloring matter and clearly within the permission of Public Acts, 1899, No. 147, § 6, which defines oleaginous products permitted to be sold.—Bennett v. Carr, 134 Mich. 243.

¶ 12. Pub. Acts 1901, No. 22, How. 2nd Ed., §§ 3232, 3233, entitled an act to prevent deception in the manufacture and sale of imitation butter, prohibits the manufacture and sale of oleomargarine which contains coloring matter.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

§ 3. False branding or labeling.

Element of knowledge and intent, see post § 4.

¶ 13. Public Acts 1903, Act No. 123, relating to the sale of corn syrup, construed as not requiring corn syrup to be labeled "glucose."—People v. Harris, 135 Mich. 136.

¶ 14. Where a manufacturer sold syrup under the label of "Maple Syrup and Cane Syrup," the sale is governed by 2 Comp Laws 1897, § 5007, requiring any adulterated maple syrup to be sold under a label specifying the percentage of the adulterant, and the sale is not governed by the Pure Food Law, No. 193, Pub. Acts, 1895, which requires no statement of ingredients in the case of ordinary articles of food.—Pierre Viaus Maple Co. v. Dairy & Food Com'r, 154 Mich. 73.

¶ 15. The word "adulteration" in the title of 2 Comp. Laws 1897, § 5007, relating to the sale of maple sugar, means the mixture of any foreign substance, wholesome or unwholesome, with maple sugar; and in connection with the proviso to section 5012, requires the label to show proportions where mixed with other syrups.—Pierre Viaus Maple Co. v. Dairy & Food Com'r, 154 Mich. 73.

¶ 16. A food mixture composed of beef, pork, veal, water and a cereal may be sold by retailers to consumers without violation of the Pure Food Statute, 2 Comp. Laws 1897, § 5010, provided the retailer labels the product as "sausage with cereal."—Armour & Co. v. State Dairy & Food Com'r, 159 Mich. 1.

¶ 17. In interpreting the meaning of 2 Comp. Laws 1897, § 5010, forbidding the sale of adulterated foods, the term "sausage" is to be taken in the sense understood by the people at large, and not as used by the manufacturers and dealers.—Armour & Co. v. State Dairy & Food Com'r, 159 Mich. 1.

¶ 18. A manufacturer of sausage in Chicago mixed a percentage of cereals therewith and supplied the same in packages to the retailers in Michigan, properly labeled to show the ingredients. The retailers sold to customers in small lots without informing them of the ingredients. Held, such sale by the retailers was in violation of 2 Comp. Laws 1897, § 5010, as being a sale of adulterated food forbidden by the statute.—Armour & Co. v. State Dairy & Food Com'r, 159 Mich. 1.

§ 4. Knowledge or intent as element in offenses.

Nonliability of sales agent for filling of order with impure goods, see ante ¶ 5.

Element of intent in the crime, see also Crimes ¶ 6.

¶ 19. Pub. Acts 1895, No. 193, prohibits the manufacture or sale of adulterated articles of food or drink, and prescribes what shall be deemed adulteration within the meaning of the act. Section 8 forbids any person from knowingly offering for sale cheese which is falsely labeled; this being the only case in which knowledge is expressly made an element of an offense designated by such statute. Held, that proof of guilty knowledge or intent is not essential to the conviction of one who sells adulterated food.—People v. Snowberger, 113 Mich. 86.

¶ 20. Scienter is an ingredient of the offense of selling or offering to sell, in violation of Pub. Acts 1913, No. 207, § 5, any fresh fruits or vegetables in packages which on their shown surfaces give a false representation of their contents.—People v. Frederighi, 192 Mich. 165.

¶ 21. Pub. Acts 1897, No. 71, prohibits the sale and manufacture of vinegar below the

standard prescribed, and it is no defense that the manufacturer or seller has no knowledge that the vinegar is not within the standard prescribed.—People v. Worden Grocer Co., 118 Mich. 604.

§ 5. Prosecutions and actions for penalties.

Civil liability and actions, see post § 6.
General law of indictments and prosecutions, see Indictment.
Actions for penalties in general, see Penalties.
Sufficiency of record for review of questions, see Indictment, XVI, C.

¶ 22. A complaint for selling vinegar below standard solid contents under Pub. Acts 1897, No. 71, consisting of two sections, both regulating sale of vinegar, cannot be objected to on the ground that it should have been drawn under the first section of the act, relating to cider vinegar, rather than the second, relating to other vinegars, as the statute as a whole provides that all "fermented" vinegar shall comply with the standard fixed by statute in containing solids, ash, or mineral matter, whether made from fruit or grain.—People v. Worden Grocer Co., 118 Mich. 604.

¶ 23. In a prosecution for selling vinegar below standard in violation of Pub. Acts 1897, No. 71, preventing the adulteration or debasement of vinegar, a contention that the act is unreasonable as providing an arbitrary, unscientific standard of cider vinegar, not calculated to protect the public, will not be considered, as such matters should be addressed to the legislature. It belongs to the legislature to determine primarily what measures are appropriate or needful for the protection of the public morals, health, or safety.—People v. Worden Grocer Co., 118 Mich. 604.

¶ 24. In a prosecution for the violation of Pub. Acts 1897, No. 71, preventing the adulteration of vinegar, by sale of vinegar having less than a standard of solids, a contention that the act is unreasonable, and that the reasonableness is a question of fact to be determined from expert evidence, will not be considered; as the question is neither for the court nor the jury, but for the legislature.—People v. Worden Grocer Co., 118 Mich. 604.

¶ 25. An information charging the colora tion of extract of vanilla to make an inferior article appear better and more valuable than it really was, was sufficient to sustain a conviction in a prosecution for adulteration, under Pub. Acts 1895, Act No. 193, as amended by Pub. Acts 1897, Act No. 118.—People v. Hinshaw, 135 Mich. 378.

¶ 26. Though in an action for violation of the pure food law (Pub. Acts 1895, No. 193, as amended), it is proper to resort to the U. S. Pharmacopœia formula for the manner of determining what lemon extract consists of, it is open to manufacturers to improve thereon where nothing is intermixed so as to lower or depreciate or injuriously affect the strength, quality or purity.—People v. Jennings, 132 Mich. 662.

¶ 27. Under the pure food law (Pub. Acts 1895, No. 193, as amended), which defines adulteration as the substitution of an inferior or cheaper substance, and also that it exists "if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it," an instruction that if any ingredient of lemon essence as defined by the pharmacopœia was wanting it amounted to an adulteration, is error since if nothing was eliminated except such ingredients as could be dispensed with without injury to it as a food product, there was no adulteration within the meaning of the statute.—People v. Jennings, 132 Mich. 662.

¶ 28. A conviction of a salesman for selling adulterated jelly under Pub. Acts 1895, No. 193, as amended by Pub. Acts 1897, No. 118, as amended by Pub. Acts 1899, No. 117, is not sustained by evidence that the respondent, a traveling salesman, took the order for pure fruit jelly upon which order the wholesale house furnished an adulterated product labeled "Pure Fruit Jelly."—People v. Skillman, 129 Mich. 618.

¶ 29. A conviction under Pub. Acts 1901, No. 22, prohibiting the sale of oleomargarine colored in imitation of yellow butter, will be sustained if the evidence shows there was sufficient coloring matter used to make it look like yellow butter, having any perceptible shade of yellow.—People v. Phillips, 131 Mich. 395.

¶ 30. In a prosecution for adulterating extract of vanilla by using coal-tar dye, testimony that the effect of such dye was to make the article appear of greater value than it really was, and that people would think it stronger that it really was, although weakened on cross-examination, presented a question for the jury.—People v. Hinshaw, 135 Mich. 378.

§ 6. Liability and actions for injuries to consumers.

Prosecutions and penal actions, see ante § 5.
Judicial notice of food qualities of oleomargarine, see Evidence § 3.
Negligence in purveying spoiled meat whereby one handling it contracted blood poisoning, see Negligence, II, B.

¶ 31. In an action for negligently selling spoiled meat whereby plaintiff was made sick, one of defendant's employees may be asked whether he knew of any spoiled meats that were sold by defendant about the time plaintiff bought, and another may testify whether he had seen spoiled meat prepared by defendant for sale about that time.—Craft v. Parker, 96 Mich. 245.

¶ 32. In an action for negligence in selling spoiled meat whereby plaintiff was made sick, it was for the jury to say whether defendant knew or by proper care could have known the condition of the meat.—Craft v. Parker, 96 Mich. 245.

¶ 33. In an action for negligence in selling spoiled bacon whereby plaintiff was made sick, it was for the jury to determine whether he exercised due care in eating the meat after he had smelled peculiar odors while it was cooking.—Craft v. Parker, 96 Mich. 245.

Liability of restaurant keepers and others for injuries to persons caused by tainted or unwholesome food, see note 7 N. C. C. A. 111, 112.

Liability for injuries due to presence of disgusting or filthy substances in food, tobacco, etc., see note 11 N. C. C. A. 359-365.

Sickness caused by tainted or unwholesome food, see note 3 N. C. C. A. 106-113.

Liability of warehouseman for contamination of foods, see note 2 N. C. C. A. 93-95.

FOOT PRINTS to FORCED VERDICTS.

Cross-References.

Foot Prints—
Evidence in criminal cases, see Indictment, VIII, B.

Forbearance—
Consideration for forbearance and forbearance as consideration for other promise, see Contracts, V.
Effect of extension on secondary liabilities, see Suretyship, II; Guaranty, III; Negotiable Instruments, VII.
Interest for forbearance, see Interest.
Releases distinguished, see Releases, I.

Force—
Unlawful force as tort, see Assault; Trespass.
In making arrest or detaining person, see Arrest § 22; False Imprisonment.
Remedy for entry on land or detention of it by force, see Forcible Entry.
Element in duress, see Duress.
Element in crime, see Crime, II; Rape.

Forced Construction—
See generally topics treating of the construction of writings, e. g., Contracts, VI, A; Deeds, III, A; Statutes, V; Wills, VI, A.

Forced Payment—
Recovery back, see Payment, VI; Duress.

Forced Verdicts—
See Verdicts and Findings; Indictment, IX, G.
Custody and conduct of jury during deliberations, see Trial, VIII; Indictment, IX, F.

FORCIBLE ENTRY AND DETAINER

(And Summary Proceedings).

TREATS of statutory proceedings for dispossession of forcible intruders on land and unlawful detainers of land by force and for restoration of possession to the person dispossessed or excluded. It also includes so called "summary proceedings" designed for similar relief. The possessory action of Ejectment and the tort action of Trespass are treated in topics by those names. See further cross-references below.

Analysis.

I. The cause of action.

§ 1. Nature and object of statutory remedy.
§ 2. ——Of summary proceedings.
§ 3. "Peaceable possession" of ousted person.
§ 4. Force in the entry.
§ 5. ——Force to resist re-entry.
§ 6. Forcible re-entry after forcible entry.
§ 7. Unlawful detainer.
§ 8. Right to damages.
§ 9. Grounds for and maturity of right to summary proceedings.
§ 10. ——Notice to quit or termination of tenancy.
§ 11. ——Service of notice.
§ 12. Waiver and estoppel of rights.

II. Complaint, procedure, trial, judgment and review.

§ 13. Jurisdiction of the proceedings and ouster of jurisdiction.
§ 14. Party complainant; who entitled.
§ 15. ——Assignees of vendors or lessors.
§ 16. ——Joint and several complaints.
§ 17. Complaint for forcible entry and detainer.
§ 18. ——Allegations of right to possession and entry.
§ 19. ——Description of premises.
§ 20. Complaint for summary proceedings.
§ 21. ——Right and title of complainant.
§ 22. ——Description of land.
§ 23. Jurisdictional allegations.
§ 24. Verification.
§ 25. Amendments of pleadings.
§ 26. Summons and appearance.
§ 27. ——Service and return.
§ 28. ——Substituted service.
§ 29. Venire and jury.
§ 30. Hour for appearance.
§ 31. Continuances.
§ 32. Declaration.
§ 33. Pleas and objections.
§ 34. ——To defects in complaint, process or venire.
§ 35. Issues and variance.
§ 36. ——Title to the land.
§ 37. ——Equitable titles and defenses.
§ 38. Burden of proof.
§ 39. Presumptions.
§ 40. Admissibility of evidence.
§ 41. Sufficiency of proofs.
§ 42. Province of court and jury; instructions.
§ 43. Custody, conduct and deliberations of jury.
§ 44. Verdicts and findings.
§ 45. Judgment and disposal of cause.
§ 46. Dismissal when title becomes involved.
§ 47. Costs.
§ 48. ——On appeal to circuit.
§ 49. Right to review and mode of review.
§ 50. Courts for review.
§ 51. Procedure to take appeal.
§ 52. Bond or security on appeal.
§ 53. Amendments and further pleadings on appeal.
§ 54. Scope of appeal and questions reviewable.
§ 55. Presumptions and concluded facts on review.
§ 56. Dismissal of appeal.
§ 57. Findings and judgment on review.
§ 58. Obligation and liability on bonds for appeal.
§ 59. ——Discharge or release of sureties.
§ 60. ——Alternative and elective remedies of plaintiff.
§ 61. ——Execution against sureties on principal judgment.
§ 62. ——Actions on bonds, and procedure and proof therein.

III. Writ of possession and restitution.

§ 63. Writ and execution of it.
§ 64. Payment or tender to stop proceeding.

Rights of possession and quiet enjoyment against forcible entries and disturbances, see such topics as Landlord and Tenant; IV; Life Estates; Trespass; Covenants for Title.
Forcible entry as a trespass and actions of trespass, see Trespass.
Impropriety of resort to force to remove fence, see Fences ¶ 20.

I. THE CAUSE OF ACTION.

§ 1. Nature and object of statutory remedy.

Elements of peaceable possession and forcible disturbance, see post §§ 3-6.
Elements of unlawful detainer, see post § 7.
Complaint, process and practice on trial, see post, II.
Exclusion of issues and trial of title to the land, see post §§ 36, 37.
Ouster of jurisdiction by raising issue of title, see post § 13.
Identification of property as requisite, see also post ¶ 87.
Possessory remedy of ejectment, see Ejectment.
Remedy for injury to the possession, see Trespass.
Equitable remedy to quiet title, see Quieting Title.

¶ 1. The object of the statute against forcible entries is not to aid men in violating their obligations, and holding what they have no right to hold, but merely to prevent riotous and forcible measures in breaches of the peace.—Marsh v. Bristol, 65 Mich. 378.

§ 2. ——Of summary proceedings.

Grounds for summary proceedings, right which will support the proceeding, and maturity of the right, see post §§ 9-11.
Complaint, process and practice on trial, see post, II.
General nature of statutory proceedings to recover possession in ejectment, see also Ejectment ¶ 5.
Statutory provisions for summary proceedings, see Jud. Act, chap. XXX, § 12 et seq.; Comp. L. 1915, § 13240 et seq.

¶ 2. While, as a general rule, summary proceedings will not lie where a question of title is involved, yet the title must be a legal title, and it must be raised by the evidence offered in the case.—Sayles v. Murphy, 201 Mich. 73.

¶ 3. Summary proceedings may be maintained by a sublessee against one to whom he sold the lease for the recovery of the premises where plaintiff obtained another lease for a further term from the original lessee, of which latter lease defendant was notified and defendant claimed the right of possession under a bill of sale of property, including the lease, dated during the term of plaintiff's original lease, and after the execution of the second lease to plaintiff, from one who erroneously claimed to have purchased the interest of the lessee in the original lease during the term of plaintiff's lease.—Sayles v. Murphy, 201 Mich. 73.

§ 3. "Peaceable possession" of ousted person.

Person entitled to possession as proper complainant, see post § 14.

¶ 4. Where premises are really vacant, a party making a bona fide claim to the right of possession may enter if it can be done without disturbance, and can speedily found such a possession as will be entitled to recognition under Comp. L. 1871, § 6695, How. St., § 8284, which forbids any entry upon lands except peaceably and by law. But "peaceable possession" cannot be based on a nocturnal entry upon premises used and improved at the time and for several months previously under claim of title and with the intruder's knowledge.—Newton v. Doyle, 38 Mich. 645.

¶ 5. Possession of a public billiard room, by a lessee, who has sublet the premises, sought to be acquired by placing several men therein, with directions to remain, which they do until the sublessee's hour for closing, when they are forcibly expelled, is not a sufficient basis for the institution of proceedings for forcible entry against the lessor, who is alleged to have colluded with the sublessee; since if there was collusion there was no forcible entry.—Vincent v. Brant, 101 Mich. 60.

§ 4. Force in the entry.

Forcible repulsion of ousted party attempting to re-enter, see post § 5.
Forcible re-entry after forcible entry, see post § 6.
Unlawful detainer with force, see post § 7.
Allegations of force in complaint, see post § 18.
Effect of later proceedings to legalize representative's forcible ouster of heirs from realty, see Estates of Decedents ¶ 396.
Statutory right to forcible entry action, see Jud. Act, chap. XXX, § 2; Comp. L. 1915, § 13230.

¶ 6. An entry without other force than that implied in every trespass is not within the forcible entry and detainer statute.—Smith v. Detroit Loan & Building Ass'n, 115 Mich. 340.

¶ 7. If an entry is obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to have been the forcible expulsion of the party in possession, and it is followed up by actual expulsion by means of personal threats or violence, or superior force, this will amount to a forcible entry.—Seitz v. Miles, 16 Mich. 456.

¶ 8. Evidence which shows merely an unlawful entry and detention, without showing

that they were accompanied with violence or a breach of the peace, will not support a complaint for forcible entry and detainer.—Davis v. Ingersoll, 2 D. 372; Harrington v. Scott, 1 Mich. 17.

¶ 9. The evidence to sustain a complaint under R. S. 1838, p. 490, ch. 5, § 2, for unlawful and forcible entry and detainer of premises, must show force or violence in making the entry, as well as the subsequent detention.—Latimer v. Woodward, 2 D. 368.

¶ 10. To sustain a complaint for unlawful and forcible entry and detainer there should be proof of such acts of violence as amount to a breach of the peace.—Harrington v. Scott, 1 Mich. 17.

¶ 11. Proof that the defendants (there being only two of them) repaired alone to the premises, and that one of them pounded upon the door and it was opened, whereupon they both entered, is not sufficient to sustain a complaint for forcible entry and detainer. —Harrington v. Scott, 1 Mich. 17.

¶ 12. Unless the tenant, disputing the right to possession with the landlord on a forfeiture of the lease, is driven off either by actual force applied to him, or as the only apparent way of avoiding its use against him at the time, he cannot be regarded as forcibly expelled, and there is no forcible entry.—Marsh v. Bristol, 65 Mich. 378.

¶ 13. Under 3 Comp. Laws 1897, § 11153, prohibiting forcible entries and detainers, it is not necessary that the actual invasion of the premises should be attended by circumstances requisite to give it the character of a forcible entry, or be accompanied by threats, actual force, or violence, or any conduct which would constitute a breach of the peace. —McIntyre v. Murphy, 153 Mich. 342.

¶ 14. Where defendant in forcible entry and detainer entered plaintiff's house accompanied by defendant's husband, his regular hired man, and two other men specially hired for the purpose, and informed the daughter of plaintiff that they intended "to move you folks out of here today," which they proceeded to do, there is a sufficient showing of force calculated to intimidate and terrify the occupants of the premises to constitute a forcible entry.—McIntyre v. Murphy, 153 Mich. 342.

¶ 15. Possession of premises is obtained forcibly by a landlord, in violation of Comp. Laws 1915, § 13229, providing that no person shall make any entry into lands, tenements, or other possessions except where entry is given by law, and in such cases he shall not enter by force, but only in a peaceable manner, so as to warrant the recovery of damages by the tenant, where the wife of the landlord, after termination of the lease, enters under the ruse that she has come to see what is the matter with the water pipes and is followed by two officers and her husband who, falsely representing that they have a valid writ of restitution, proceed to remove plaintiff's goods to a place designated by plaintiff upon his arrival.—Gallant v. Miles, 200 Mich. 532.

§ 5. ——Force to resist re-entry.

Forcible re-entry after forcible entry, see post § 6.
Assaults in defense of possession, see Assault § 18.

¶ 16. M., a tenant holding the premises in arrears of rent and subject to a forfeiture of his lease, concurred with B., an agent of his landlord, in exhibiting the house to a proposed tenant, and then, when B. asserted that he took possession of the house and of plaintiff's goods therein mortgaged to secure the rent and began to put out his goods other than those mortgaged. M. remonstrated and left the house to get assistance. B. shut up the house and ejected M. on his return. Held, that B.'s entry was not forcible and ejecting plaintiff was not a trespass.—Marsh v. Bristol, 65 Mich. 378.

¶ 17. Where a school-district by its teacher had long been in possession of a schoolhouse upon land the legal title whereto was in the authorities of a certain religious body who had recognized the district's possession but who subsequently claimed the school was parochial, not public, the teacher could not legally attorn to such authorities, and the district having peaceably obtained possession could use force against force in retaining it without changing the character of its entry or making that forcible which before was peaceable.—Richter v. Cordes, 100 Mich. 278.

¶ 18. A chattel mortgagee of goods in a store took possession of them, but instead of removing them at the lessee's request took possession of the building, leaving two men in charge, who barricaded the door and refused admission to the lessee. Held, that this was a forcible entry, or at least that the fact of such entry, and, if forcible, who made it, were questions for the jury.—Donovan v. Chappell, 63 Mich. 685.

§ 6. Forcible re-entry after forcible entry.

Force in repelling re-entry, see ante § 5.

¶ 19. Where A. obtained possession of premises occupied by B. by knocking a door open with a hammer in B.'s absence, and B. soon afterwards, in A.'s absence, re-entered by similar violence, it was held that A.'s temporary occupation so acquired was not such quiet and peaceable possession as would entitle him to maintain forcible entry and detainer against B.—Harrington v. Scott, 1 Mich. 17.

§ 7. Unlawful detainer.

See also post ¶ 55.

Forcible holding as peaceable possession in complainant, see ante § 3.

Element of force in forcible entry, see ante § 4.

Allegations as to entry and detainer, see post § 18.

Variance from allegation of forcible entry, see post ¶ 123.

Statutory ground for action, see Jud. Act, chap. XXX, § 2; Comp. L. 1915, § 13230.

¶ 20. Every forcible entry is forbidden, but a forcible detainer after a peaceable entry is not forbidden unless the detainer is unlawful, and in neither case is the possessory remedy given to any one not entitled to possession.—Hoffman v. Harrington, 22 Mich. 52; Marsh v. Bristol, 65 Mich. 378.

¶ 21. A proceeding for forcible entry and detainer does not lie against one whose entry was peaceable and without collusion with a tenant.—Farmer v. Hunter, 45 Mich. 337.

¶ 22. There is no forcible detainer where a person in possession uses no force and threatens none, but simply says to one who demands possession that he will not go until put out.—Appleton v. Buskirk, 67 Mich. 407.

§ 8. Right to damages.

Liability on bond for appeal, see post §§ 58-62.

Alternative remedy on appeal bond or in trespass for treble damages, see post § 60.

Admissibility of evidence of breach of covenant by plaintiff, see post ¶ 150.

Liability for treble damages for wrong, see Damages § 208.

Statutory remedy for treble damages as due process, see Constitutional Law § 145.

Provisions for double damages on action for trespass after restitution, see Jud. Act, chap. XXX, § 23; Comp. L. 1915, § 13251.

¶ 23. Suing for compensation for use and occupation is a waiver of any claim for treble damages on obtaining restitution of the leased premises.—Hogsett v. Ellis, 17 Mich. 351.

¶ 24. A person evicted contrary to the forcible entry and detainer statute cannot recover damages for being disturbed in his possession of the land, but he may recover compensation for any injuries done to himself or his personal property in the course of the eviction.—McIntyre v. Murphy, 153 Mich. 342.

§ 9. Grounds for and maturity of right to summary proceedings.

Nature of the remedy and inappropriateness to trial of title, see ante § 2.

Right of sublessee to proceed against his assignee, see also ante ¶ 3.

Notice to quit and termination of tenancy, see post §§ 10, 11.

Distinction between tenants holding over and tenants at sufferance with respect to notice, see post § 10.

Outstanding sublease as bar to lessor's right, see also post ¶ 67.

By lessor against assignee of the lessee, see post ¶ 70.

Estoppel to pursue remedy, see post § 12.

Person presently entitled to possession as proper complainant, see post § 14.

Pleading grounds in complaint, see post § 21.

Burden of proof of grounds and right, see post § 38.

Summary proceedings by dowress for possession before assignment, see Dower § 48.

Propriety of summary proceedings to recover possession where ejectment fails for want of title in plaintiff, see Ejectment ¶ 69.

Right as dependent on nature of agreement, whether mortgage or tenancy, see also Mortgages, I, II.

Statutory grounds for summary proceedings, see as follows:

Holding over a demise or executory contract for purchase of lands, Jud. Act, chap. XXX, § 12, ¶ 1; Comp. L. 1915, § 13240, ¶ 1.

Neglect to deliver possession or surrender on demand when rent is overdue, Jud. Act, chap. XXX, § 12, ¶ 2; Comp. L. 1915, § 13240, ¶ 2.

Any person continuing in possession after expiration of time for redemption from foreclosure or execution, or heir or devisee continuing in possession after probate sale for debts, Jud. Act, chap. XXX, § 12, ¶ 3; Comp. L. 1915, § 13240, ¶ 3.

Tenant at will or by sufferance holding over after notice to quit, Jud. Act, chap. XXX, § 12, ¶ 4; Comp. L. 1915, § 13240, ¶ 4.

¶ 25. Summary proceedings may be brought against one who is in possession either as a contract purchaser or as a lessee, and who, being in default, is a tenant at will and liable to be ousted on notice.—Moody v. Seaman, 46 Mich. 74.

¶ 26. Summary proceedings to recover possession from a tenant who holds from year to year and whose rent is payable annually, but who has failed to keep it up, can be instituted if, after written demand of payment and notice to quit has been served upon him, he still neglects for seven days to pay (How. St., § 8295).—Judd v. Fairs, 53 Mich. 518.

¶ 27. How. St., § 8295, which provides for the recovery by summary proceedings of leased premises for nonpayment of rent, does not authorize the commencement of such proceedings before the rent paid has been fully earned.—Barber v. Stone, 104 Mich. 90.

¶ 28. Where a tenant has been legally evicted by a third party, and has attorned,

summary proceedings against him by his original landlord to recover the premises are not the proper remedy for determining the title to the land as between the landlord and the third party. The appropriate proceeding is ejectment against such third party.—Foss v. Van Driele, 47 Mich. 201.

¶ 29. Where a sub-lease could not, under the statute of frauds, have been valid for more than one year, summary proceedings instituted the day after the expiration of one year from its date, to recover the possession of the premises covered by it, are not premature.—Fratcher v. Smith, 104 Mich. 537.

¶ 30. A. conveyed by B., by warranty deed, premises of which C. was in possession, having held over for four months after the expiration of his lease from A. On C.'s refusing to surrender, B. leased to A. for a term expiring November 15th, with right to sublet, and A. leased to C. until November 1st, the lease containing a written waiver of notice to quit. Held, that summary proceedings were properly instituted by A. on November 2nd, C. refusing to vacate.—Lewis v. Brandle, 107 Mich. 7.

¶ 31. An agreement by a tenant to surrender the leased premises prior to the expiration of the lease cannot be enforced by summary proceedings to vacate.—Fish v. Thompson, 129 Mich. 313.

¶ 32. How. St., § 8295, providing for the remedy by a summary proceeding cannot be extended by construction, so as to enable an excluded tenant to enter under it against the landlord.—Freeborn v. LaLonde, 118 Mich. 662.

¶ 33. A lessee of lands cannot resort to the remedy by summary proceedings (How. St., § 8295) as to holding over of premises demised, where the owner refuses possession under the lease.—Freeborn v. LaLonde, 118 Mich. 662.

¶ 34. The remedy by summary proceedings (How. St., § 8295) is not available to a lessee of land, where the owner refuses possession under the lease, on the ground that such owner is a tenant at sufferance, it not being shown that the owner is holding over after a determination of his estate by a notice to quit.—Freeborn v. LaLonde, 118 Mich. 662.

¶ 35. Summary proceedings cannot be brought under Comp. Laws 1897, §§ 11164-11166, How. 2nd Ed., §§ 13684-13686, by a lessee against a landlord who refuses possession.—Chylowski v. Steinberg, 193 Mich. 547.

¶ 36. An executory contract of sale provided that in case of default in payment the vendor should be discharged from all obligations, and all payments made should be forfeited, without further notice, as stipulated damages. Possession was given, but the contract contained no express provision for it. On default the vendor proceeded under Comp. L. 1871, chap. 211, How. St., § 8295, which allows summary proceedings to dispossess one who holds contrary to the covenants of any extraordinary contract. Held, that as there were no covenants regulating possession the case was not within the statute.—Rawson v. Babcock, 40 Mich. 330.

¶ 37. Summary proceedings under How. St., § 8295, will not lie for the possession of land where each party claims title under a third person, such claims being hostile and adverse.—Hill v. Olin, 82 Mich. 643.

¶ 38. Since summary proceedings must be based on a legal title in the plaintiff, they cannot lie on a contract whereby plaintiff had bought in a leasehold at execution sale with an agreement that he should reconvey to defendant on being reimbursed, or if not reimbursed that the defendant should be regarded as a tenant holding over without permission, though the purchase was made as agreed and defendant fell in default.—Anderson v. Smith, 103 Mich. 446.

¶ 39. In a former suit a decree was entered against complainant on a land contract, and to carry out such decree he deeded to the defendant a certain warehouse alley, "together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining." The decree had simply held that defendant was entitled to the alley and left open the question whether the complainant might be entitled to certain sheds located partly on the alley. Held, after the aforesaid deed complainant could not, for the purpose of getting possession of the sheds as personalty bring summary proceedings under 3 Comp. Laws 1897, § 11164, relating to the recovery of land.—Cunningham v. Kenyon, 156 Mich. 428.

¶ 40. The summary remedy under How. St., § 8295, subd. 3, for securing possession of premises "sold by virtue of any mortgage or execution," does not cover chancery foreclosure sales.—Dowling v. Hannant, 78 Mich. 115.

¶ 41. The summary remedy given by Laws of 1840, p. 85, § 5, where premises had been sold on mortgage foreclosure or on execution, applied only where there was privity between the parties, and not where the grantee of a purchaser at an execution sale sought to recover possession from a person holding adversely to the judgment debtor.—Royce v. Bradburn, 2 D. 377.

¶ 42. Where both parties to a summary proceeding to recover possession of lands trace title to the same person, and claim under him, there is sufficient privity of estate between them to sustain the proceeding.—Green v. Gill, 47 Mich. 86.

¶ 43. Summary proceedings to recover possession of land will not lie against the holder of a tax-title antedating the mortgage under which complainant claims as foreclosure purchaser; and there is no rule of law to prevent the holder of the tax-title from fortifying it, if he can, by purchasing other and earlier titles and incumbrances.—Brown v. Martin, 49 Mich. 565.

¶ 44. Summary proceedings before a circuit court commissioner to recover possession, under Comp. L., §§ 6706, 6707 (How. St., §§ 8295, 8296), are maintainable against a builder who refuses to turn over a building at the time fixed by his contract.—Wilkinson v. Williams, 51 Mich. 155.

¶ 45. Prior to the enactment of Laws 1881, Act No. 198 (amended How. St., § 8295, subd. 3), summary proceedings to recover possession would not lie against heirs in possession, peaceably obtained and held, of a testator's land.—Newkirk v. Tracey, 61 Mich. 174.

§ 10. ——Notice to quit or termination of tenancy.

See also ante ¶ 26.

Summons and service or warrant and arrest after complaint, see post §§ 26-28.

Termination of tenancies in general, see Landlord and Tenant, II.

Sufficiency of notices to quit in order to terminate tenancies in general, see Landlord and Tenant, II, IV, I.

¶ 46. Under the statute providing for summary proceedings to obtain possession of land before a circuit court commissioner no notice to quit is necessary to tenants holding over.—Smith v. Smith, 144 Mich. 139.

¶ 47. The statute giving a summary remedy against tenants at will or at sufferance, whose estate has been determined, only allows it when such determination has been by notice to quit.—Raynor v. Haggard, 18 Mich. 72.

¶ 48. Oral demand of payment of rent, followed on refusal thereof by a written demand of possession and notice to quit, constitute a sufficient compliance with How. St., § 8295, subd. 2, which requires a demand in writing to deliver possession or pay the rent.—Judd v. Fairs, 53 Mich. 518.

¶ 49. A purchaser in possession and in default under an executory contract, which did not provide for possession and which did stipulate for forfeiture of all payments as liquidated damages and for discharge of the vendor on default, is entitled as a tenant at will to three months' notice to quit.—Rawson v. Babcock, 40 Mich. 330.

¶ 50. The vendor of land in the possession of the vendee under a contract of sale was not entitled immediately to institute summary proceedings to recover possession thereof, upon vendee failing and refusing to pay certain taxes provided for in such contract; where such contract provided that after breach vendor shall have the immediate right to declare the same void, but contained no provision that breach of the contract should at once determine the contract relations; since the tenant was entitled to the notice prescribed by law. (Comp. L. 1897, § 11164.)—Miner v. Dickey, 140 Mich. 518.

¶ 51. Complaint in a summary proceeding to recover possession of land held under a contract of purchase may be made on the day a second notice of forfeiture and to quit was served, where a sufficient notice had been previously served which failed to describe all of the premises.—Patterson v. Hogstein, 183 Mich. 470.

¶ 52. Where summary proceedings to recover possession of land sold under foreclosure are begun within a short time after the expiration of the period of redemption, the defendant is not entitled to three months' notice to quit.—Lieblien v. Hansen, 178 Mich. 11.

¶ 53. When a proceeding to recover possession of land held over after statutory foreclosure is begun promptly after the expiration of the time for redemption, defendant is not entitled to three months' notice to quit.—Gage v. Sanborn, 106 Mich. 269.

¶ 54. Where a land contract does not intend that vendee's possession shall end on default in payment at a specified date (i. e., where there is provision made for interest after that date, and for an election on vendor's part to declare a forfeiture should vendee neglect or refuse to perform his covenants) vendee if allowed to remain several months after default without the exercise of such election cannot be dispossessed by summary proceedings without the three months' notice to quit to which a tenant at will or by sufferance is entitled (How. St., § 5774).—Knight v. Hartman, 81 Mich. 462.

¶ 55. Complainant owned property by virtue of a state homestead deed under Act No. 206, Pub. Acts 1893, § 131, and Act No. 141, Pub. Acts 1901, and asked defendant to surrender possession. Defendant stated he had no rights in the premises, and agreed to vacate within a week. Without serving notice to quit, the complainant started summary proceedings to recover possession. Held, complainant could not recover under either 3 Comp. Laws 1897, § 11154, for forcible entry, or 3 Comp. Laws 1897, § 11164, for summary proceedings. His sole remedy was ejectment.—Duff v. Hall, 158 Mich. 513.

§ 11. ——Service of notice.

Of notices in general, see Notices.

¶ 56. The notice to pay rent or surrender possession required by Comp. L. 1871, § 6707,

How. St., § 8295, providing for summary proceedings to recover the possession of land, may be served by delivery on the premises to a member of the tenant's family of suitable age and discretion, with the request to deliver it to the tenant.—McSloy v. Ryan, 27 Mich. 110.

¶ 57. It is not necessary that a personal demand on the leased premises for payment of the rent due be made to entitle the landlord to the common-law right or re-entry, under Comp. L. 1897, § 11164, which provides a means of terminating a tenancy for nonpayment of rent by a notice to quit or pay rent.—Cockerline v. Fisher, 140 Mich. 95.

§ 12. Waiver and estoppel of rights.

Disclaimer to expectant purchaser as estoppel to have summary possession, see Estoppel ¶ 182.
Estoppels in general, see Estoppel.
Election of remedies in general, see Election and Waiver.

¶ 58. A lease provided for the payment of rent in monthly instalments in advance. The tenant was in arrears for part of a month's rent, and failed to pay the rent for the succeeding month when due. The landlord served the tenant with notice to quit, and on the same day accepted from him a sum of money sufficient to pay the rent which had been earned and part of the instalment due for the succeeding month. After the expiration of the time limited in the notice for the payment of the rent, and before the part of the advance instalment paid had been fully earned, the landlord instituted summary proceedings to recover the leased premises. Held, that it is inconsistent for the landlord to assert a forfeiture and termination of the lease by said notice and action, and at the same time take and retain money, his only right to which is predicated upon the continuance of the tenant's right to occupy under the lease, and a judgment in favor of the tenant is affirmed.—Barber v. Stone, 104 Mich. 90.

¶ 59. An agreement by the purchaser under foreclosure to extend the time of redemption and to permit the mortgagors to continue in occupancy, which expressly preserves all rights, duties and liabilities of the parties, will not prevent summary proceedings to recover possession.—Audretsch v. Hurst, 126 Mich. 301.

II. COMPLAINT, PROCEDURE, TRIAL, JUDGMENT AND REVIEW.

§ 13. Jurisdiction of the proceedings and ouster of jurisdiction.

Pleading the jurisdiction and sufficiency of allegations, see post § 23.
Summons or warrant as proper means of gaining jurisdiction, see post § 26.
Effect of delay in making return on justice's jurisdiction, see also post ¶ 111.
Incidental power to grant continuances, see post § 31.
Dismissal when title comes in issue, see post § 46.
Jurisdiction of appeals and certiorari, see post § 49.
General law of jurisdiction, see Courts, V.
Office and powers of circuit court commissioners in general, see Courts, I, V.
Validity of act conferring power on circuit court commissioners, see Constitutional Law § 58.
To whom forcible entry complaint is to be made, see Jud. Act, chap. XXX, § 3; Comp. L. 1915, § 13231.
Procedural powers of commissioner or officer issuing forcible entry warrant, see Jud. Act, chap. XXX, § 7; Comp. L. 1915, § 13235.
Powers of commissioner or officer to subpoena witnesses and enforce orders, see Jud. Act, chap. XXX, § 21; Comp. L. 1915, § 13249.

¶ 60. Jurisdiction of a circuit court commissioner of the proceeding is not ousted by mere filing of plea of title, nor until it appears that question of title is necessarily involved.—Butler v. Bertrand, 97 Mich. 59.

¶ 61. The mere assertion by defendant that the title to the land is in question does not oust the commissioner's jurisdiction.—Barrett v. Cox, 112 Mich. 220.

¶ 62. Under Comp. L. 1897, § 11164, providing when summary proceedings may be commenced where the relationship of landlord and tenant has existed, the court is not divested of jurisdiction because the defendant claims title where the proofs show the occupancy to have been instituted by agreement for compensation and vacation on request and knowledge of the relationship in the present holder.—Chapman v. Nehman, 128 Mich. 295.

¶ 63. A circuit court commissioner is not ousted of jurisdiction of a summary proceeding to recover possession of demised premises on the expiration of a lease, by the lessee attempting to dispute his landlord's title by showing an attornment to a third person who held a tax title at the inception of the tenancy.—Balch v. Radford, 182 Mich. 292.

¶ 64. Where, under 3 Comp. Laws 1897, § 11164, subd. 1, in a summary proceeding to recover land, the defendant in his plea states that the ownership of the land is in his wife, but offers no evidence to that effect, a question of title is not raised so as to deprive the commissioner of jurisdiction.—Tefft v. Tefft, 154 Mich. 239.

§ 14. Party complainant; who entitled.

Grounds and occasions for forcible entry or summary proceedings, see ante §§ 3-11.

Classes of persons and contract relations supporting summary proceedings, see ante § 9.
Joint and several complainants, see post § 16.
Assignees of vendors or lessors as proper parties, see post § 15.
Requisites of the complaint, allegations of right to possession, see post §§ 18, 21.
Right of representative to bring summary proceedings, see Estates of Decedents ¶ 992.
Right of receiver of lessor to maintain the proceeding, see Receivers, IV, C.
Person entitled by statute, see Jud. Act, chap. XXX, § 3; Comp. L. 1915, § 13231.
Person entitled to make complaint for summary proceedings, see Jud. Act, chap. XXX, § 13; Comp. L. 1915, § 13241.

¶ 65. Proceedings to recover premises will not lie where complainant himself does not show that he is at the time entitled to possession.—McGuffie v. Carter, 42 Mich. 497; Pickard v. Kleis, 56 Mich. 604.

¶ 66. The general rule is that the possession of a tenant is not such a possession as entitles his landlord to bring the action for forcible entry and detainer, when a tenant is disseised; it should be instituted by the tenant.—Vincent v. Brant, 101 Mich. 60.

¶ 67. A lessee cannot prior to expiration of a sublease intrude into possession and maintain forcible entry and detainer against one entering under the sublessee.—Vincent v. Brant, 101 Mich. 60.

¶ 68. A landlord colluding with a subtenant and thus entering has no more rights against the tenant than the subtenant has. —Vincent v. Brant, 101 Mich. 60.

¶ 69. A lessor who, before the termination of the lease, relets the premises to another tenant for a term to commence at the expiration of the former lease, and contracts to put the second lessee into possession, can maintain summary proceedings against the first tenant on the expiration of his term, if he refuses to surrender possession.—Vincent v. Defield, 98 Mich. 84.

¶ 70. A lessor who has not consented to the assignment of a lease may bring action under Comp. L. 1897, § 11164, governing summary proceedings to recover possession of land, to recover possession of premises of which the lessee has assigned the lease contrary to a covenant against assignment without the consent of the lessor.—Marvin v. Hartz, 130 Mich. 26.

§ 15. ——Assignees of vendors or lessors.
Assignment to several in common, see post ¶ 73.

¶ 71. Under Comp. L. 1871, chap. 211, giving a summary remedy against persons holding lands contrary to the conditions or covenants of executory contracts of purchase, an assignee of the vendor may institute the proceedings as well as the vendor himself.—Vos v. Dykema, 26 Mich. 399.

¶ 72. Under R. S. 1838, a suit against a lessee to recover possession of the demised premises on account of the non-payment of rent, etc., was held properly brought by the lessor in his own name, although he had previously assigned the rents to accrue under the lease to a third person.—Chamberlain v. Brown, 2 D. 120.

§ 16. ——Joint and several complaints.

¶ 73. The statutory proceeding to recover possession of land from a tenant cannot be maintained by one of two independent grantees of the lessor under the provision in the lease that the lessor is to have the right of selling the land on certain conditions.—Abeel v. Hubbell, 52 Mich. 37.

¶ 74. The defendant must represent the entire interest; and tenants in common of the whole estate can join in summary proceedings to recover possession.—Moody v. Seaman, 46 Mich. 74.

¶ 75. An intestate's widow and the heirs at law represent the whole possessory estate, and where the widow has the right of possession in behalf of the heirs, and thus represents the whole title, she can bring summary proceedings to recover its possession without waiting for the assignment of her dower to her.—Moody v. Seaman, 46 Mich. 74.

§ 17. Complaint for forcible entry and detainer.
Amendments, see post § 25.
Pleas and objections by defendant, see post § 33.
Allegations of right, title and description, see post §§ 18, 19.
Complaints in summary proceedings, see post §§ 20-22.
Jurisdictional allegations, see post § 23.
Verification, on knowledge or information and belief, see post § 24.
Necessity of writ of restitution following complaint, see post § 63.
Pleading the damages for the entry, see Damages § 247.
Pleading right to treble damages, see Damages § 260.
Statutory provisions as to complaint, see Jud. Act, chap. XXX, § 3; Comp. L. 1915, § 13231.

¶ 76. A complaint under R. S. 1838, for unlawful and forcible entry into lands, etc., was required to contain the same substantive allegations that would be requisite in an indictment under section 1 of the same chapter; and the complainant should be held to the same proof, substantially, that would be necessary to justify a conviction upon

such indictment.—Davis v. Ingersoll, 2 D. 372.

¶ 77. The complaint must show that it is made by the person entitled to the possession, or by his agent or attorney.—Bush v. Dunham, 4 Mich. 339.

¶ 78. The proper forms of complaint under the statute of forcible entries and detainers suggested.—Bush v. Dunham, 4 Mich. 339.

§ 18. ——Allegations of right to possession and entry.

Showing as to person making complaint, see ante ¶ 77.
In summary proceedings, see post § 21.

¶ 79. A complaint under the Forcible Entry and Detainer Act (How. St., § 8286) must allege that the complainant is entitled to the possession of the premises at the time the complaint is made.—Bush v. Dunham, 4 Mich. 339.

¶ 80. The complaint need not set forth the particulars of the complainant's right, or of the forcible entry and detainer; but enough must be set forth to show that the court has jurisdiction.—Bush v. Dunham, 4 Mich. 339.

¶ 81. The general allegation in the complaint that defendant is in possession of the premises and unlawfully holds them against the rights of the plaintiff is sufficient, though possession was taken or held by force (Comp. L., § 6697, How. St., § 8286).—Gault v. Stormont, 51 Mich. 636.

¶ 82. In special proceedings by a guardian to recover possession of the lands of his wards, a complaint was held sufficient which stated that complainant was sole testamentary guardian of certain minors, who were named, being duly nominated as such in their father's last will, which had been duly probated; that at a certain date he was in quiet and peaceful possession of certain described lands; that on that date defendant entered said premises and unlawfully holds them, and holds complainant out of possession by force, contrary to statute; and that at the time of said entry complainant was and ever since has been and still is well entitled to the same, and that he prays to be restored to possession.—Carpenter v. Harris, 51 Mich. 223.

¶ 83. A complaint alleging that complainant is the owner and landlord of the premises therein described; that defendant was a subtenant under complainant and is in possession of such premises, that she holds the same unlawfully and against the right of complainant, and forcibly detains the possession thereof, is sufficient under How. St., § 8286.—Kusterer v. Wise, 59 Mich. 382.

¶ 84. A bill of complaint filed by a tenant of a building with the circuit court commissioner alleging that the defendant landlord owns the premises, of which complainant is lessee, against the rights of such complainant, and that such complainant is entitled to possession of same, and praying that proceedings be taken for the restoration of the possession of such premises to complainant, but failing to allege that force or intimidation was used against complainant to keep him out of the premises, is not sufficient as a complaint under Comp. Laws 1897, §§ 11153-11162, How. 2nd Ed., §§ 13673-13682, providing for the recovery of possession of land which has been entered or detained by force.—Chylowski v. Steinberg, 193 Mich. 547.

¶ 85. Where the complaint alleges an unlawful and forcible entry, and also a detainer by force, the latter allegation may be rejected as surplusage.—Seitz v. Miles, 16 Mich. 456.

§ 19. ——Description of premises.

In summary proceedings, see post § 22.

¶ 86. In proceedings for forcible entry and detainer, the description of the premises must be sufficiently definite to enable the officer executing the writ to restore complainant to possession, and exclude defendant therefrom.—Gardner v. Hickok, 102 Mich. 497.

¶ 87. The complainant, claiming to have been forcibly excluded from the possession of a part of a stable leased of defendant, instituted proceedings for forcible entry and detainer. The premises were described in the complaint as "the following described lands and premises, situate in the village of Allegan, in said county, to wit: The first two stalls at the left of the entrance to the first floor, and standing room on that floor for a buggy, and the north half of the upstairs, of the third entrance, counting from the north side, to the building known as the 'Rink Building,' situate on the east side of Water street, in the village of Allegan, situate on lots 232 and 233." Held, that the description is too indefinite to enable the officer executing the writ of restitution to restore complainant to possession, and exclude the defendant therefrom; and that the only remedy open to complainant is an action for breach of the lease.—Gardner v. Hickok, 102 Mich. 497.

§ 20. Complaint for summary proceedings.

For forcible entry, see ante § 17.
Time for complaint with respect to notice to quit, see also ante § 10.
Alleging right and title of complainant, see post § 21.
Describing the premises, see post § 22.
Jurisdictional allegations, see post § 23.
Verification, see post § 24.
Amendments, see post § 25.

Pleas and objections by defendant, see post § 33.
Statutory requisites of the complaint, see Jud. Act, chap. XXX, § 13; Comp. L. 1915, § 13241.

¶ 88. The complaint is of the nature of a pleading, and the degree of certainty with which it should describe the premises should be measured by the rules of pleading rather than by those which govern contracts.—Clark v. Gage, 19 Mich. 507.

¶ 89. The complaint must show upon its face that it is made by the person entitled to the possession, or by his agent or attorney. —Bryan v. Smith, 10 Mich. 229.

§ 21. ——Right and title of complainant.
In forcible entry and unlawful detainer, see ante § 18.

¶ 90. The complaint may be in general form, without setting forth the particular facts making a case within the statute; but it must show that complainant is entitled to the possession of the premises at the time of the complaint.—Bryan v. Smith, 10 Mich. 229.

¶ 91. In summary proceedings under How. St., §§ 8295, 8296, to recover the possession of land sold on mortgage foreclosure, and held after the time for redemption has expired a complaint alleging that defendant is in possession of the premises therein set forth, and holds the same unlawfully and against the rights of complainant, who is lawfully entitled to the possession of the same, is sufficient.—Gage v. Sanborn, 106 Mich. 269.

¶ 92. A complaint alleged that complainant was the landlord of the premises described, and respondent the tenant thereof; that respondent holds said premises unlawfully and against the right of said complainant, who is entitled to the possession of them in her own right and as guardian of the minor heirs of a designated person. Held sufficient. —Moody v. Seaman, 46 Mich. 74.

¶ 93. A complaint was held insufficient to confer jurisdiction which only showed that complainant became entitled to possession upwards of fourteen months before the proceeding was instituted.—Bryan v. Smith, 10 Mich. 229.

¶ 94. A complaint which sets out that the respondent is in possession of the premises, describing them, and contains the usual allegations of the common printed form, but with the blanks for the names left unfilled, and closes with an allegation that the respondent "therefore holds said premises unlawfully and against the right of this complainant, and that this complainant is entitled to the possession of the same," etc., is sufficient; the printed portion with the unfilled blanks being treated as if erased, and the word "therefore" rejected as surplusage. —Bennett v. Robinson, 27 Mich. 26.

§ 22. ——Description of land.
Amending description, see post ¶ 103.
In forcible entry, see ante § 19.

¶ 95. The following description was held insufficient: "A farm in the town of Quincy in said county, lately occupied by complainant, being the same farm mentioned in the writing executed between the said Clark (defendant) and complainant, and dated November 24, 1866, by which complainant let the said farm to said Clark."—Clark v. Gage, 19 Mich. 507.

¶ 96. In proceedings to obtain possession of land bought on mortgage foreclosure, it is sufficient to follow the description in the mortgage, especially where occupancy by the mortgagor removes all ambiguity.—Cook v. Wiles, 42 Mich. 439.

§ 23. Jurisdictional allegations.
See also ante ¶¶ 80, 93.

¶ 97. The complainant in summary proceeding instituted before a justice need not state the fact that no circuit court commissioner resides in the township. The statute (How. St., § 8296) does not require the affidavit so to state.—Grand Rapids Nat. Bank v. Kritzer, 116 Mich. 688.

¶ 98. Prior to R. S. 1846 the complaint was required to set out all the facts necessary to give the justices jurisdiction of the particular case.—Caswell v. Ward, 2 D. 374; Royce v. Bradburn, 2 D. 377.

¶ 99. A complaint filed with a justice in a proceeding to recover possession of premises is not jurisdictionally defective in omitting the name of the defendant from the body of the instrument if there is enough in it to supply the name.—Olson v. Muskegon Circuit Judge, 49 Mich. 85.

§ 24. Verification.
Time for issuance of process with respect to verification, see post § 26.
Jurisdictional averments, see also ante ¶ 97.
Necessity of oath to forcible entry complaint, see Jud. Act, chap. XXX, § 3; Comp. L. 1915, § 13231.

¶ 100. A complaint, verified as being true "to the best of the knowledge, information and belief" of affiant, is void.—Seitz v. Miles, 16 Mich. 456; Miles v. Goffinet, 16 Mich. 472.

¶ 101. A complaint in a summary proceeding to recover the possession of land may be verified in a county other than that in which the land lies.—Patterson v. Hogstein, 183 Mich. 470.

§ 25. Amendments of pleadings.

Amendments and further pleadings on appeal, see post § 53.

General law of amendments, see Pleadings, VI.

¶ 102. The general statute with reference to amendments, 3 Comp. Laws 1897, § 10268, is applicable to summary proceedings for the recovery of possession of land under 3 Comp. Laws 1897, § 11165.—Gensler v. Nicholas, 151 Mich. 529.

¶ 103. In summary proceedings under 3 Comp. Laws 1897, § 11165, a faulty description of the premises in the complaint is amendable where the statute of amendment permits an amendment either in form or substance, where the object of the amendment is to correct an error in stating the real subject of controversy between the parties, where the parties are in no way misled, and where no question arises under the statute of limitations.—Gensler v. Nicholas, 151 Mich. 529.

§ 26. Summons and appearance.

Times for service, see post § 27.

Service and return, see post § 27.

Substituted service, see post § 28.

Allowance of hour for appearance, see post § 30.

Notices to quit, see ante §§ 10, 11.

Venire for jury, see post § 29.

Writ of restitution on the judgment, see post § 63.

General law of process, see Process.

Statutory provisions as to issuance of warrant for forcible entry, see Jud. Act, chap. XXX, § 4; Comp. L. 1915, § 13232.

Provisions as to issuance of summons in summary proceedings, see Jud. Act, chap. XXX, § 14; Comp. L. 1915, § 13242.

¶ 104. Proceedings to recover possession of real estate may be begun by summons instead of by warrant, at complainant's option.—Carpenter v. Harris, 51 Mich. 223.

¶ 105. The summons in a summary proceeding to recover the possession of land need not be issued on the same day that the complaint is verified.—Patterson v. Hogstein, 183 Mich. 470.

¶ 106. A summons in a summary proceeding to recover the possession of land is valid although issued two days after the verification of the complaint.—Patterson v. Hogstein, 183 Mich. 470.

¶ 107. A complaint in a summary proceeding for the recovery of the possession of land was sworn to on one day but the summons not issued until the next. Held, that the proceedings should not have been dismissed on this ground.—Gruler v. McRoberts, 48 Mich. 316.

¶ 108. In a statutory proceeding to obtain possession of land the summons was dated August 29, 1864, while the complaint, itself undated, showed that it was sworn to August 29, 1861. The docket did not show in what year the proceeding was instituted. There was a plea to the complaint. Proof was offered in a collateral proceeding to show that the date of the jurat was, by mistake, written 1861 instead of 1864. Whether such proof was admissible, and whether the proceedings were void for irregularity, quære, the court being equally divided.—Allen v. Carpenter, 15 Mich. 25.

§ 27. ——Service and return.

Objections to service and how presented, see post § 34.

Service and return of process in general, see Process, II.

Exclusion of Sunday in computing time for return, see Sunday; Time.

Manner of executing warrant in forcible entry cases, see Jud. Act, chap. XXX, § 5; Comp. L. 1915, § 13233.

Time and manner of serving summons for summary proceedings, see Jud. Act, chap. XXX, § 15; Comp. L. 1915, § 13243.

¶ 109. Comp. L. 1857, § 4488, How. St., § 8298 requires two entire days to intervene between the day of service and the return day of summons in summary proceedings.—Sallee v. Ireland, 9 Mich. 154.

¶ 110. Three entire days must intervene between the day of issuing and the day of the return of the summons, under Comp. L. 1857, § 4987, How. St., § 8297, in summary proceedings.—Sallee v. Ireland, 9 Mich. 154.

¶ 111. A justice does not lose jurisdiction of a proceeding to recover possession of land merely because the constable does not make return to the summons until an hour after the time fixed, if the parties are present and remain in attendance without objection.—Olson v. Muskegon Circuit Judge, 49 Mich. 85.

§ 28. ——Substituted service.

¶ 112. Jurisdiction in summary proceedings is not acquired by substituted service of summons before the expiration of the time for personal service.—Crozier v. Allen, 117 Mich. 171.

§ 29. Venire and jury.

Matters relating to common law juries, see Jury.

Request for jury trial and nature of jury and manner of calling same, see Jud. Act, chap. XXX, § 8; Comp. L. 1915, § 13236.

Penalty for nonappearance of person summoned as juror, see Jud. Act, chap. XXX, § 22; Comp. L. 1915, § 13250.

¶ 113. Where, under R. S. 1838, a warrant and venire were issued and served, and on the return day the parties and most of the jurors summoned appeared, and the cause was then adjourned to a future day, and the

justice thereupon issued a second venire, by which another jury was summoned, before whom the case was tried, held, that the justices had no power to direct the second jury to be summoned, but that they should have required the jurors who appeared in obedience to the first venire to appear on the adjourned day, and if their number was insufficient to complete the panel the deficiency should have been supplied by summoning additional jurors by virtue of the same venire.—Latimer v. Woodward, 2 D. 368.

§ 30. Hour for appearance.

Provision for notation of nonappearance in minutes, see Jud. Act, chap. XXX, § 18; Comp. L. 1915, § 13246.

¶ 114. A circuit court commissioner is not obliged to wait one hour, after the time at which a summons in summary proceedings to recover the possession of land is made returnable, for defendant to appear.—Fowler v. Bredin, 98 Mich. 133.

§ 31. Continuances.

Continuances on appeal with payments on account as discharging sureties for appeal, see post ¶ 205.

Provisions as to adjournments on nonappearance in summary proceedings after return of due service, see Jud. Act, chap. XXX, § 17; Comp. L. 1915, § 13245.

Provisions for adjournments after issue joined, see Jud. Act, chap. XXX, § 19; Comp. L. 1915, § 13247.

Custody of defendant in forcible entry cases during adjournments in default of bond for costs, see Jud. Act, chap. XXX, § 20; Comp. L. 1915, § 13248.

¶ 115. Continuances might have been granted under R. S. 1838, though the power to continue was not expressly conferred; it being incident to the jurisdiction to hear and determine.—Caswell v. Ward, 2 D. 374.

§ 32. Declaration.

Requisites and sufficiency of the complaint, see ante §§ 17-23.

Amendments and further pleadings on appeal, see post § 53.

In action on appeal bond, see post § 62.

¶ 116. No declaration is necessary in these proceedings; the complaint stands in lieu of a declaration.—Caswell v. Ward, 2 D. 374; Bush v. Dunham, 4 Mich. 339.

§ 33. Pleas and objections.

Defendant's pleadings in actions at law in general, see Pleading, III, IV; Justices of the Peace, IV, D.

Set-offs pleadable in the proceedings, see Set-off.

Impropriety of trial of fact of bar by former action on motion to dismiss, see Discontinuance § 19.

Provisions as to pleas to forcible entry complaints, see Jud. Act, chap. XXX, § 6; Comp. L. 1915, § 13234.

Statutory provisions as to pleas to complaint for summary proceedings, see Jud. Act, chap. XXX, § 16; Comp. L. 1915, § 13244.

¶ 117. How. St., § 8299, which provides that, upon the return, duly served, of the summons issued in summary proceedings to recover the possession of land, defendant may plead not guilty to the complaint, or, if he neglect or refuse to plead thereto, the officer before whom the proceedings are pending shall enter such plea for him, contemplates a plea of not guilty, simply.—Hill v. Carter, 101 Mich. 158.

¶ 118. Under the statutory plea of not guilty the point that title to the land is involved may be raised.—Butler v. Bertrand, 97 Mich. 59.

§ 34. ——To defects in complaint, process or venire.

Jurisdictional questions open on appeal, see post § 54.

Time for issuance of process, see ante § 26.

Pleading general issue as waiver by appearance of defects in summons and venire, see Appearance § 7, ¶ 21.

¶ 119. The remedy for mere formal defects in a complaint before a justice to recover possession of lands or in return to the process is by motion in the circuit court to which the case went on special appeal and not by mandamus to the supreme court to compel vacation of judgment.—Olson v. Muskegon Circuit Judge, 49 Mich. 85.

¶ 120. Pleading the general issue to the complaint was held a waiver of irregularities in the summons and venire.—Falkner v. Beers, 2 D. 117.

¶ 121. Defendant moved to quash proceedings before a circuit court commissioner for want of due service of the summons. The commissioner took time for giving his decision; the complainant stipulating to submit the motion without argument, if defendant would plead to the complaint, which he did. It was held that defendant did not, by so pleading, waive his objection to the service.—Sallee v. Ireland, 9 Mich. 154.

§ 35. Issues and variance.

Burden of proof on the issues, see post § 39.

Waiver of objections by plea of general issue, see ante § 34.

¶ 122. The complainant, under R. S. 1838, p. 490, chap. 5, and Sess. L. 1840, p. 83, in his evidence is confined to proof of the facts alleged in the complaint.—Caswell v. Ward, 2 D. 374.

¶ 123. On trial of a complaint for forcible entry, evidence of force employed to main-

tain a possession is not admissible as relating back to the entry in such manner as to make it forcible also. Forcible entry is entirely distinct from forcible detainer.—Hoffman v. Harrington, 22 Mich. 52.

¶ 124. A complaint under the Forcible Entry and Detainer Act, being on oath, the time alleged therein is not immaterial in the sense in which it is so held in indictments. Two distinct occurrences cannot properly be submitted to the jury under one complaint alleging a time different from that proved for either, and if they could, a complainant can no more claim recovery on one upon which the jury has found in his favor than the defendant can claim a discharge because acquitted on the other.—Hoffman v. Harrington, 25 Mich. 146.

¶ 125. Where a suit for forcible entry had twice been brought to the supreme court for review, said court took notice of the fact that on a former trial the complainant sought to recover upon proof of a forcible entry on the day named in the complaint, and held that, having once gone to trial with evidence directed to the events of that precise day, the occurrence would be considered as fixed for that day, and the ground of the complaint could not be changed to an occurrence on another day at the new trial.—Hoffman v. Harrington, 25 Mich. 146.

¶ 126. In an action by summary proceedings to recover possession of premises where the lessee has assigned the lease contrary to a covenant therein against assignment without the consent of the lessor, the pleadings being in compliance with Comp. L. 1897, §§ 11165 and 11166 relating to summary proceedings to recover possession of land, the lessor is not bound to recover by showing forcible entry and detainer because of the fact that his counsel in his opening statement and argument stated that the action was brought for forcible detainer under How. St., chap. 286, in which the title "Forcible entry and detainer" is carried at the head of the entire chapter relating to summary proceedings, which error was corrected in Comp. Laws, 1897.—Marvin v. Hartz, 130 Mich. 26.

§ 36. ——Title to the land.

Under general plea, see also ante ¶ 118.
Ouster of jurisdiction by plea of title, see ante § 13.
Equitable titles and defenses, see post § 37.
Right to show want of title to defeat complainant's right to institute proceedings, see post ¶ 153.
Proof of entry under claim of title in rebuttal of allegation of unlawful detainer, see post ¶ 148.
Admissibility of deeds for other purposes than trial of title, see post § 40.
Dismissal when title comes in issue, see post § 46.
Impropriety of summary proceedings where claims are adverse, see also ante ¶ 37.

¶ 127. Title to real estate cannot be put in issue or considered in summary proceedings to recover possession thereof.—Miller v. Havens, 51 Mich. 482; Hoffman v. Clark, 63 Mich. 175.

¶ 128. Ejectment, not summary proceedings, is the proper remedy for determining title as between a landlord and a third party to whom the former's tenant has attorned after a legal eviction by such third party.—Foss v. Van Driele, 47 Mich. 201.

¶ 129. A homestead right, though not strictly an estate, sufficiently involves the question of title to fall within the rule that questions of title are not triable in mere summary proceedings before a circuit court commissioner to recover possession of real estate.—Riggs v. Sterling, 51 Mich. 157.

¶ 130. Boundary lines cannot be tried in a summary proceeding before a circuit court commissioner.—Drake v. Happ, 92 Mich. 580.

¶ 131. Where plaintiff claimed the premises under a sheriff's deed on execution sale, while defendant's deed from a third person covenanted against incumbrances "except a certain levy," describing the one under which plaintiff claimed an inquiry as to whether plaintiff was estopped by the recital in his deed to raise the question of paramount title involved of itself the question of title to land which could not be tried in summary proceedings.—Hill v. Olin, 82 Mich. 643.

¶ 132. In summary proceedings to recover possession of land sold on statutory foreclosure and held after the time for redemption has expired, the question of the validity of the foreclosure, and also the question whether the premises were redeemed, may be tried: This would not be a litigation of conflicting titles to real estate.—Gage v. Sanborn, 106 Mich. 269.

¶ 133. In proceedings instituted by a first mortgagee to gain possession of foreclosed premises, a tenant of a second mortgagee who has foreclosed, and who was not made a party to the foreclosure of the earlier mortgage, may show that the title under the second foreclosure as a defense until such time as the defect in the first is cured.—Walker v. Fisher, 117 Mich. 72.

¶ 134. In summary proceedings against one who holds over after a sale of real estate on execution beyond the statutory period the question of the validity of the title under the sheriff's deed is properly triable.—Grand Rapids Nat. Bank v. Kritzer, 116 Mich. 688.

¶ 135. While a tenant cannot, during the continuance of the tenancy, dispute the title under which he obtained possession, he may show, in summary proceedings to obtain possession of the leased premises, that his landlord's title has been extinguished by a sale

of the land for taxes, and that he has attorned to the purchaser at such sale.—Jenkinson v. Winans, 109 Mich. 524.

¶ 136. In a summary proceeding under C. L. 1897, § 11164, How. 2nd Ed., § 13684, to recover possession of land sold under a mortgage foreclosure and execution thereunder after the period of redemption has expired, the commissioner has jurisdiction to determine the validity of the foreclosure proceedings and the validity of the sheriff's deeds. —Lieblien v. Hansen, 178 Mich. 11.

§ 37. ——Equitable titles and defenses.

¶ 137. The question of fraud in the procurement of a deed is triable in a court of equity only, and cannot, therefore, be raised in summary proceedings, to oust the commissioner of jurisdiction.—Gale v. Eckhart, 107 Mich. 465.

¶ 138. In summary proceedings by the holder of the legal title to recover possession of land, defendant cannot set up as a defense an oral agreement made by him with complainant for the purchase of the land, coupled with evidence of part performance on his part, his remedy, if any, being in equity. —Bartlett v. Bartlett, 103 Mich. 293.

¶ 139. In summary proceeding to obtain possession of land leased by the defendant from the plaintiff at an annual rental for several years, after the defendant had deeded the property to the plaintiff with the right to repurchase on a payment of the amount of a debt owing, the defense that the deed was a mortgage is purely equitable and not admissible.—Cottrell v. Moran, 138 Mich. 410.

¶ 140. In summary proceedings to obtain possession of land brought after the expiration of the period of redemption by the assignee of the equitable interests of the purchaser at the foreclosure sale, a mortgagor who has allowed the period of redemption to expire without redeeming cannot set up as a defense that he was induced so to do by the deceit of such assignee, such facts being cognizable only in a court of equity. —Roff v. Miller, 189 Mich. 558; McCrery v. Roff, Id.

¶ 141. Where by a misunderstanding the plaintiff, instead of making a deed to the defendant, made it to his son, who, with the consent of the father, borrowed money from the plaintiff to erect a house on the premises, giving a mortgage on the whole lot as security, which was foreclosed, and possession taken of part of the lot and proceeding taken to get possession of the remainder under Comp. Laws 1897, § 11164 et seq., which was resisted by the defendant on the ground that he was the owner, the court will not consider the case because the question of title cannot be litigated under the sections of the statute referred to.— Northern Michigan Building & Loan Ass'n v. Fors, 171 Mich. 331.

§ 38. Burden of proof.

Presumptions, see post § 39.

¶ 142. Where the proceeding is by the purchaser at a statutory foreclosure of a mortgage, the complainant must prove the regularity of all the proceedings on the foreclosure.—Caswell v. Ward, 2 D. 374.

¶ 143. The issue involved in the statutory proceeding for the possession of lands is not only whether rent is overdue, but whether a proper written demand of payment or possession was made the required length of time before the complaint was made; the rent overdue is that due when the demand was made; and any subsequent case that is tried on a new demand is for a cause that originates with that demand, and is therefore a different case from any based upon a former demand and already passed upon.—McSloy v. Ryan, 27 Mich. 110.

¶¶ 144, 145. In a suit to obtain restitution of premises after expiration of a lease, a verdict cannot be rendered against one who has been joined as a defendant as occupying under the lessee, unless it is affirmatively shown that such person was in possession; and his failure to deny such occupation when testifying will not supply the want of proof thereof.—Canfield v. Burns, 66 Mich. 684.

§ 39. Presumptions.

¶ 146. When complainant shows possession by defendant and title in himself, a presumption of tenancy is raised.—Butler v. Bertrand, 97 Mich. 59.

§ 40. Admissibility of evidence.

Scope of issues, see ante §§ 35-37.

General law of evidence, see Evidence.

Right to give evidence of eviction or detainer when admitted, see also Evidence ¶ 392.

Inadmissibility of testimony that agent serving notice to quit told tenant that it might be ignored, see Evidence ¶ 972.

¶ 147. Adverse titles cannot be tried in the summary proceedings provided by statute to recover possession of lands; but deeds of conveyance may nevertheless become competent evidence in such proceedings, and cannot be objected to for not tending to show privity between the parties, as that need not be shown, and in cases of tenancy by sufferance does not exist.—Bennett v. Robinson, 27 Mich. 26.

¶ 148. Where suit is brought before a justice for a forcible detainer, and the complaint alleges the entry to have been peaceable, defendant can show that he entered under a bona fide claim of title and without collusion with the complainant's tenant.— Farmer v. Hunter, 45 Mich. 337.

¶ 149. In summary proceedings to recover the possession of land, a deed purporting to

convey the premises in question to complainant is admissible to show his right of possession.—Gale v. Eckhart, 107 Mich. 465.

¶ 150. In proceeding under the statute for obtaining the possession of lands (Comp. L. 1871, § 6710 et seq., How. St., §§ 8295-8312). evidence of the landlord's breach of covenants to repair and make improvements, which are independent of the covenant to pay rent, is irrelevant; this proceeding is not one in which, even if the amount of rent due be in issue, there can be any deduction of offsets, or by way of recoupment.—McSloy v. Ryan, 27 Mich. 110.

¶ 151. In a summary proceeding by the grantee of the vendor in an executory land contract to recover possession from a vendee holding contrary to the terms of his contract, the warranty deed under which the grantee claims is admissible in evidence; it does not involve the trial of title to real estate, for its validity or sufficiency cannot be questioned as a conveyance of title, but only as a transfer of the title.—Vos v. Dykema, 26 Mich. 399.

¶ 152. In proceedings to dispossess a purchaser on the ground that he held possession contrary to the covenants of an executory contract, the refusal to admit evidence that the vendor had served notice on the purchaser of his election to forfeit the contract is not prejudicial where there had been no covenant relating to possession; it could not put the purchaser in the position of one holding contrary to covenant.—Rawson v. Babcock, 40 Mich. 330.

¶ 153. Where proceedings to recover possession of land are brought against a tenant holding over, the latter may show that the complainant had parted with his title before bringing the proceedings and was no longer entitled to possession.—McGuffie v. Carter, 42 Mich. 497.

§ 41. Sufficiency of proofs.

See also ante ¶ 76.
Requisite proofs of force in forcible entry, see also ante ¶¶ 8-15.
Variance of proofs from allegations, see ante §§ 35-37.
Sufficiency of evidence to establish unlawful withholding of possession in ejectment, see Ejectment ¶ 178.
Conclusiveness of alimony award in summary proceedings for possession, see Divorce § 175.

¶ 154. Where complainant in a summary proceeding showed the possession of defendants and title in himself, and then rested without showing any relation of tenancy, and where defendants, not seeing fit to rest their case upon complainant's showing, supplied by their evidence the element lacking, complainant's case was established.—Barrett v. Cox, 112 Mich. 220.

¶ 154a. On summary proceedings a verdict cannot be rendered against one joined as defendant as occupying under lessee, unless it is affirmatively shown that he was in possession.—Canfield v. Burns, 66 Mich. 684.

§ 42. Province of court and jury; instructions.

Force in the entry as jury question, see also ante ¶ 18.
General law of instructions, see Instructions.

¶ 155. In special proceedings to recover possession of land the jury are judges of law and fact and do not require instructions.—Chamberlain v. Brown, 2 D. 120; Hart v. Lindley, 50 Mich. 20.

¶ 156. In suits before two justices of the peace, under the statute of forcible entry and detainer (R. S. 1838, p. 490, ch. 5, as amended in 1840), the jury were the judges of both the law and the facts. Misdirection of the court to the jury could not, therefore, be assigned for error. But it might be assigned for error that the verdict was against law.—Chamberlain v. Brown, 2 D. 120.

¶ 157. In a summary proceeding to recover land, under 3 Comp. Laws 1897, § 11164, subd. 1, it appeared that a lease between the complainants and defendant as lessors and lessee, respectively, had expired. Defendant in his plea set up that the land in question belonged to his wife, and was a homestead, but offered no evidence to support the plea. Complainants proved ownership of only a part interest. Held, it was error to direct a verdict for the defendant, since the record revealed the relation of landlord and tenant between complainants and defendant.—Tefft v. Tefft, 154 Mich. 239.

§ 43. Custody, conduct and deliberations of jury.

Presumption on appeal as to harmfulness of irregularity, see post § 55.
In civil trials in general, see Trial, VIII.

¶ 158. In a statutory proceeding by a landlord to recover premises in the tenant's possession the parties are not prejudiced by the fact that the jury were shut up by the commissioner before whom the proceedings were held, instead of by a constable, especially if no objection was made. Nor is it important that at the jury's request the commissioner went into the jury room after telling them that he would give them no instructions.—Hart v. Lindley, 50 Mich. 20.

§ 44. Verdicts and findings.

Direction of verdict, see ante § 42.
Findings on review, see post § 57.
Separate or joint verdict as to codefendant in possession, see ante ¶ 144.

Verdicts and findings in civil cases in general, see Verdicts and Findings.

¶ 159. The finding of the amount due, though required to be stated in the judgment for restitution, is in fact no part of it and does not bind the complainant in an action for the rent.—McSloy v. Ryan, 27 Mich. 110.

¶ 160. A finding "that the relation of landlord and tenant existed between the parties; that the defendant was a tenant at will; that said tenancy was terminated by notice to quit before the commencement of this suit," warrants a judgment for the possession of lands.—Sawyer v. Van Housen, 39 Mich. 89.

¶ 161. Findings that complainant, being in possession of and claiming to own the property described in the complaint, leased the same to a tenant with the right to sublet; that thereupon such tenant sublet three rooms of the premises to defendant, whose real reason for renting the rooms was that she claimed she had a homestead right to the premises, and she wanted to get possession thereof in order to enforce her rights; that subsequently the tenant gave up his lease, and requested defendant to move; that defendant remained and took possession of the entire house; that immediately thereafter the agent of complainant ordered defendant to leave, which order she for some time disregarded; but that before suit commenced, she surrendered up possession and at the time of the trial was not in possession; and that defendant unlawfully withheld such premises, were sufficient to sustain judgment for restitution.—Kusterer v. Wise, 59 Mich. 382.

§ 45. Judgment and disposal of cause.

Right to damages incidentally to the proceeding, see ante § 8.
Sufficiency of findings, see ante § 44.
Dismissal when title comes in issue, see post § 46.
Judgment on review, see post § 57.
Payment of amount found due to avoid restitution, see post § 64.
Conformity of writ to judgment, see post § 63.
General law of judgments, see Judgments.
Effect of judgment as res adjudicata, see Former Adjudication.
Statutory form and provisions of judgment on verdict of guilty in forcible entry cases, see Jud. Act, chap. XXX, § 9; Comp. L. 1915, § 13237.
Provisions for judgment for want of prosecution or on finding of not guilty of forcible entry or detainer, see Jud. Act, chap. XXX, § 11; Comp. L. 1915, § 13239.
Provision for judgment as to part of premises, see Jud. Act, chap. XXX, § 29; Comp. L. 1915, § 13257.
Provisions as to judgment in summary proceedings, see Jud. Act, chap. XXX, § 18; Comp. L. 1915, § 13246.
Provisions as to form and matter of judgment in summary proceedings, including provision for finding and adjudging amount due, if any, see Jud. Act, chap. XXX, § 16; Comp. L. 1915, § 13244.

¶ 162. A judgment against a tenant for possession does not necessarily divest him of his right under the terms of the lease to a share in the crops, and if the judgment is not based on a forfeiture he is at least entitled to his proportion of crops already harvested.—Stancer v. Roe, 55 Mich. 169.

¶ 163. Complainant in summary proceedings to recover possession of land from a tenant who is found to have been wrongfully holding over when the proceeding was begun is entitled to judgment for restitution and to damages and costs; and if, pending appeal by the tenant, the term claimed by him expires and the landlord regains possession, the landlord's right to recover damages and costs upon affirmance of the judgment in his favor is not thereby lost, even though he no longer requires process to restore him to possession.—Peters v. Fisher, 50 Mich. 331.

§ 46. Dismissal when title becomes involved.

Dismissal on appeal on raising issue of title, see post § 56.

¶ 164. A circuit court commissioner should dismiss a summary proceeding brought before him to recover the possession of leased premises when a question of title is raised by defendant's offer to show a sale of the land for taxes to a third party, to whom defendant claims to have attorned.—Jenkinson v. Winans, 109 Mich. 524.

¶ 165. The rule that summary proceedings to recover possession should be dismissed where the question of title is raised, does not apply to a case where the defendant shows an outstanding tax title to a third person to whom he has been paying rent where his arrangement with the complainant was entered into subsequent to the existence of the relationship with the third person and there had been no change of title or condition after possession gained as tenant of complainant.—Meeske v. Miller, 138 Mich. 87.

¶ 166. When action was brought under Comp. Laws 1897, § 11164, to recover possession of land, the trial court should have dismissed the action as soon as it appeared that a question of title was necessarily involved.—Northern Michigan Building & Loan Ass'n v. Fors, 171 Mich. 331.

§ 47. Costs.

On appeal to circuit, see post § 48.
Right to costs on abatement by expiration of interest, see also ante ¶ 163.
Matters of costs common to all actions, see Costs.

Presumption as to regularity of taxation by commissioner on mandamus to compel return by commissioner for appeal, see Mandamus, V.

On verdict of guilty in forcible entry, see Jud. Act, chap. XXX, § 9; Comp. L. 1915, § 13237.

On judgment for defendant in forcible entry, see Jud. Act, chap. XXX, § 11; Comp. L. 1915, § 13239.

Cost provisions applicable in summary proceedings, see Jud. Act, chap. XXX, § 16; Comp. L. 1915, § 13244.

Provision as to costs on restitution under summary proceedings, see Jud. Act, chap. XXX, § 18; Comp. L. 1915, § 13246.

¶ 167. Costs in proceedings before justices of the peace for forcible entries and detainers are to be taxed by the same rules as when before circuit court commissioners or other officers having jurisdiction in such cases. Comp. L. 1857, § 3779, How. St., § 6940 applies only to cases of which justices have jurisdiction under the justices' act and its amendments.—Dibell v. Brinkerhoff, 22 Mich. 371.

¶ 168. The taxation of costs by the commissioner is presumed regular under Comp. L. 1897, § 11163, providing for taxation for prevailing defendant in the same manner as costs of complainant recovering judgment.—Stuart v. Corlette, 129 Mich. 611.

§ 48. ——On appeal to circuit.

Liability for costs on appeal bond, see post § 58.

Bond or security for appeal, see post § 52.

Statutory provisions as to costs on appeal, see Jud. Act, chap. XXX, § 26; Comp. L. 1915, § 13254.

¶ 169. Under How. St., §§ 7026, 8307, 9004, the allowance of costs upon the trial of an appeal from a circuit court commissioner in summary proceedings to recover the possession of land is within the discretion of the circuit court.—Voight Brewery Co. v. Wayne Circuit Judge, 108 Mich. 356.

¶ 170. Where judgment was rendered in favor of the complainant, in a case where the complaint was insufficient to confer jurisdiction, and an appeal was taken to the circuit court, it was held that that court had jurisdiction, on reversing the judgment, to render judgment against the complainant for costs.—Bryan v. Smith, 10 Mich. 229.

§ 49. Right to review and mode of review.

Office of certiorari and effect of judgment therein, see also post ¶ 196.

Appellate procedure, see post § 51 et seq.

General law of appeals and certiorari from justices, see Justices of the Peace, V, VI.

General law of certiorari other than statutory certiorari to justice, see Certiorari.

Statutory provisions for appeal to circuit court, see Jud. Act, chap. XXX, § 24; Comp. L. 1915, § 13252.

Statutory right to certiorari to circuit court in same manner as in justice cases, see Jud. Act, chap. XXX, § 27; Comp. L. 1915, § 13255.

¶ 171. Appeals from proceedings under the forcible entry and detainer act are allowable in the same manner as from judgments of justices of the peace.—Bearse v. Aldrich, 40 Mich. 529.

¶ 172. Discretion to allow appeals, if jurisdictional, is not reviewable.—Bearse v. Aldrich, 40 Mich. 529.

¶ 173. A proceeding to recover possession of lands under the statute of forcible entries, etc., being summary and unknown to the common law, certiorari, only, lies to bring the cause directly into the supreme court.—Parker v. Copland, 4 Mich. 528.

¶ 174. The supreme court, although it has power to review, upon a common-law certiorari, summary proceedings under the statute to recover possession of lands, will dismiss the writ, as the statute provides other remedies.—Farrell v. Taylor, 12 Mich. 113; Smith v. Reed, 24 Mich. 240.

¶ 175. The statute regulating certiorari in cases of forcible entry and detainer tried by a circuit court commissioner is the same that applies to justices' judgments.—Knapp v. Gambsy, 47 Mich. 375.

¶ 176. Certiorari should not be resorted to for the review of statutory proceedings to recover possession unless there is some fair ground for it on which the whole case can be disposed of justly and finally; but if a full review is desired an appeal should be taken.—Wilkinson v. Williams, 51 Mich. 155.

¶ 177. Certiorari will not lie, as a matter of right, to review the action of a circuit court commissioner in denying an application for a continuance in summary proceedings, since complete justice may be obtained by an appeal and a trial on the merits.—McNaughton v. Evert, 116 Mich. 141.

§ 50. Courts for review.

Writ of error or certiorari to judgment of circuit court, see Appeal and Error; Certiorari.

Review of judgment of circuit rendered on appeal from justice or commissioner, see Appeal § 26.

Propriety of common law certiorari to supreme court, see ante § 49.

Provisions for certiorari to circuit, see Jud. Act, chap. XXX, §§ 27, 28; Comp. L. 1915, §§ 13255, 13256.

§ 51. Procedure to take appeal.

Bond or security for appeal, see post § 52.

Amendments and further pleadings on appeal, see post § 53.

Scope of appeal and matters open on appeal, see post §§ 54, 55.
Dismissal or findings and judgment on appeal, see post §§ 56, 57.
For procedure in appealing from justices of the peace, see Justices of the Peace, V.

¶ 178. An affidavit on appeal from a commissioner's judgment in summary proceedings to recover land is sufficient under How. St., § 8307, if it follows the form commonly used on appeals from justices' courts; it need not state the nature of the action, when it arose, or when it was tried.—Hanaw v. Bailey, 83 Mich. 24.

¶ 179. The circuit court has jurisdiction to extend the time for appeals on good cause shown; such as being prevented by severe sickness from taking the appeal.—Bearse v. Aldrich, 40 Mich. 529.

§ 52. Bond or security on appeal.

Dismissal of appeal for failure of sureties to justify, see post § 56.
Obligation and liability on bond and actions or procedure to enforce it, see post §§ 58-62.
Statutory provisions as to bond, see Jud. Act, chap. XXX, § 24; Comp. L. 1915, § 13252.
Bond for certiorari, statutory provisions, see Jud. Act, chap. XXX, § 28; Comp. L. 1915, § 13256.

¶ 180. How. St., § 8307, providing that appeals may be taken in summary proceedings to recover the possession of land in the same manner as in cases of appeals from judgments rendered before justices of the peace, does not restrict the procedure on appeal to those provisions of the justices' act in existence when said section was adopted in the Revision of 1846, but, rather, is intended to furnish a rule for the conduct of appeals, to be ascertained by reference to the laws in force at the time the appeal is sought to be taken. The appeal bond in such case, therefore, may be approved by a deputy county clerk, under How. St., § 7000; but the sureties thereon must justify, as provided by section 7001.—Cole v. Wayne Circuit Judge, 106 Mich. 692.

¶ 181. Security for costs is not required by statute on appeal from summary proceedings before commissioner.—McDowd v. Wayne Circuit Judge, 41 Mich. 551.

¶ 182. Where, on an appeal in summary proceedings, the commissioner accepts the appeal bond and returns it with the appeal papers to the circuit court, it will be presumed in favor of the jurisdiction of that court that the commissioner approved the bond and fixed its penalty according to law.—Hanaw v. Bailey, 83 Mich. 24.

§ 53. Amendments and further pleadings on appeal.

¶ 183. Where a landlord recovers possession from his tenant in summary proceedings, and pending appeal by the tenant the term claimed by him expires, and the landlord immediately lets the premises to tenant's wife, the appellant cannot plead this as a fact puis darrein amounting to surrender by himself and acceptance by the landlord and precluding judgment for the landlord on the appeal.—Peters v. Fisher, 50 Mich. 331.

§ 54. Scope of appeal and questions reviewable.

General law as to matters reached by appeal or writ of error or certiorari, see Appeal, XII; Certiorari § 48 et seq.
Saving questions for review by objections below, see also Saving Questions.
Presumption on error to circuit judgment that commissioner had jurisdiction, see Appeal ¶ 1526.

¶ 184. The appeal, in forcible entry and detainer cases, covers jurisdictional questions as well as those arising on the merits.—Farrell v. Taylor, 12 Mich. 113; Sallee v. Ireland, 9 Mich. 154.

¶ 185. A justice of the peace has the same jurisdiction as a circuit judge in summary proceedings to recover possession; and the judge can decide no question therein that could not have been decided by the justice. (Comp. L. 1875, § 5250, p. 258; 1881, §§ 5825-5333, p. 23.)—Riggs v. Sterling, 51 Mich. 157.

¶ 185a. On error to a judgment of ouster in forcible entry by a guardian to expel an administrator from possession of the land, if the showing of guardianship contains no proof of jurisdiction in the court which granted the letters, it is not a material question whether matters subsequent to the ouster could legalize it, e. g., whether a statute entitling the administrator to possession was retroactive.—Carpenter v. Harris, 51 Mich. 223.

¶ 186. On certiorari to a circuit court commissioner to bring up his proceedings on a complaint of forcible entry and detainer, the objection that he extended the time for giving security for costs does not go to the merits and is of no force.—Knapp v. Gamsby, 47 Mich. 375.

¶ 187. It is error to treat a summary dispossession case upon certiorari from a commissioner, as one to be heard de novo upon the merits, as the decision of the commissioner upon controverted questions of fact is final, and the case can only be reversed for errors of law apparent upon the face of the return.—O'Connor v. White, 124 Mich. 22.

¶ 188. The contention that a lease for five years did not terminate at the end of five years from its date, but at the end of five years from the date when possession was given, cannot be first urged on appeal.—Gensler v. Nicholas, 151 Mich. 529.

§ 55. Presumptions and concluded facts on review.

Changing theory to entry on different day, see also ante ¶ 125.

Presumption in favor of jurisdiction of appeal, see also ante ¶ 182.
Presumptions on error or appeals in general, see Appeal, XII, C.

¶ 189. No harm can be presumed from the commissioners having gone into the jury room after refusing instructions, especially where it does not appear that the jury would have decided otherwise.—Hart v. Lindley, 50 Mich. 20.

¶ 190. On writ of error to the circuit court on reversal of judgment by the circuit court commissioner in favor of the complainant in summary proceeding for possession, the finding by the commissioner on conflicting evidence that the relation of landlord and tenant existed is conclusive and not subject to review.—Meeske v. Miller, 138 Mich. 87.

§ 56. Dismissal of appeal.

Authority to dismiss on hearing and effect of dismissal on judgment below, see post § 57.

¶ 191. The jurisdiction of the circuit court on appeal from a circuit court commissioner is no greater than the commissioner had; and if the title to the land was involved, as it would be if defendant denied the validity of an execution sale under which plaintiff claimed, a motion to dismiss the proceeding should be granted.—Mulder v. Corlett, 54 Mich. 80.

¶ 192. Where a lessee, after appeal from a judgment of restitution in summary proceedings against him, served notice that he would quit the place and requested that the lessor should come and divide the property on the premises at the time and then surrenders possession, such surrender is not ground for dismissing the appeal, for it does not satisfy the judgment or operate as an admission that at the commencement of suit defendant was held unlawfully.—Hanaw v. Bailey, 83 Mich. 24.

¶ 193. Where the sureties upon an appeal bond fail to justify as required by How. St., § 7001, and the appellant does not offer a sufficient bond under section 7018, the appeal is properly dismissed.—Cole v. Wayne Circuit Judge, 106 Mich. 692.

§ 57. Findings and judgment on review.

Effect of failure to find amount due, release of sureties, see post § 59.
Time for issuance of writ of restitution, see post §§ 63, 64.
Judgment on abatement of cause pending appeal by expiration of interest of appellant, see also ante ¶ 163.
Costs on appeal, see ante § 48.

¶ 194. Upon the trial in the circuit, on appeal, there need not be a finding of the amount of rent due. Comp. L. 1871, § 6710 (How. St., § 8299), requiring this finding, and section 6719 (§ 8308), providing "that no writ of restitution shall issue if the defendant shall, within five days after final judgment, pay the amount so found due" and double costs, do not apply to the trial on appeal.—McSloy v. Ryan, 27 Mich. 110.

¶ 195. Where, in summary proceedings to recover the possession of lands, defendants appeal from a judgment for the restitution of the premises, and are ordered by the circuit court to give a bond additional to that approved by the commissioner, and fail to comply with such order, the court has authority to dismiss the appeal, and by so doing the judgment appealed from will stand affirmed, but, there having been no hearing on the merits in the circuit court, no judgment of ouster can be entered.—McMillan v. Felcher, 100 Mich. 341.

¶ 196. Reversal on certiorari in forcible entry proceedings does not secure a new trial, but ends the proceedings. The statute (Comp. L. 1871, § 6718, see How. St., § 8307) provides for an appeal on which a new trial can be had as of right. Whether certiorari is a proper remedy where an appellate court would not know whether the judgment would have been different if the errors complained of had not been made, quære.—Knapp v. Gamsby, 47 Mich. 375.

§ 58. Obligation and liability on bonds for appeal.

Discharge or release of sureties, see post § 59.
Alternative right to enforce bond or sue for trespass, see post § 60.
Execution on principal judgment against sureties without separate action on bond, see post § 61.
Actions on the bond, see post § 62.
Statutory provisions of the bond, see Jud. Act, chap. XXX, § 24; Comp. L. 1915, § 13252.

¶ 197. Until actual restitution and possession have been obtained no right of action accrues upon a bond given on appeal to the circuit court from a commissioner's judgment in a proceeding to obtain restitution of premises under Laws 1861, pp. 466, 467, § 25, How. St., § 8307.—Delashman v. Berry, 21 Mich. 516.

¶ 198. It is no defense to a recovery on a bond to secure rent, given on an appeal in proceedings to recover possession, that the obligee had never obtained restitution under his judgment where he was prevented by order of the court, on motion of the principal obligor in such bond, from getting possession until after the expiration of the term for which he held the premises from his lessor and until after his right to possession had terminated.—Holcomb v. Bonnell, 32 Mich. 6.

¶ 199. In summary proceedings by an execution purchaser for possession where de-

fendant has appealed, if complainant's right to possession ends before restitution can be had, the latter is entitled, the judgment being affirmed on appeal, to recover for rent during his term upon the appeal bond conditioned to pay all rent due if said complainant should obtain restitution.—Estey Mfg. Co. v. Runnells, 67 Mich. 310.

¶ 200. Rent and costs are all that the surety in a bond on appeal in a summary proceeding is answerable for.—Hoffman v. Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

¶ 201. In an action on a bond given on appeal in a summary proceeding, the landlord may recover from an overholding tenant the actual rental value of the premises from the expiration of his lease, irrespective of the stipulated rental.—Hoffman v. Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

¶ 202. A surety on a bond on appeal in a summary proceeding is not liable for a charge for light and ice furnished by a landlord under contract with a tenant.—Hoffman v. Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

§ 59. ——Discharge or release of sureties.

See also post ¶ 212.
General law of suretyship, see Suretyship.

¶ 203. The failure of the court on appeal from summary proceedings before a commissioner to find the amount of rent due as required by How. St., § 8299 does not release the liability of a surety on the appeal bond.—Bauer v. Wasson, 66 Mich. 256.

¶ 204. How. St., § 7030 of the justices' act, making the continuance of the sureties' liability on an appeal bond depend upon the issuing of execution within thirty days after the rendition of the judgment against the appellant, does not apply to appeal summary proceedings to recover possession of land, and therefore has no reference to appeals from circuit court commissioners in such cases though section 8307 likens such appeals to those from justices.—Bauer v. Wasson, 66 Mich. 256.

¶ 205. The sureties on a bond given on appeal from a circuit court commissioner's decision granting restitution under a forfeiture of a land contract are discharged by repeated postponements of the hearing of the appeal consented to by the plaintiff each time upon the receipt of additional payments on the original contract.—Walker v. Archer, 128 Mich. 608.

§ 60. ——Alternative and elective remedies of plaintiff.

¶ 206. Plaintiff brought proceedings under Comp. L. 1897, chap. 308, to obtain possession of premises which had been leased to defendant and obtained judgment before a circuit court commissioner. Defendant appealed and plaintiff had judgment of restitution in the circuit court. Plaintiff sued on the appeal bond under section 25 which provides that he might sue on the bond, or bring action for treble damages under section 24, and recovered judgment for the rental value up to the time of restitution. Held that he could not thereafter sue under section 24 for items of damages which could not be, and were not, recovered in the action on the bond.—Schellenberg v. Frank, 139 Mich. 183.

¶ 207. Where a landlord has elected to sue upon the appeal bond under Comp. L. 1897, chap. 308, § 25, which permits him to elect between suing on the bond and suing for damages under section 24, he can recover neither treble nor single damages under section 24 upon items for which he could not, and did not, recover in the action on the bond, since, having made his election, he is precluded from pursuing the alternative remedy.—Schellenberg v. Frank, 139 Mich. 183.

§ 61. ——Execution against sureties on principal judgment.

Judgment against sureties without separate action and execution on the judgment on appeal or for security for costs, see Appeal § 573; Certiorari § 64; Security for Costs, III.

¶ 208. The amount of rent found due in a summary proceeding appealed to the circuit constitutes no part of the judgment, and for that reason it cannot be enforced by execution against either principal or surety in the appeal bond.—Bauer v. Wasson, 66 Mich. 256.

§ 62. ——Actions on bonds, and procedure and proof therein.

Election between action on bond and suit in trespass for treble damages, see ante § 60.
See also Appeal, XVI; Bonds §§ 6-8.
Limitation applicable in action on bond, see Limitations, II.

¶ 209. Where judgment of restitution of leased premises was rendered against two defendants as partners, and one alone appealed to the circuit court and gave bond conditioned upon the payment of the rent "if the plaintiff obtained restitution," and whereupon judgment of restitution being and rendered by that court in form against both defendants, action on the bond was begun against only the defendant who gave the bond, and the declaration alleged that the bond was one given by such defendant alone, and that the breach consisted in the partners not having paid rent; the assignment of the breach corresponded to the condition of the bond with sufficient certainty to enable plaintiff to recover for the breach.—Grashaw v. Wilson, 123 Mich. 364.

¶ 210. In an action for rent based on the condition of the appeal bond in proceedings for the recovery of the land, it was held that proof of the writ of restitution was proper if it was served, and immaterial if complainant got possession without it.—Hecht v. Ferris, 45 Mich. 376.

¶ 211. An action for rent was brought on the condition of the appeal bond in proceedings to recover land from a tenant. In bar of a recovery proof was offered of an execution sale of the property against one of the lessors in favor of one of the sureties, and of a judgment in favor of the same surety in summary proceedings against the same lessor and the lessee for the possession of the same premises. But the lessee had enjoyed the premises for a certain period, and neither he nor his lessor had been ousted. Held, that the proof was properly ruled out. —Hecht v. Ferris, 45 Mich. 376.

¶ 212. In an action for rent against the sureties on an appeal bond bringing up proceedings for the recovery of the premises leased by a man and his wife, an order payable out of the rent, signed by the man but not by his wife, and drawn upon the tenant, was held inadmissible where there was no assignment of the lease of both lessors.—Hecht v. Ferris, 45 Mich. 376.

¶ 213. In an action on an appeal bond given by one defendant on appeal from a judgment of restitution of leased premises against such defendant and another, it is not error to admit in evidence the files and records in the action for restitution.—Grashaw v. Wilson, 128 Mich. 364.

¶ 214. In an action on an appeal bond from a judgment of restitution of premises, where plaintiff delayed 14 days after the judgment without suing out a writ of restitution, it was not error to refuse to charge that plaintiff, having failed to prove that restitution was obtained by virtue of the restitution proceedings, could therefore not recover, it appearing that although no writ issued, the defendants voluntarily surrendered possession.—Grashaw v. Wilson, 123 Mich. 364.

III. WRIT OF POSSESSION AND RESTITUTION.

§ 63. Writ and execution of it.

Sufficiency of description of land in complaint to sustain writ, see ante §§ 19, 22.
Withholding writ for period to allow payment, see also post § 64.
Payment or tender to avoid execution of writ, see post § 64.
Time for issuance of final process to hold sureties on appeal bond, see ante ¶ 204.
Restitution as maturing liability on appeal bond, see ante § 58.
Voluntary surrender without writ as maturing liability on bond, see also ante ¶ 214.
Provisions as to issuance of precept on judgment of guilty in forcible entry, see Jud. Act, chap. XXX, § 10; Comp. L. 1915, § 13238.
Provisions for withholding writ of restitution if payment of sum found due be made within five days, see Jud. Act, chap. XXX, § 25; Comp. L. 1915, § 13253.
Provisions for withholding writ of restitution for five days and thereafter during pendency of appeal, if any, see Jud. Act. chap. XXX, § 25; Comp. L. 1915, § 13253.
Writ of possession on judgment on appeal, statutory provisions, see Jud. Act, chap. XXX, § 26; Comp. L. 1915, § 13254.

¶ 215. Under a circuit court judgment for restitution in summary proceedings to recover the possession of land, a writ of restitution may be issued by the clerk in vacation as well as in term.—Christler v. Locke, 103 Mich. 86.

¶ 216. This writ in forcible entry cases must follow the judgment, and consequently the complaint, in describing the premises.—Clark v. Gage, 19 Mich. 507.

¶ 217. Whether an officer executing a writ of possession can handcuff a tenant who resists him, quære.—Sutherland v. Ingalls, 63 Mich. 620.

¶ 218. The court in setting aside a writ of possession which has been executed may order the possession restored.—Campau v. Coates, 17 Mich. 235.

§ 64. Payment or tender to stop proceeding.

¶ 219. Writ of restitution cannot issue upon a judgment of a circuit court commissioner, in a proceeding brought under Comp. L. 1897, §§ 11164-11181, for the recovery of possession of land because of nonpayment of instalments due under a contract for its purchase, where within 5 days after the judgment, defendant paid to the commissioner the amount found due and double the amount of costs awarded, since section 11177 expressly provides that no writ of restitution shall issue in such case.—Lambton Loan & Inv. Co. v. Adams, 132 Mich. 350.

¶ 220. A subtenant was a stranger to summary proceedings instituted by the landlord against the lessee for nonpayment of the rent, and could not compel such landlord to accept such payment; since there was no privity of contract between the landlord and such subtenant.—Wray-Austin Machinery Co. v. Flower, 140 Mich. 452.

¶ 221. The provision in Comp. L. 1897, § 11177, giving a defendant tenant in summary proceedings for possession five days after judgment of restitution in which to pay the amount due, before a writ of resti-

tution shall issue, applies only to prpceedings before the commissioners and in the circuit court, and defendant is not entitled to such right after the judgment of restitution has been affirmed against him in the supreme court.—Smith v. Nelson, 165 Mich. 438.

¶ 222. Where a vendee on notice of forfeiture of a land contract, surrenders possession to his vendor, a subsequent forcible entry and retention of possession by the former will not permit him in an action by the vendor to recover possession, to claim the benefit of §§ 11168, 11177, Comp. Laws 1897, How. St., 2nd ed., §§ 13688, 13697, permitting the discharge of contractual obligations after judgment of restitution.—Kennedy v. Ford, 183 Mich. 481.

FORECLOSURE.

Cross-References.

Foreclosure—
- Of chattel mortgages, see Chattel Mortgages, VII.
- Of land mortgages, see Foreclosure of Mortgages.
- Of liens, see Liens; Mechanics' Liens.
- Of land purchase contracts, see Vendor and Purchaser, XI, XII.
- Of corporate and railroad mortgages, see Corporations § 89; Railroads, VI.

FORECLOSURE OF MORTGAGES.

TREATS of the foreclosure of mortgages on land either by suit or by advertisement and sale under the statutes pursuant to power reserved in the mortgage, including the procedure, sale, redemption, deficiency judgments, and defective foreclosures. The general law of mortgages, including the common-law right to redeem and bills for accounting and redemption, is treated in Mortgages.

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I. CAUSE OF ACTION AND RIGHT TO FORECLOSE.

§ 1. In general; concurrent rights and remedies.

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Nature and characteristics of mortgages in general, see Mortgages, I.
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Pending foreclosure bill as bar to quieting title, see also Equity ¶ 100.

¶ 1. In Michigan mortgages can only be foreclosed by statutory publication or a foreclosure suit in chancery.—Kollen v. Sooy, 172 Mich. 214.

¶ 2. Foreclosure is not barred by the existence of another mortgage as prior security.—Connerton v. Millar, 41 Mich. 608.

¶ 3. One who holds several securities for the same debt may foreclose either of them at his option until his debt is satisfied.—McKinney v. Miller, 19 Mich. 142.

¶ 4. Where one holds a chattel mortgage as security for the payment of a note, and afterwards takes a mortgage on real estate conditioned in the usual form for the performance of the condition of the note, he is not obliged to resort to the chattel mortgage before foreclosing that upon real estate.—Davis v. Rider, 5 Mich. 423.

¶ 5. Where the grantee in a deed of certain land agreed to pay a mortgage on the land which also included other land owned by the grantor, a bill by the latter to have the mortgage foreclosed and satisfied first out of the property conveyed, will not be denied on the ground that he had an adequate remedy at law by recovering compensation, since he had a right to resort to equity to preserve his own property.—Mowry v. Mowry, 137 Mich. 277.

¶ 6. A father bought land, making the first payment with his own money, and gave in his own name a purchase-money mortgage for the balance. In the deed to him, following the description, was a statement that the land was conveyed to him in trust for his minor son. Held that, as against the mortgagee, the minor had no equitable rights, and that such mortgagee had at least a vendor's lien upon the premises for the unpaid purchase-money.—Strong v. Ehle, 86 Mich. 42.

§ 2. Persons entitled to foreclose.

Persons entitled to remedy of statutory foreclosure and persons bound thereby, see post § 19.
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Persons entitled to subrogation on foreclosure, see Subrogation, I.
Mortgages executed to invalid or irregular banks, see Banking § 48.

¶ 7. A mortgage conditioned for the support of the mortgagee by the mortgagor during her lifetime cannot be foreclosed for the benefit of persons who had boarded the mortgagee at the mortgagor's request. Such a mortgage is for the benefit of the mortgagee, and not for the benefit of those who may, at the request of the mortgagor, furnish her with support.—Daniels v. Eisenlord, 10 Mich. 454.

§ 3. Grounds and maturity of right.

Elective right to treat whole sum due on any default, see post § 4.
Mortgages to secure conditional or collateral liability, see post § 5.
Validity, construction and effect of mortgages in general, see Mortgages, III.

¶ 8. A foreclosure bill will not lie until the debt secured by the mortgage under foreclosure falls due.—Kelly v. Bogardus, 51 Mich. 522.

¶ 9. The only effect of an omission, before filing a foreclosure bill, to demand payment at the place stipulated in the mortgage, would be to prevent a recovery of costs. It would not defeat foreclosure.—Norton v. Ohrns, 67 Mich. 612.

¶ 10. Where a debt is made payable after several years, but the interest is payable annually, a bill to foreclose the mortgage which secures it may be properly filed after the expiration of the year, if interest is in arrears.—Dederick v. Barber, 44 Mich. 19.

¶ 11. A mortgage payable absolutely at a specified time, given to secure the payment of another incumbrance on land conveyed to the mortgagee, may be foreclosed by him upon default, without first paying off such incumbrance.—Raffel v. Epworth, 107 Mich. 143.

¶ 12. A condition in a mortgage that the mortgagor "shall promptly pay and discharge all notes and papers of his upon which the mortgagees shall become indorsers or acceptors, together with all the interest, costs and charges accruing thereon, so as to save said mortgagees harmless by reason of their connection with such paper," is broken at once on a failure to pay the paper at maturity, and a right to foreclose accrues, without further action of the mortgagees.—Butler v. Ladue, 12 Mich. 173.

§ 4. ——Elective right to treat whole sum due on any default.

¶ 13. It seems that formal notice of an election to foreclose for the whole debt, if an instalment is overdue, is unnecessary, and a declaration in the bill, of such election, is enough.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 14. Whether a formal notice of an election by the mortgagor to treat the whole

amount as due for the nonpayment of interest is necessary before commencing foreclosure, or whether the want of such notice affects anything more than the question of costs, quære.—English v. Carney, 25 Mich. 178.

¶ 15. Where a mortgage provides that a default in the payment of interest for a specified time shall render the whole amount of principal, as well as interest, due, and an insufficient tender is made, the mortgagor may declare the entire amount due and foreclose therefor.—First State Bank of Decatur v. Day, 188 Mich. 228; O'Dell v. First State Bank of Decatur, Id.

¶ 16. A foreclosure for one instalment due on a mortgage debt and in default without any election therein to treat the whole debt as due according to an option in the mortgage is not an election not to do so, or a waiver of that right, in the case of a subsequent default; and either the mortgagee or his assignee may thereafter so elect.—Brand v. Smith, 99 Mich. 395.

¶ 17. Where a mortgage covenanted that, on default in payment of interest, the whole amount of the debt should become due if the holder so elected, the mortgagee, who had assigned the mortgage and indorsed the notes secured by it, was held not to be so far interested in the question of election as to be entitled to disturb a decree against him as indorser on the ground that notice to him of such election was not alleged or proved.—English v. Carney, 25 Mich. 178.

¶ 18. Proceeding by notice and advertisement to foreclose is a sufficient election to treat the mortgage debt as due and in default pursuant to a clause in the mortgage, and no prior notice is requisite.—Hawes v. Detroit Fire & Marine Ins. Co., 109 Mich. 324.

¶ 19. Where a complaint in a mortgage foreclosure reciting the terms of a mortgage states that the mortgagor covenanted to pay the taxes within 40 days after they became due and in case of default the mortgagee could pay them and such payment would become a further lien on the premises and payable forthwith to the mortgagee with interest, and if the principal, interest, or taxes, or insurance premiums are not paid when the same become payable as provided in the mortgage and remain unpaid for 30 days then the option to declare the whole sum due, an averment of default in the nonpayment of the taxes is insufficient and an action of foreclosure cannot be brought until 30 days after the mortgagee has himself paid the taxes.—Union Trust Co. v. Grant, 148 Mich. 501.

§ 5. ——Mortgages to secure conditional or collateral liability.

Averments in bill for foreclosure as to conditions and contingencies, see post § 74.

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Sufficiency of proof to enforce mortgage securing contingent liability, see post ¶ 358.

¶ 20. A mortgage securing an agreement, conditioned on the success of a pending suit, cannot be foreclosed if the suit fails.—Lamb v. Scullen, 61 Mich. 280.

¶ 21. Where a conveyance was made as security for a debt upon the express condition that the grantee shall save the grantor harmless from certain debts there is no breach of the condition until the grantor is actually damnified; a failure to pay the debts, by reason of which the grantor is threatened with suit, is not a breach.—Michigan State Bank v. Hastings, 1 D. 225.

¶ 22. A mortgage given as collateral security for the notes of third parties, does not require the mortgagee to first attempt to collect the notes from the makers and indorsers before resorting to a foreclosure of such mortgage.—Clare County Sav. Bank v. Goodman, 119 Mich. 338.

¶ 23. Mortgagees who hold their mortgage for security of a bond given by the mortgagors conditioned to pay certain notes within a time certain after they mature, the mortgagors and mortgagees being respectively principals and sureties on said notes, may at the stipulated time sue to foreclose, although they have not then been compelled as such sureties to pay the notes; since the bond is absolute and not by way of indemnity.—Hall v. Nash, 10 Mich. 303.

¶ 24. A purchase-money mortgage given upon condition that should the vendor die before perfecting title by procuring a discharge of a prior mortgage and an undertaking to save harmless against any claim for rents and profits, the mortgage is to be fully discharged, cannot be foreclosed unless it can be shown that the prior mortgage was discharged and an acquittance of any claim for use and profits obtained.—McCrath v. Myers, 126 Mich. 204.

¶ 25. A condition in a mortgage that if at the expiration of the time limited for the payment of the instalments there should remain due on the mortgage a specified sum, the mortgagor might have the privilege of paying the amount due by giving therefor his note, secured by mortgage on other real estate, does not prevent the instalments from falling due at the time stipulated, nor prevent a sale under the mortgage to satisfy them when they fall due, though the mortgagor may in such case stop the sale by insisting on and complying with the terms of the condition.—Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 26. On a bill to foreclose a real estate mortgage where the note for which it was

security was made a part of the defeasance clause, and contained a distinct and unequivocal promise to pay the principal sum on or before a specified number of years after date together with interest of a specified rate, but further stipulated that the note should become void and canceled at the death of the payee, provided the interest was fully paid at the time specified, and a later section of the defeasance clause provided that if the maker should pay the interest on the principal to the payee or his assigns when the same fell due, and the mortgage and note should become void upon the death of the payee, otherwise to remain in full force and effect, and the payee was living after the maturity of the note and the interest was not fully paid as therein provided, held that the mortgage was not intended as security for the payment of interest only but also for the principal, and that the complainant was entitled to a decree for both principal and interest, and that the land should be sold and the proceeds applied to satisfaction of the same.—Engler v. Engler, 192 Mich. 361.

§ 6. Pending actions and process for the debt.

Garnishment by mortgagee's creditors, see post § 7.

Right to commence statutory foreclosure proceedings during pendency of "proceedings at law," see post § 18.

Effect of bankruptcy on pending foreclosures, see Bankruptcy § 17.

Statutory provisions as to pending actions or process for debt, see Jud. Act, chap. XIX, §§ 27, 28; Comp. L. 1915, §§ 12681, 12682.

¶ 27. Complainant, a holder of notes secured by mortgage took a judgment on them at law, and allowed the statute to run on said judgment. Section 521, Comp. Laws 1897, requires a holder taking judgment at law to levy execution and have the same returned unsatisfied before bringing a bill to foreclose. Held, complainant's bill to foreclose would not lie.—Stegeman v. Fraser, 161 Mich. 35.

¶ 28. No proceeding can be had on a bill to foreclose a mortgage, if it appear that any judgment has been obtained in a suit at law for the debt, or any part thereof, unless to an execution against the property of the defendant in such judgment the sheriff shall have returned the execution unsatisfied in whole or in part, and also returned that defendant has no property to satisfy the execution except the mortgaged premises (R. S. 1838, p. 377, § 109, How. St., § 6706).—Dennis v. Hemingway, W. 387.

¶ 29. Where bill was filed to foreclose a mortgage given to secure the payment of three notes, and the bill stated that a judgment had been recovered on the first note, which had been nearly paid, but did not show that an execution had been issued on the judgment and returned unsatisfied in whole or in part, nor distinctly claim a decree for the amount of the other two notes only, nor waive the right to the mortgage security as to the judgment, it was held that the bill could not be maintained (Comp. L. 1857, § 3569, How. St., § 6706).—Cooper v. Bresler, 9 Mich. 534.

¶ 30. To prevent proceedings on a foreclosure bill, it is not necessary that judgment shall have been rendered on the bond or note accompanying the mortgage, but for the money for which the mortgage was given.—Dennis v. Hemingway, W. 387.

§ 7. ——Garnishment by mortgagee's creditors.

¶ 31. An assignee of a mortgage is not entitled to foreclose it pending garnishment proceedings begun against the mortgagor, before the assignment, by the mortgagee's creditor.—Gemberling v. Spaulding, 104 Mich. 217.

§ 8. Express powers of sale and implied rights.

Sufficiency of power of sale in general, see post § 21.

¶ 32. In a mortgage with the condition to save harmless from liability incurred by indorsing paper, the power of sale was limited to the case of the mortgagees being damnified by paying the debts. It was held that the power of sale need not be coextensive with the condition of the mortgage, and that the remedy in equity was open for every breach of the condition, whether the parties had seen fit to provide for such a breach in the power of sale or not.—Butler v. Ladue, 12 Mich. 173.

§ 9. Defenses, objections or bar of right.

Failure of consideration or defective title, see post § 10.

Payment or tender, see post § 11.

Laches or delay and bar of debt, see post § 12.

Estoppel and waiver of rights or defenses, see post § 13.

Set-offs and cross-demands against foreclosure, see post, III, C, D; Set-off.

Suits for relief from defective foreclosures, see post, V.

Right of persons who have deeded away their equity of redemption to defend against mortgage, see post ¶ 244.

Release of one parcel from mortgage as bar to foreclosure to other parcels covered by mortgage, see post ¶ 90.

Counter suits to redeem or to enjoin foreclosure because of defenses or set-offs, see Mortgages, IX; Injunctions, II.

Defenses by bona fide takers as against unrecorded mortgages, see Notice and Record of Title, I.

Defense of discharge of mortgage as inuring to defaulted defendants, see Defaults ¶ 53.

Objections to representative's mortgage available on foreclosure, see Estates of Decedents § 256.

¶ 33. Proof in a foreclosure case that the note which is the basis of the proceedings does not belong to the complainant, but to other parties who use complainant's name for the purposes of the suit, does not affect the proceeding any further than to entitle defendants to the benefit of any defense they might have against the real owners.—Spear v. Hadden, 31 Mich. 265.

¶ 34. Where a complainant parted with his interest in a mortgage before answer, it was held a good objection to his foreclosure suit.—Wallace v. Dunning, W. 416.

¶ 35. The fact that pending a foreclosure suit the complainant borrowed money from a third person on the mortgage on the understanding that the suit was to go on and the money be repaid with interest, if it succeeded, is no defense to the foreclosure.—Chase v. Brown, 32 Mich. 225.

¶ 36. It is no defense to a bill for foreclosure by the assignee of a mortgage that the assignment to him was without consideration. The mortgagor has no interest in the question whether the assignment was for or without consideration, except as the want of it may enable him to make available any defense he might have had as against the mortgagee.—Adair v. Adair, 5 Mich. 204.

¶ 37. It is no defense to a suit to foreclose a purchase-money mortgage that knowledge of an outstanding incumbrance was withheld from the vendee, where the vendor had at the time arranged for its release, and it was so released after the filing of the bill, and before damage had resulted to defendant.—Raffel v. Epworth, 107 Mich. 143.

¶ 38. Where the purchaser of a newspaper has been deceived by misrepresentations of the seller as to the amount of circulation, so as to have a good defense against the seller in a suit by him for the purchase price, it is held the purchaser may interpose such a defense against the seller's cross-bill in equity to foreclose the mortgage securing the purchase price.—Smith v. Werkheiser, 152 Mich. 177.

¶ 39. The good faith of a second mortgagee in taking his mortgage on the strength of a forged discharge of the former one is no defense to the foreclosure of the earlier mortgage if the holder had nothing to do with deceiving the later mortgagee.—Keller v. Hannah, 52 Mich. 585.

¶ 40. A release of part of mortgaged lands at the instance of the mortgagor is no defense to a foreclosure of the rest if there is nothing to indicate that the release was against the rights of any of the defendants.—Botsford v. Botsford, 49 Mich. 29.

§ 10. ——Failure of consideration or defective title.

¶ 41. A note and mortgage given for a fixed sum and payable absolutely, but with no consideration except an undertaking to furnish goods which the mortgagees afterwards failed to furnish, cannot be enforced where the holder is not a bona fide holder for value.—Fisher v. Meister, 24 Mich. 447.

¶ 42. Where upon an executor's bill for the foreclosure of a mortgage found in testator's safe, and which the mortgagor claimed was given as indemnity for the indorsement of a note finally paid after renewals, it appeared that the mortgagee never had money to lend, and that he never called upon the maker of the note for payment but permitted it to outlaw in his hands, the bill was properly dismissed.—Saenger v. Von Der Heide, 80 Mich. 152.

¶ 43. How far the rule debarring a mortgagor, holding by warranty deed and not ousted or disturbed, to set up an outstanding title by way of defense to a foreclosure should be applied, quære.—Powell v. Conant, 33 Mich. 396.

¶ 44. Where a defendant in foreclosure obtains delay in the foreclosure by promising to pay the amount of the decree, both parties supposing that his title to the mortgaged land is good, he cannot, on finding it to be defective, defend against payment on that ground.—Tenney v. Hand, 32 Mich. 63.

¶ 45. An adverse tax title cannot be pleaded as a defense to a purchase-money mortgage where no claim under it has been made against the mortgagor.—Smith v. Fiting, 37 Mich. 148.

¶ 46. One who has purchased land from a claimant under tax deeds cannot defend a suit to foreclose a purchase-money mortgage given by him upon the ground that it was his duty, as an administrator in possession, to discharge the taxes for the nonpayment of which the deeds were executed, and that, therefore, he acquired no title and the mortgage could convey none.—Judson v. Miller, 106 Mich. 140.

§ 11. ——Payment or tender.

Pleading and proof of payment or tender, see Payment, V.

¶ 47. Part payments on a mortgage, made after foreclosure by advertisement, and received with the clear understanding that the redemption was to be completed by paying the whole sum necessary for that purpose within the year allowed by the statute, are in affirmance and not in avoidance of the sale, and their acceptance does not operate as a waiver of the foreclosure in subsequent suit in equity for foreclosure.—Cameron v. Adams, 31 Mich. 426.

¶ 48. On a bill to foreclose two mortgages and on a bill to enjoin the foreclosure of a third mortgage by advertisement, the two cases being consolidated, held that the decree for foreclosure of the first two mortgages and the decree dismissing the injunction should not be reversed because of an alleged tender made by mortgagor where such tender was made to cover principal and interest on all the mortgages and notes and was insufficient.—First State Bank of Decatur v. Day, 188 Mich. 228; O'Dell v. First State Bank of Decatur, Id.

§ 12. ——Laches and delay and bar of debt.

See also ante ¶ 44.

Effect on personal liability where right of action for debt is barred, see post § 165.

Statute of limitations on foreclosure, see Limitations of Actions, I.

Laches in suing to foreclose after maturity of debt, see also Equity ¶ 173.

[Note. How. St., § 8709 (Pub. Acts 1879, No. 204) requires suits or proceedings to foreclose mortgages on real estate to be commenced within fifteen years from the time when the mortgage became due or within fifteen years after the last payment made thereon; with a saving clause of five years as to mortgages that would otherwise have been barred at once (Pub. Acts, 1879, p. 186). See this statute commented on in cases cited below. For decisions applying this statute of limitations, see Limitations of Actions.]

¶ 49. A mortgage on lands given to secure notes that have been allowed to run after maturity may be foreclosed at any time within the period of the limitation of actions for the recovery of real estate.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 50. Foreclosure in equity may take place at any time before a presumption of payment arises by the lapse of twenty years.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265.

¶ 51. The fact that an action at law upon the debt or obligation secured has become barred by the statute of limitations or by bankruptcy does not prevent foreclosure, or affect the validity of the mortgage.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265; In re Goodrich v. Leland, 18 Mich. 110; Powell v. Smith, 30 Mich. 451; Webber v. Ryan, 54 Mich. 70; Damon v. Deeves, 57 Mich. 247.

¶ 52. Lapse of time, in connection with nonpayment of interest, and continued possession of the mortgagor, unaccompanied by any effort on the mortgagee's part to enforce payment, is not a legal but an equitable or presumptive bar, and the presumption may be rebutted by circumstances. What circumstances will rebut the presumption must depend upon the facts in each particular case.—Abbott v. Godfroy's Heirs, 1 Mich. 178; Baent v. Kennicutt, 57 Mich. 268.

¶ 53. Foreclosure of a mortgage dated in 1855 was not barred in 1878 where there was proof of payments made as late as 1866 by the mortgagor as agent for his wife, who held the mortgaged interest under an assignment from a mesne purchaser.—Butler v. Hogadone, 45 Mich. 390.

¶ 54. The dismissal of a foreclosure bill was affirmed where the mortgage was never recorded, and the mortgagee had died twenty-nine years before suit, and no attempt to procure administration on the estate or to enforce the mortgage was made until after the mortgagor's death, and there were indorsements indicating that nearly the whole sum had been paid, and some evidences of a counterclaim that would have extinguished the rest of it.—Burrow v. Debo, 47 Mich. 242.

¶ 55. A delay of twelve years from the maturity of the postponed mortgage, and six years after such foreclosure, and the postponement of suit until the original mortgagor was dead and the foreclosure title vested in his heirs, should in a case of doubt put complainant to the necessity of making out a plain case.—Burdick v. Wheelock, 48 Mich. 289.

¶ 56. A mortgagee delayed foreclosure four years after an assignment of the mortgage had been obtained and after the assignee had discharged the mortgage upon a small payment by the then owner of the equity of redemption. But the assignee had paid no consideration for the assignment and had not received the collateral securities, and as their nondelivery should have put the owner of the equity upon inquiry as to whether he was dealing with the actual owner of the mortgage, it was held that he had not acquired any rights in good faith, and that the mortgagee was not estopped from foreclosing by the delay.—Fletcher v. Carpenter, 37 Mich. 412.

¶ 57. A., upon the receipt of a second mortgage on the M. estate, agreed to look to it before resorting to a mortgage on the L. estate, which he subsequently discharged in consideration of a mortgage upon the N. estate. A., being enjoined from proceeding to sell the M. estate, took no steps to dissolve the injunction, and two years elapsed before the injunction suit was dismissed. Meanwhile, the M. estate had been sold on the first mortgage upon it, and the time for redemption had expired. Held, that A. could not, because of his laches, foreclose his mortgage on the N. estate.—Thompson v. Jarvis, 39 Mich. 689.

¶ 58. Foreclosure of a mortgage not under seal is not barred in less time than

would bar a sealed one.—McKinney v. Miller, 19 Mich. 142.

¶ 59. The lapse of less than twenty years before filing the bill did not (prior to the enactment of How. St., § 8709) bar the foreclosure of a mortgage given for either indemnity or payment.—Shelden v. Warner, 45 Mich. 638.

§ 13. Estoppel and waiver of rights or defenses.

See also ante ¶ 56.

Receipt of part payment after foreclosure by advertisement as waiver of right to foreclose in equity, see ante ¶ 47.

Right to urge adverse tax title as defense to foreclosure where no claim made under it against mortgagor, see ante ¶ 45.

Estoppel to urge delay as defense where obtained by promise of payment, see also ante ¶ 44.

Estoppel to question validity or priority of mortgages or liens, see Mortgages, III, V; Liens.

Necessity of detrimental action to make estoppel to foreclose, see Estoppel ¶ 118.

Right to foreclose barred by accord, see Accord and Satisfaction ¶ 70.

Consent to prompt sale as consideration for promise of reduction, see Contracts ¶ 512.

Consideration for promises between mortgagor and mortgagee as to crops during pendency of foreclosure suit, see Contracts ¶ 443.

¶ 60. A man held mortgages on the farm of his half-brother. The latter died intestate, and his son thought of going away, but his uncle, the mortgagee, persuaded him to stay and take care of the family, promising that the mortgages should never be enforced. It was held that the mortgagee was estopped by his promise from taking any steps to foreclose the mortgage, when several years had elapsed, during which the son had cultivated the farm and cared for the family, and the land had grown valuable under his tillage.—Faxton v. Faxon, 28 Mich. 159.

¶ 61. A representation honestly made to a subsequent purchaser of the land that the land was clear of taxes, did not preclude a mortgagee from foreclosing his mortgage, and even if such representation had amounted to a guaranty, it would have affected his claim only to the extent of the amount paid by such purchaser for a tax title.—Brown v. Avery, 119 Mich. 384.

¶ 62. Where a mortgage given by a vendee stipulated that it should not be foreclosed until the mortgagee had removed all clouds from the title, the mortgagor was estopped from setting up this stipulation against a foreclosure where he had himself prevented the removal of a cloud.—Haney v. Roy, 54 Mich. 635.

§ 14. Effect of assignment.

Assignment and rights of assignees in foreclosure by advertisement, see post § 20.

Rights of assignees as complainants in equity suit to foreclose, see post § 63.

Assignment of decree and rights thereunder, see post § 105.

Assignment of rights under purchase, see post §§ 141, 142.

Assignment of deficiency decree, see post § 177.

Averment of assignment in bill for foreclosure, see post § 75.

Right of one assigning mortgage as security for debt to receive amount of excess over debt realized on foreclosure, see post ¶ 507.

Effect of assignment after sale but before redemption period has expired, see also post ¶ 577.

Assignment or transfer of mortgage or debt secured by it, see Mortgages, VI.

Sufficiency of record of assignment of mortgage to entitle assignee to foreclose, see Notice and Record of Title, II.

¶ 63. The assignment of a note and mortgage after beginning foreclosure cannot affect the decree or sale thereunder if it neither appears of record nor is brought to the knowledge of the court.—Bigelow v. Booth, 39 Mich. 622.

¶ 64. An assignment pending the foreclosure proceedings puts an end to them, and a sale afterwards made under an advertisement in the name of the assignor does not cut off the equity of redemption.—Niles v. Ransford, 1 Mich. 338.

§ 15. Successive foreclosures for instalments.

Propriety of foreclosure by advertisement on default in instalment, see post § 22.

Equity proceedings for further decree on instalments, see post § 100.

Rights of purchaser on foreclosure for instalment, see post § 138.

Decree for instalment accruing during pendency of suit for foreclosure, see post ¶¶ 381, 383.

¶ 65. How. St., § 8498, subd. 4, providing that in cases of mortgages to secure payment of money in instalments each instalment after the first shall be deemed to be a separate mortgage, and that each may be foreclosed as if separate mortgages were given and redeemed from sale with like effect, includes instalments of interest as well as of principal, so that a mortgage is not extinguished by a statutory foreclosure of sale for an instalment of interest, and by a redemption by the mortgagor's grantee.—Edgar v. Beck, 96 Mich. 419. Limiting and disapproving language to the contrary in Miles v. Skinner, 42 Mich. 181.

§ 16. Foreclosing by ejectment.

Ejectment as remedy to cure or avoid foreclosure, see post § 161.

Ejectment by mortgagee to recover premises occupied as homestead, see Homestead, IX.
Statute forbidding ejectment before foreclosure has no application to mortgages given before its enactment, see Statutes, VI.
Statutory prohibition against ejectment until title absolute upon foreclosure of mortgage, see Jud. Act, chap. XXIX, § 54; Comp. L. 1915, § 13221.

¶ 66. Where the mortgage was made after the Act of 1843, forbidding ejectment by the mortgagee before foreclosure, the mortgagee cannot bring ejectment before foreclosure becomes absolute.—Baker v. Pierson, 5 Mich. 456; Caruthers v. Humphrey, 12 Mich. 270; Crippen v. Morrison, 13 Mich. 23; Newton v. Sly, 15 Mich. 391; Wagar v. Stone, 36 Mich. 364; Lee v. Clary, 38 Mich. 223; Hazeltine v. Granger, 44 Mich. 503; Morse v. Byam, 55 Mich. 594; and see Livingston v. Hayes, 43 Mich. 129.

¶ 67. The mortgagee in a mortgage executed prior to the act of March 8, 1843, forbidding ejectment by him before foreclosure (How. St., § 7847), may maintain ejectment after the mortgagor's default if not before.—Stevens v. Brown, W. 41; Mundy v. Monroe, 1 Mich. 68; Dougherty v. Randall, 3 Mich. 581; Blackwood v. Van Vleet, 11 Mich. 252; Todd v. Davis, 32 Mich. 160; Baldwin v. Cullen, 51 Mich. 33.

¶ 68. The grantee in a deed absolute in form but intended as a mortgage may bring ejectment; the statute prohibiting mortgagees to bring ejectment does not apply.—Jeffery v. Hursh, 42 Mich. 563; Bennett v. Robinson, 27 Mich. 26; Wetherbee v. Green, 22 Mich. 311; Morse v. Byam, 55 Mich. 594.

II. BY ADVERTISEMENT AND SALE UNDER POWER.

A. THE POWER AND RIGHT TO SELL.

§ 17. In general.
Effect of pending "proceedings at law" on right to sell, see post § 18.
Foreclosure by suit in equity, see post, III.
Presumption that mortgage contains power of sale, see post ¶ 592.
Necessity of strict conformity to statute, see post § 25.
Validity of oaths administered by mortgagee's attorney in statutory foreclosure proceedings, see Oaths.
Statutory provisions for foreclosure by advertisement, see Comp. L. 1915, §§ 14949-14968.
Statutory prerequisites to statutory foreclosure, see Comp. L. 1915, § 14950.

¶ 69. The statutory provisions for foreclosure are to be treated as a part of every mortgage with a power of sale executed under the statute; and the sale under the power is a distinct exercise of authority under the terms of the contract.—Hoffman v. Harrington, 33 Mich. 392.

¶ 70. The statutes regulating statutory foreclosures were made to enlarge, not to cut down, the rights of mortgagors.—Bacon v. Northwestern Mutual Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 71. Statutory foreclosure proceedings are not adapted to cases in which there are conflicting equities; such equities can be considered only in equity.—Covey v. Leslie, 144 Mich. 165; Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 72. A foreclosure by advertisement of mortgages given simultaneously cannot settle the relative rights of the mortgagees or of the foreclosure purchasers. A bill in equity is necessary for this and to marshal the assets.—Van Aken v. Gleason, 34 Mich. 477.

¶ 73. Statutory foreclosure is not allowable in cases where there are conflicting equities that can only be worked out and protected in a court of chancery, as where the ownership of the security is so uncertain that the value of the equity of redemption must be greatly depreciated by permitting a foreclosure at law. So held where, after the legal title to a note and the record title to the mortgage by which it was secured had passed out of the creditor's hands by assignment and delivery, and his assignee had again assigned them to one who had previously bought the mortgaged premises, the original creditor had again assigned an interest which he still claimed in the mortgage, and the assignee had sought to foreclose against the purchaser of the land.—Olcott v. Crittenden, 68 Mich. 230.

¶ 74. Where a mortgage of lands by a third person is simply collateral to a purchase-money mortgage given by the vendee of chattels to the vendor and to a mortgage of land by the vendee's wife, it should not be foreclosed by advertisement after the mortgagee has appropriated and sold the chattels without regularly foreclosing the mortgage on them; but resort should be had to chancery to determine the conflicting equities of the parties.—Drayton v. Chandler, 93 Mich. 383.

¶ 75. Where, by a decree of the supreme court, one of several mortgages is allowed to stand as a valid security for the amount which the court finds the mortgagor has been benefited, but the time for payment and the rate of interest are changed, and the mortgagee enjoined from foreclosing until he has discharged the other mortgages, which are declared void, and surrendered the accompanying notes, the only method of foreclosing the lien created by the decree is by a proceeding in chancery, in which a com-

pliance with the terms of the decree must be alleged and proved, and a foreclosure by advertisement is improper.—Strong v. Tomlinson, 88 Mich. 112.

¶ 76. A tenant in common in possession who has three past-due mortgages on his cotenant's interest cannot foreclose them by separate advertisements, but must foreclose in equity, where all the rights of the parties can be determined and protected.—Dohm v. Haskin, 88 Mich. 144.

§ 18. Pending "proceedings at law."

Effect on cause of action and right to foreclose of pending actions or process for the debt, see ante § 6.

Effect of proceedings at law on right to statutory foreclosure, see Comp. L. 1915, § 14950.

¶ 77. The statute forbidding the beginning of a statutory foreclosure if any "suit or proceeding shall have been instituted at law to recover the debt," etc., refers to suits on the debt, and not to previous foreclosure proceedings.—Lee v. Clary, 38 Mich. 223; Larzelere v. Starkweather, 38 Mich. 96.

¶ 78. Proving a claim that is secured by mortgage before the commissioners on an estate is not such a proceeding at law as is contemplated by Comp. L. 1871, § 6913, How. St., § 8498, forbidding a foreclosure by advertisement while a proceeding at law is pending to recover the debt. The proceedings referred to are those in which judgment may be rendered and execution issued against the debtor's property.—Larzelere v. Starkweather, 38 Mich. 96.

§ 19. Persons entitled to remedy and persons bound.

Assignment and rights of assignees, see post § 20.

Persons entitled to foreclose, see ante § 2.

Person from whom notice of sale must purport to emanate, see post ¶ 100.

Power of bank to foreclose mortgages by advertisement, see Banking ¶ 150.

¶ 79. None but the legal holder of a mortgage can foreclose by advertisement; the owner of the debt secured is such holder and he can foreclose for the benefit of any one interested.—Lee v. Clary, 38 Mich. 223.

¶ 80. A statutory foreclosure by advertisement under Comp. L. 1897, § 11133 et seq., if regular, is binding on minor heirs of the deceased mortgagor.—Jobert v. Wagner, 147 Mich. 409.

§ 20. Assignment and rights of assignees.

Effect of assignment on right to foreclose, see ante § 14.

Assignment improperly executed in another state and illegally recorded as ground for setting aside sale by assignee, see post ¶ 607.

Assignment or transfer of mortgage or debt secured by it, see Mortgages, VI.

¶ 81. The mortgage assignments which How. St., § 8498 requires to be recorded before the mortgage can be foreclosed at law are those only that are voluntary; such transfers as result from the operation of law need not be recorded. The executor or administrator of an owner of a mortgage can therefore execute the power of sale as owner of the legal title therein.—Miller v. Clark, 56 Mich. 337.

§ 21. Character of the mortgage and sufficiency of power of sale.

Propriety of remedy on default in single instalment, see post § 22.

Propriety of remedy on default in building and loan mortgages, see post § 23.

Power of sale as distinguished from right to foreclose for breach of condition of mortgage, see ante § 8.

Mortgages which may be foreclosed by advertisement, see Comp. L. 1915, § 14949.

¶ 82. A foreclosure of a mortgage by advertisement is valid only where the mortgage contains a power of sale.—Bradway v. Miller, 200 Mich. 648.

¶ 83. A power of sale in a mortgage is a prerequisite to a right to foreclose the mortgage by advertisement.—Bryan v. Straus Bros. & Co., 157 Mich. 49.

¶ 84. The right to foreclose by advertisement is confined to mortgages containing a power of sale.—Doyle v. Howard, 16 Mich. 261; Hebert v. Bulte, 42 Mich. 489.

¶ 85. Where the words, "In case of nonpayment," were omitted before the words, "of the principal sum, or of the interest thereof," in the provision of a mortgage by which a power of sale was sought to be conferred, foreclosure by advertisement was unauthorized.—Lariverre v. Rains, 112 Mich. 276.

¶ 86. Whether, if a trustee's mortgage is valid as an equitable charge, it is capable of statutory foreclosure, as there can be no legal power of sale, seems doubtful.—Weaver v. Van Akin, 71 Mich. 69.

§ 22. On default in single instalment.

Successive foreclosures for instalments, see ante § 15.

Equity proceedings for further decree on instalments, see post § 100.

Rights of purchaser on foreclosure for instalment, see post § 138.

Presumption that sale for default in single instalment was made subject to other instalments, see post ¶ 595.

Right of purchaser to resort to power of sale on default of further instalment, see post ¶ 564.

Sale subject to payment of further instalments, see post ¶ 560.
Statutory foreclosure on instalment mortgages, see Comp. L. 1915, § 14950.

¶ 87. Under Comp. L. 1871, § 6913, How. St., § 8498, a mortgage payable in instalments stands upon the same basis as to foreclosure as if each instalment were secured by a separate and independent mortgage, neither having priority over any others, and a foreclosure under the power of sale for an instalment simply is entirely unsuited to the enforcement of the respective liens or the adjustment of the respective interests.—McCurdy v. Clark, 27 Mich. 445.

§ 23. On default in building and loan mortgages.

¶ 88. There is nothing in Comp. Laws 1915, § 10007, which forbids the foreclosure of a building and loan association mortgage by advertisement, and such right is expressly granted by the general statute, Comp. Laws 1915, § 14949, relating to foreclosures by advertisement, where there is a power of sale.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 89. Whether there are conflicting equities in the matter of the foreclosure of a building and loan association mortgage by advertisement involves the entire question as to the propriety of the exercise of that remedy by the association.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

§ 24. Several parcels under same mortgage.

¶ 90. A release of a parcel of land from a mortgage does not defeat the right to sell the rest of the mortgaged premises under a power of sale.—Durm v. Fish, 46 Mich. 312.

§ 25. Conformity to statute; strictness required.

Necessity of conformity to statute of foreclosure notice, see also post ¶¶ 96, 97.
Nature and scope of statutory provisions in general, see also ante ¶¶ 69, 70.
Statutory provisions for foreclosure by advertisement, see Comp. L. 1915, §§ 14949-14968.

¶ 91. The statutory provisions as to the right to foreclose by advertisement must be followed strictly.—Dohm v. Haskin, 88 Mich. 144.

¶ 92. Foreclosure by advertisement must comply substantially with statutory requirements.—Grover v. Fox, 36 Mich. 461; Miller v. Clark, 56 Mich. 337.

¶ 93. Statutory foreclosures are matters of contract authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law.—Lee v. Clary, 38 Mich. 223.

¶ 94. The statutory proceeding, being ex parte, must conform in all matters to the conditions expressed by the legislature.—Lee v. Mason, 10 Mich. 403.

¶ 95. Unreasonable restrictions and intendments against statutory foreclosures should not be favored.—Gage v. Sanborn, 106 Mich. 269.

B. NOTICE, PUBLICATION AND OTHER PRELIMINARIES.

§ 26. Necessity and requisites of notice.

Specifications and descriptions in notice, see post §§ 27-29.
Publication and proof, see post §§ 30, 31.
Lack or imperfection of notice as ground for avoiding foreclosure, see post § 149.
Notice of sale in equity foreclosure, see post §§ 108, 109.
Notice in statutory foreclosure, see Comp. L. 1915, §§ 14951, 14952.

¶ 96. The notice of a statutory foreclosure must conform to the statutory requisites; but if it contains all that the statute requires it will not be void for errors in other respects which are not misleading.—Reading v. Waterman, 46 Mich. 107.

¶ 97. A substantial compliance with the provisions of Comp. Laws 1897, § 11136, How. 2nd Ed., § 13931, as to the contents of a notice of foreclosure of a real estate mortgage by advertisement is necessary.—Lau v. Scribner, 197 Mich. 414.

¶ 98. The notice of foreclosure sale by advertisement need not allege the existence of prior mortgages.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 99. Where the notice of the foreclosure sale by advertisement under a building and loan association mortgage and the sheriff's deed covered both the land and its appurtenances, they were sufficient to include an easement appurtenant to the land without a specific sale and description thereof.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 100. The notice of sale, in foreclosure by advertisement, must purport to emanate from the owner of the legal title to the mortgage.—Niles v. Ransford, 1 Mich. 338; Lee v. Clary, 38 Mich. 223.

¶ 101. A notice of foreclosure of a mortgage on real estate by advertisement is in substantial compliance with Comp. Laws 1897, § 11136, How. 2nd Ed., § 13931, although it does not give the date of recording where the date of the mortgage, the names of the mortgagors and mortgagees, and the volume and page of the record are correctly given.—Lau v. Scribner, 197 Mich. 414.

¶ 102. The only things absolutely required in a notice of foreclosure sale by advertise-

ment under Comp. L. 1871, §§ 6912, 6913, 6914, 6915, are the names of the parties, original or by assignment, the date of the mortgage and of its record, the amount claimed to be due, and a description substantially agreeing with that in the mortgage.—Bacon v. Northwestern Mutual Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 103. A notice which states that the premises will be sold, "or so much thereof as may be necessary," is in the usual and proper form, and is not objectionable as not designating the precise parcels to be sold; and if it describes the land in two government subdivisions it is presumptively desirable to sell them separately, though if they are in one connected estate it may be proper to sell them together; and the expression "I will sell" in a notice signed by the mortgagee does not preclude the sheriff from making the sale.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 104. Where the notice says that the sale will be at public auction, it need not say that the sale will be made to the highest bidder; the term "auction sale" implies a sale to the highest bidder, and it will be presumed that a sale, made pursuant to a notice that the premises would be sold at public auction, was made to the highest bidder.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 105. The place where sale is to be made is sufficiently described as "at the court house in the village of Mason, Ingham County" within Comp. Laws 1871, § 6915, regulating notice of foreclosure sales and requiring that they be "at the place of holding the circuit court within the county," etc. —McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 106. Two mortgages, one of which contains land not covered by the other, cannot be combined in one advertisement.—Morse v. Byam, 55 Mich. 594.

§ 27. Specifications and descriptions in notice.

Names and descriptions of parties, see post § 28.

Dates, see post § 29.

Matters to be specified in notice on statutory foreclosure, see Comp. L. 1915, § 14952.

¶ 107. The notice of a statutory foreclosure cannot be held void for not containing what the statute does not require.—Lee v. Clary, 38 Mich. 228.

¶ 108. A trifling mistake in the notice of a foreclosure by advertisement sale of real estate, not of such a nature as to mislead or injure any one, may be corrected in the subsequent publications of the notice without affecting the validity of the proceedings. —First State Bank of Decatur v. Day, 188 Mich. 228; O'Dell v. First State Bank of Decatur, Id.

¶ 109. Defects in a notice of a foreclosure sale by advertisement will not defeat the title acquired at the sale where they are not sufficient to deceive any one.—Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 110. Including in a notice of statutory foreclosure sale a larger amount than is actually due—e. g., an instalment of interest not due until a few days after the date of the notice—will not render the foreclosure void.—Huyck v. Graham, 82 Mich. 353.

¶ 111. Where a notice of foreclosure sale by advertisement in stating the amount claimed to be due included a sum due a day after its date, but was not published until several days thereafter, it not appearing that there was bad faith or that any one was misled, the sale was held valid.—Cook v. Foster, 96 Mich. 610.

¶ 112. In the record of a sheriff's foreclosure sale and deed where the notice gives the date of an assignment of the mortgage, and the date of record thereof, the omission to give the book and page of registry is not fatal, it not being required by the statute.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 113. The notice of a statutory foreclosure need not state the hour and minute when the mortgage was recorded.—Lee v. Clary, 38 Mich. 223.

¶ 114. The notice of a statutory foreclosure need not state the commencement and discontinuance of previous foreclosure proceedings.—Lee v. Clary, 38 Mich. 223.

¶ 115. Where the notice of a mortgage foreclosure by advertisement described the land as being in section 35, when in fact it was in section 25, and the sheriff's deed followed the notice, there was no foreclosure of the mortgage on the lands in section 25.—Woodruff v. Coffman, 139 Mich. 634.

¶ 116. A sale under a mortgage given by a married woman—her husband joining therein—upon her own land is not void because the notice of sale describes her as his wife.—Yale v. Stevenson, 58 Mich. 537.

¶ 117. It seems that excessiveness in the amount claimed in the notice of foreclosure sale by advertisement will not necessarily invalidate the sale provided the claim was made in good faith.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

§ 28. ——Names and descriptions of parties.

¶ 118. If the notice of statutory foreclosure does not give the mortgagor's name the sale will be void.—Lee v. Clary, 38 Mich. 223.

¶ 119. A notice which gives the Christian name of one of the mortgagors as Julia in-

stead of Tofila, is fatally defective.—Zlotoeciszki v. Smith, 117 Mich. 203.

¶ 120. A notice that identifies a mortgage by date and parties, and that accurately describes the time and place of its record, is not rendered invalid for calling the mortgagee Dixon instead of Dickson, or for once giving inaccurately the date of the mortgage.—Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 121. The notice of statutory foreclosure is not bad for calling the mortgagee "Dixon" instead of "Dickson," where it otherwise identifies the mortgage by date and parties.—Reading v. Waterman, 46 Mich. 107.

¶ 122. If the notice of foreclosure by advertisement, purports to be signed by the party foreclosing, it is not fatally defective for being signed in the wrong name; if the true name is specified in the body of the notice, the party is not required to sign it (Comp. L. 1871, § 6915).—Michigan State Ins. Co. v. Soule, 51 Mich. 312.

§ 29. ——Dates.

Sufficiency of notice which omits date of recordation, see also ante ¶ 101.

¶ 123. A notice published for the proper time and giving the proper time and place of sale is not invalidated by a palpable error of date.—Bacon v. Northwestern Mut. Life Ins. Co., 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787.

¶ 124. It is not bad for misstating the date of the mortgage if it accurately refers to the record, thereby giving the means of correction.—Reading v. Waterman, 46 Mich. 107.

¶ 125. The notice is not void, though erroneously dated, if published for the proper time and giving the proper time and place of sale.—Reading v. Waterman, 46 Mich. 107.

¶ 126. Where a notice of a foreclosure sale of real estate by advertisement contains a discrepancy between the day of the week and the date, the latter controls, especially where there is no claim that the party complaining was misled.—First State Bank of Decatur v. Day, 188 Mich. 228; O'Dell v. First State Bank of Decatur, Id.

¶ 127. A notice of foreclosure by advertisement under Comp. L. 1897, § 11136, subd. 2, requiring the date of the mortgage and when recorded is not invalid because of a mistake in the date of the mortgage where it contains the correct date of recording, the volume and page where recorded and otherwise identifies the mortgage.—Brown v. Burney, 128 Mich. 205.

§ 30. Publication.

Affidavits and proofs, see post § 31.

Legality of newspaper for publication of notice, see Newspapers.

Publication of notice in statutory foreclosure, see Comp. L. 1915, § 14950.

¶ 128. A notice of twelve weeks, excluding the day of the first publication and including the day of sale, is sufficient on a statutory foreclosure sale.—Gantz v. Toles, 40 Mich. 725.

¶ 129. The notice of a statutory foreclosure sale must be published not merely twelve times, once a week, but once a week for twelve successive weeks; and a sale is invalid if made on a notice which, although published twelve times in separate weeks, provided for selling on a day less than twelve weeks from the first publication.—Bacon v. Kennedy, 56 Mich. 329.

¶ 130. A statutory foreclosure is not invalidated by a change in the name of the newspaper in which the foreclosure advertisement is published, and by the removal of the publication office to another place in the same county, if the paper otherwise preserved its identity.—Perkins v. Keller, 47 Mich. 53.

¶ 131. Comp. Laws 1897, § 11135, How. 2nd Ed., § 13930, providing that the notice of the foreclosure of a real estate mortgage by advertisement shall be published in a newspaper in the county where the premises are situated is complied with, and the sale is effected without fraud where the property is located in a large city and the advertisement is inserted in a newspaper in a small town twenty miles away in the same county, and, although the property is sold for one-half of its value, and the mortgagor has no actual notice of the sale until after the expiration of the year for redemption, it is purchased by the mortgagee for the amount of the principal, interest, taxes and costs, the county records being open for inspection.—Lau v. Scribner, 197 Mich. 414.

§ 31. ——Affidavits and proofs.

See also post ¶ 191.

¶ 132. The production of copies of the newspaper in which a notice of sale was published, showing its publication for thirteen consecutive weeks prior to the sale, is sufficient proof of the publication required by the statute on foreclosure by advertisement and it is not necessary for the sheriff at the time of the sale to have an affidavit of such publication before him.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 133. An affidavit of publication of notice of sale on statutory foreclosure made between seven and eight years after the sale took place, was held not presumptive evi-

dence of the facts therein stated, under R. S. 1838, p. 501, § 9.—Mundy v. Monroe, 1 Mich. 68.

¶ 134. An affidavit of publication which states that the newspaper in which the notice of statutory foreclosure was published was printed and published weekly and every week, and that the publication was for thirteen successive weeks, the first being Nov. 26, 1879, and the last Feb. 18, 1880, is explicit that the notice was published once in each week.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 135. Notice of a foreclosure sale is indispensable to its validity, and as it is the act of the party, and not of the officer making the sale, the presumption of the performance of official duty does not apply for the purpose of making out a valid foreclosure without actual proof of notice.—Sinclair v. Learned, 51 Mich. 335.

¶ 136. In ejectment by a purchaser on foreclosure the original affidavit of publication showed that the notice of sale was insufficient, but another affidavit was produced, correcting the first, and the publisher gave evidence tending to show that the sale was regularly advertised, and that the original affidavit was incorrect. Held, that the testimony was admissible, but that it was for the jury to pass on, and could not be treated as conclusive by the court.—Wyman v. Baer, 46 Mich. 418.

C. SALE AND INCIDENTS THEREOF.

§ 32. Manner and conduct of sale.

Persons qualified to sell, see post § 33.
Persons entitled to bid and buy, see post § 34.
Sale in parcels or in gross, see post §§ 35-37.
Amount and extent of sale, see post § 38.
Sale under diverse mortgages, see post § 39.
Validity of sale and grounds for avoidance, see post §§ 40-42.
Reopening sale and resale, see post § 43.
Sale in equity foreclosure, see post III, E.
Fraud in foreclosure sale. see Fraud, I.
Manner and conduct of sale, see Comp. L. 1915, § 14953.
Postponements of sale, see Comp. L. 1915, § 14954.

§ 33. ——Persons qualified to sell.

Sale by unauthorized person as ground for setting aside, see post ¶ 606.
Right of sheriff to sell where notice of sale states that mortgagee will sell, see ante ¶ 103.

¶ 137. A sheriff's deputy may, under How. St., § 8501, sell on foreclosure by advertisement.—Heinmiller v. Hatheway, 60 Mich. 391.

¶ 138. At the foreclosure sale the sheriff may sell though the notice of sale says that the mortgagee will sell.—Snyder v. Hemmingway, 47 Mich. 549.

§ 34. Persons entitled to bid and buy.

Transfer of bid on foreclosure sale as ground for avoiding sale, see post ¶ 608.
Right of mortgagee to purchase, see Comp. L. 1915, § 14956.

¶ 139. Where a man and his wife have given, to secure their joint note, a mortgage on her land, it is presumable from the record that the debt was hers and not his; if so, he has as much right as any one to bid on the premises on a foreclosure by advertisement.—Lucas v. Parks, 84 Mich. 202.

¶ 140. The fact that, in a deed executed as security only, the grantee assumes and agrees to pay a prior mortgage, will not necessarily preclude him from acquiring title under a sale of foreclosure of such mortgage.—Gage v. Sanborn, 106 Mich. 269.

§ 35. Sale in parcels or in gross.

Tracts subdivided or severed after mortgage, see post § 36.
Order of sale of parcels, see post § 37.
Sale in parcel or in gross in equity foreclosure, see post §§ 113-115.
Relief on setting aside sale on ground that it was not made in parcels, see post ¶¶ 679, 680.
Burden of proving that premises sold on foreclosure as one parcel were not occupied as such, see post ¶¶ 684, 685.
Sale in bulk as ground for avoiding foreclosure, see post ¶¶ 610, 611.
Sales to be made in parcels, see Comp. L. 1915, § 14955.

¶ 141. A mortgage sale of several lots which were fenced and used as one parcel when the mortgage was given and had continued so was not void under Comp. L. 1871, § 6918 (see How. St., § 8503).—Yale v. Stevenson, 58 Mich. 537.

¶ 142. Whether, where mortgaged premises are made up of contiguous parcels occupied together as a single farm, a sale in parcels is essential to a valid foreclosure, quære.—Grover v. Fox, 36 Mich. 461.

¶ 143. Comp. L. 1871, § 6918, How. St., § 8503, providing that, where mortgaged premises consist of distinct farms, tracts or lots, they shall be sold separately, does not apply to a tract divided by a highway or by section lines, but occupied as one farm and mortgaged in one parcel.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 144. "Occupancy," within the meaning of How. St., § 8503, authorizing the sale together, on a mortgage foreclosure by advertisement, of separate lots occupied as one parcel, does not require that all of the land be fenced or improved. The actual inclosure of part carries with it the occupancy of the remainder, which is used, or intended to be used, as part of one farm.—Harris v. Creveling, 80 Mich. 249.

¶ 145. Mortgaged premises consisting partly of unplatted land, and partly of land platted by the mortgagor for the purpose of selling it as lots, which plat was recognized by the mortgagee, though not recorded, and referred to for description by the mortgage, cannot be said to constitute a single farm; and a sale thereof as a single parcel, on foreclosure of the mortgage, is irregular.—Hawes v. Detroit Fire & Marine Ins. Co., 109 Mich. 324.

¶ 146. A mortgage foreclosure will not be set aside as against a purchaser who has paid approximately the full value of the property, where there is no evidence of fraud, upon the mere showing that the mortgagee's attorney was mistaken as to the lot lines, and had permitted the two lots covered by the mortgage to be bid in for the same amount, supposing that a store building was upon both lots, whereas it stood entirely upon one.—Marx v. Smith, 111 Mich. 125.

¶ 147. A foreclosure sale in two parcels under a mortgage covering two farms, was in compliance with How. St., § 8503, requiring distinct farms to be sold separately, although there was a prior mortgage.—McIntyre v. Wycoff, 119 Mich. 557.

¶ 148. In view of the facts, namely, separate use, etc., and the statutory provisions, held that the separate sale of contiguous pieces of land, under foreclosure of a building and loan association mortgage by advertisement was proper.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 149. Whether, on foreclosure of a building and loan association mortgage by advertisement, contiguous pieces of land should have been sold as one parcel, involves a question of fact.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 150. Where a first mortgage covering two parcels, with the exception of one acre from one of the parcels was given, and upon nonpayment a second mortgage was given on the same tracts, but including the one acre, and the mortgagor gave a warranty of title under the second mortgage, it was not necessary to except the one acre from the sale of the second tract and sell the tract in two parcels.—McIntyre v. Wycoff, 119 Mich. 557.

§ 36. ——Tracts subdivided or severed after mortgage.

¶ 151. Mortgaged premises may be sold as a single parcel where they were so mortgaged, even though they have been since subdivided by the mortgagor but without the mortgagee's concurrence; but where the parties have joined in obtaining the release of a parcel so situated as to leave the rest in distinct parcels and thus affect the security, the sale is void if not made in parcels.—Durm v. Fish, 46 Mich. 312.

¶ 152. Where by release of part the remainder of mortgaged land is severed into separate and distinct parcels, they must, under How. St., § 8503, be sold separately on statutory foreclosure.—Keys v. Sherwood, 71 Mich. 516.

¶ 153. The mortgagee of a lot mortgaged as one parcel may so sell on statutory foreclosure, though aware that part of the lot has been conveyed by the mortgagor to a grantee assuming the mortgage, and that the rest has been conveyed to some one else. The latter, if he wishes his part sold last, should file a bill in equity before the sale.—Long v. Kaiser, 81 Mich. 518.

§ 37. ——Order of sale of parcels.

Selling in equity foreclosure in inverse order of alienation to marshall assets, see post § 116.

Doctrine of marshalling assets in general, see Marshalling Assets.

Between what persons doctrine of marshalling assets is to be applied, see Marshalling Assets.

¶ 154. Sale on foreclosure by advertisement is to be made in the inverse order of alienation or incumbrance of the parcels.—Sager v. Tupper, 35 Mich. 134.

§ 38. Amount and extent of sale.

¶ 155. Where a foreclosure sale is made in parcels, the power of sale is exhausted when enough parcels have been sold to satisfy the mortgage debt and all costs and expenses, and it then affords no authority to make further sales of the remaining parcels.—Grover v. Fox, 36 Mich. 461.

§ 39. Sale under diverse mortgages.

Right to include two or more mortgages in one notice of foreclosure, see also ante ¶ 106.

¶ 156. A foreclosure sale by advertisement is void if one advertisement is made to cover two mortgages in which the descriptions were not identical, and if both parcels are sold on one bid and for one gross sum.—Morse v. Byam, 55 Mich. 594.

§ 40. Validity of sale; grounds for avoidance.

Excessive sale or claim of excessive amount, see post § 41.

Inclusion of improper fees or expenses, see post § 42.

Reopening sale or resale, see post § 43.

Objections to sale in equity foreclosure, see post § 121.

¶ 157. Inadequacy of price cannot vitiate a statutory foreclosure sale otherwise fair and regular; for the owner of the equity of redemption cannot be prejudiced thereby, since he may always redeem within the year by refunding the amount paid, with interest at the rate fixed by the statute.—Cameron v. Adams, 31 Mich. 426.

¶ 158. Where the mortgages were all of record, the fact that, on foreclosure sale under one of them by advertisement, no information was given of prior mortgages, does not impeach the fairness and good faith of the sale.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 159. A tenant in common, at a statutory foreclosure sale under a mortgage on his cotenant's undivided half of the realty, insisted on the validity of a chattel mortgage held by him on his cotenant's interest in certain machinery upon the premises, threatened to foreclose such chattel mortgage, and bought in the property. Held, that the cotenant was entitled to have the sale declared void.—Dohm v. Haskin, 88 Mich. 144.

§ 41. ——Excessive sale or claim of excessive amount.

¶ 160. A sale to a mortgagee upon statutory foreclosure for an amount in excess of that legally demandable, but claimed by him to be due, is not invalid, in the absence of proof that the surplus was not paid to the officer.—Gage v. Sanborn, 106 Mich. 269.

§ 42. ——Inclusion of improper fees and expenses.

Disposal of surplus arising from inclusion of attorney fees, see post § 53.
Effect of inclusion of improper fees on title of purchaser, see post ¶ 551.
Effect of failure to pay to officer making sale amount of illegal attorney fee, see post ¶ 199.

¶ 161. A mortgage sale is not necessarily invalid for being made for more than was in fact due; the excessive claim becomes important only when it is attempted to redeem from the sale, and its importance depends upon its magnitude or apparent want of good faith.—Millard v. Truax, 50 Mich. 343.

¶ 162. A foreclosure having taken place by advertisement, and land having been struck off for the amount claimed to be due, which included a considerable sum not allowable as costs, and the owner of the mortgage having become the purchaser without paying to the officer making the sale the amount of the bid less what was legally demandable, held, that the same was incomplete, and that he could not claim title under it.—Louder v. Burch, 47 Mich. 109.

¶ 163. A statutory foreclosure sale is not necessarily invalid because the mortgagee claimed in his notice of sale an attorney's fee to which he was not legally entitled, and made the purchase for a sum which included such fee.—Millard v. Truax, 47 Mich. 251; Kennedy v. Brown, 50 Mich. 336.

¶ 164. A foreclosure by advertisement is not void merely because an attorney fee is in good faith included in the sum for which sale is made; that is only an irregularity of which one who is guilty of laches in moving to redeem cannot complain.—Emmons v. Van Zee, 78 Mich. 171.

§ 43. Reopening sale or resale.

Reopening sale for inadequacy of price, see also post ¶¶ 626, 628, 629.
Reopening sale on ground of surprise, see also post ¶ 632.

¶ 165. If a bidder at a statutory foreclosure sale withdraws his offer while the other bidders are still present, the sale should be reopened, especially if some other person promises a higher bid.—Miller v. Miller, 48 Mich. 311.

¶ 166. The Foreclosure Statute (Comp. L. 1871, ch. 218), contemplates that every opportunity shall be given to bidders so that premises may be sold at the best price obtainable, and to that end authorizes the sale to be postponed from time to time. And it does not contemplate legal proceedings to enforce payment of a bid if the bidder is irresponsible or refuses to pay it. The sale should be reopened.—Miller v. Miller, 48 Mich. 311.

¶ 167. Subsequent purchasers cannot resist the reopening of a mortgage sale if the successful bidder takes back his offer immediately after acceptance, and while competing bidders are still present.—Miller v. Miller, 48 Mich. 311.

D. DEED, AND FILINGS AND RECORDS.

§ 44. Form and requisites of deed in general.

Necessity of setting out price of separate parcels, see post § 45.
Deed in foreclosure by suit in equity, see post § 122.
Deputy's deed acknowledged before sheriff, see Acknowledgments ¶ 9.
Statutory provisions as to deed on foreclosure by advertisement, see Comp. L. 1915, §§ 14957, 14958.

¶ 168. The deed must be acknowledged; a falsely antedated deed and certificate of acknowledgment are invalid.—Grover v. Fox, 36 Mich. 461.

¶ 169. While it is not necessary to express in the sheriff's deed the rate of interest borne by the mortgage, yet where such rate is expressed therein, payment of the principal with interest at that rate is sufficient to effect a redemption.—Dodge v. Kennedy, 93 Mich. 547.

¶ 170. A sheriff's deed on foreclosure is not made invalid by an error in setting forth the date of a mortgage, which is so described otherwise as to be clearly identified. The statute does not prescribe the form of such a deed.—Reading v. Waterman, 46 Mich. 107.

§ 45. ——Necessity of setting out price of separate parcels.

¶ 171. A deed which represents the lands as sold as a single tract and for one gross sum, when in fact the sale was in parcels, is erroneous.—Grover v. Fox, 36 Mich. 461.

¶ 172. Under Comp. L. 1857, § 5183, How. St., § 8503, if the premises consist of several parcels not adjoining each other, the sale of the parcels must be separate; and in order to admit of redemption under the statute the deed given in pursuance of the sale must show the price at which each parcel was sold.—Lee v. Mason, 10 Mich. 403.

§ 46. Indorsements on deed.

¶ 173. The provision requiring the officer to indorse upon the deed the time when it will become operative is directory merely.—Johnstone v. Scott, 11 Mich. 232; Doyle v. Howard, 16 Mich. 261.

¶ 174. The foreclosure is not void by reason of the sheriff erroneously stating the time of redemption, in his certificate indorsed upon the deed, as one year instead of two. To avoid the foreclosure it must be shown that a tender of the redemption money was actually made within the two years.—Johnstone v. Scott, 11 Mich. 232.

¶ 175. The statute fixes the time for redemption, and a sheriff's certificate fixing an impossible time does not invalidate the foreclosure.—Reading v. Waterman, 46 Mich. 107.

§ 47. Proper maker or grantor and grantee.

¶ 176. Under the act of April 19, 1833, the deed could lawfully be made by the person selling, or his executors, whether in or out of office.—Hoffman v. Harrington, 33 Mich. 392.

¶ 177. Where statutory foreclosure sale was made by the under-sheriff, a deed executed by him and acknowledged by the sheriff, acting as notary, was good since as notary he did not act as sheriff.—Cook v. Foster, 96 Mich. 610.

¶ 178. A sheriff has no right to execute deeds to purchasers on foreclosure if he has previously, to the knowledge of competing bidders, sent a notice of the reopening and postponement of the sale for publication.—Miller v. Miller, 48 Mich. 311.

§ 48. Operation and effect.

¶ 179. How. St., § 8506, in declaring that a sheriff's deed on foreclosure shall vest in the grantee all the interest which the mortgagor had at the time of executing the mortgage, or at any time thereafter, does not enlarge any estate definitely limited in the mortgage, but as between original parties may bind a subsequently acquired interest.—Brayton v. Merithew, 56 Mich. 166.

¶ 180. Notwithstanding How. St., § 8506, a sheriff's deed, though time for redemption has passed, does not operate to vest in the grantee an after-acquired title where the mortgage was void in its inception; e. g., where a wife for her husband's debt mortgaged land owned by both in the entirety.—Naylor v. Minock, 96 Mich. 182.

¶ 181. A mortgagee bid in the property at a foreclosure sale, but afterwards extended the time of payment and made such arrangements with the mortgagor as rendered the sale ineffective. The mortgagor defaulted again in payment and the mortgagee then recorded the sheriff's deed, assigned the mortgage, and quitclaimed the land. Held, that the sheriff's deed was then of no force, because the proceedings on which it depended had been invalidated.—Dodge v. Brewer, 31 Mich. 227.

§ 49. Filing and record or delivery to purchaser.

Evidence and proof of filing, see post § 50. Statutory provisions as to recordation of deed, see Comp. L. 1915, § 14957.

¶ 182. The sheriff's deed on foreclosure at law should be filed immediately after sale, and where this is done without unreasonable delay, the year for the redemption of the premises runs from the date of the filing.—Lilly v. Gibbs, 39 Mich. 394.

¶ 183. Whether there may not be so long a delay in filing the sheriff's deed on foreclosure as to render the whole proceeding as one of foreclosure void, quære.—Lilly v. Gibbs, 39 Mich. 394.

¶ 184. It seems that a brief delay in filing the sheriff's deed on foreclosure while it might subject the sheriff to a mandamus requiring him to perform his duty, ought not entirely to destroy the foreclosure.—Doyle v. Howard, 16 Mich. 261.

¶ 185. A sheriff's deed, which (as appears by the original record) was filed on the day of the sale, but not acknowledged by the sheriff until five days afterwards, was notice to the mortgagor, and he was not deprived of the right of redemption.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 186. In a statutory foreclosure of mortgage neglect to file the sheriff's deed within twenty days after the sale does not of itself invalidate the foreclosure, but extends the time for redemption by the period of the delay.—Perkins v. Keller, 43 Mich. 53.

¶ 187. A statutory foreclosure is not invalidated by neglect for more than twelve years to record the sheriff's deed; for if redemption is not made within one year from the date of the sale and deposit of the deed

all rights are barred.—Sanford v. Cahoon, 63 Mich. 228.

¶ 188. Under Comp. L. 1871, chap. 157, § 9, requiring the sheriff on a foreclosure by advertisement to deliver to the purchaser "forthwith" a deed to the premises, specifying when the deed shall become operative if not redeemed, a delay of more than a year was held to invalidate the foreclosure.—Doyle v. Howard, 16 Mich. 261.

§ 50. Evidence and proof of sale and filing.

Sheriff's deed as evidence, see post § 51.
Necessity of proof of mortgage and power of sale to support purchaser's title, see also post ¶ 597.
Perpetuating evidence of sale, see Comp. L. 1915, §§ 14963-14966.

¶ 189. The presumption of law that a public officer performs his duty applies where the question is whether a sheriff's deed on foreclosure was immediately filed by him, as required by Comp. L. 1871, § 6920, and, unless the circumstances of the case overturn it, prevails so far as to throw the burden of proof upon the party who questions the fact.—Sinclair v. Learned, 51 Mich. 335.

¶ 190. Even if it did not appear by the printed record that the sheriff's deed was filed with the register of deeds, it will be presumed that the deed was so filed as a performance of official duty.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 191. The affidavits of publication of notice of sale, and of the fact of sale pursuant thereto, required by Comp. L. 1871, § 6926, relating to foreclosure by advertisement, do not, by themselves, prove a valid foreclosure.—Hebert v. Bulte, 42 Mich. 489.

¶ 192. The affidavits of publication of notice of sale are not required to be recorded, and the proof of sale may be made by oral testimony.—Doyle v. Howard, 16 Mich. 261; Lee v. Clary, 38 Mich. 223.

§ 51. ——Sheriff's deed as evidence.

Estoppel to deny recitals in sheriff's deed as to terms of mortgage, see Estoppel ¶ 27.

¶ 193. The sheriff's deed on a statutory foreclosure is no evidence that the foreclosure was legal.—Bryan v. Straus Bros. & Co., 157 Mich. 49.

¶ 194. A sheriff's deed by itself is no evidence of a regular foreclosure of mortgage by advertisement under the statute.—Barman v. Carhartt, 10 Mich. 338; Hebert v. Bulte, 42 Mich. 489.

¶ 195. The recital in the sheriff's deed that a mortgage foreclosed by advertisement contains a power of sale is no evidence of the fact.—Bradway v. Miller, 200 Mich. 648.

E. DISPOSAL OF PROCEEDS; FEES AND EXPENSES.

§ 52. In general.

Surplus arising from inclusion of attorney fees, see post § 53.
Petition and proceedings to obtain surplus, see post § 54.
Presumptions and evidence as to disposal of proceeds, see post § 55.
Fees and expenses, see post § 56.
Disposal of proceeds of sale in equity foreclosure, see post, III, G.
Right of dowress to dower in surplus on foreclosure sale, see Dower § 13.
Application of proceeds of mortgage foreclosure where mortgage given to secure several items, see Marshalling Assets.

¶ 196. Where, upon a foreclosure sale, the mortgagee bids in the property for a greater amount than that for which the lien exists, the surplus is due at once to the owner of the equity of redemption.—Kennedy v. Brown, 50 Mich. 336; Millard v. Truax, 50 Mich. 343.

¶ 197. A mortgagee who, on foreclosure, bids off the premises at a sum exceeding the debt and legal charges, is estopped, at least in the absence of evidence, from claiming that he did not have to bid the surplus sum to obtain the land, and he cannot repudiate that part of his bid as fictitious. Nor can he deny that he is liable for the surplus to the owner of the equity of redemption on the ground that he has not paid it over to the sheriff for the latter's benefit.—Kennedy v. Brown, 50 Mich. 336.

¶ 198. Nonpayment by the sheriff to the mortgagor of the surplus received on foreclosure sale does not defeat the sale, for the sheriff must account for the money to the mortgagor even though he fails to obtain it, and if the mortgagor redeems without getting it he still has an unquestionable right to have it taken into account.—Sinclair v. Learned, 51 Mich. 335.

¶ 199. In the absence of fraud or oppression the mere failure to pay over the proper surplus to the officer who makes the sale—the amount of an illegal attorney fee being retained—does not render the sale ineffectual to pass the title if no steps are taken to redeem.—Damon v. Deeves, 62 Mich. 465.

§ 53. Surplus arising from inclusion of attorney fees.

See also ante ¶ 199.
Inclusion of improper attorney fee as ground for avoidance, see ante § 42.
Rights in surplus arising from statutory sale of foreclosure, see Comp. L. 1915, § 14962.

¶ 200. It is illegal to include an attorney's fee in the statutory foreclosure of a mortgage executed prior to the enactment of How. St., § 8515a; and such a fee if deliberately included in the amount for which sale is made,

and if retained by the mortgagee's attorney, will be regarded as a surplus, and as belonging to the owner of the equity of redemption, who, if there has been no redemption, may sue the mortgagee therefor.—Wilkinson v. Baxter's Estate, 97 Mich. 536.

¶ 201. The owner of a levy upon the equity of redemption at whose request a sale on statutory foreclosure has been allowed to ripen into a title, which he has purchased of the mortgagee in hostility to the mortgagor's title, stands in the mortgagee's shoes, and cannot recover the surplus arising from the inclusion of an illegal attorney's fee.—Wilkinson v. Baxter's Estate, 97 Mich. 536.

§ 54. Petition and proceedings to obtain surplus.

Presumptions and evidence as to disposal of proceeds, see post § 55.

Procedure for distribution and disposal of proceeds of sale in equity foreclosure, see post § 126.

Statutory proceedings to obtain surplus, see Comp. L. 1915, § 14962.

¶ 202. How. St., § 8510, provides that on foreclosure sale any claimant to the surplus may file his claim with the officer making sale, and that a reference to a commissioner to take proofs may be ordered by the court. Held, that—apart from any question as to the validity of this statute—a petition for such reference is fatally defective if it does not establish a prima facie right to a part of the surplus; and it does not do this if it does not show how the parties cited are related to the mortgaged lands. And in the proceedings before the commissioner all parties interested in the equity of redemption must have notice so that they may produce any defense that they have.—Allen v. Wayne Circuit Judges, 57 Mich. 198.

§ 55. Presumptions and evidence as to disposal of proceeds.

¶ 203. In the absence of any averment or proof on the subject it is not a presumption of law that the mortgagee making a purchase at a sale under foreclosure proceedings by advertisement did not pay over to the officer any surplus to which the mortgagor would be lawfully entitled. Therefore it cannot be presumed that he retained any illegal allowance which had been claimed by him.—Millard v. Truax, 47 Mich. 251.

¶ 204. The burden of proof in ejectment by a foreclosure purchaser is not upon the party claiming under a statutory foreclosure to show that he made payment after the sale of the surplus over the amount due.—Damon v. Deeves, 62 Mich. 465.

§ 56. Fees and expenses.

Costs, fees and expenses in equity foreclosure, see post, III, H.

Mode of taxing fees of foreclosure by advertisement, see Jud. Act, chap. XLVII, § 33; Comp. L. 1915, § 13714.

Statutory provision for attorney fee in foreclosure by advertisement, see Comp. L. 1915, § 14968.

¶ 205. Printers' fees cannot be charged on statutory foreclosure if the advertisement is withheld from publication and payment is tendered on the mortgage meanwhile.—Myer v. Hart, 40 Mich. 517.

III. BY SUIT IN EQUITY AND JUDICIAL SALE.

A. IN GENERAL.

§ 57. Jurisdiction and grounds for suit.

Rights after abortive and void foreclosure by advertisement, see post § 58.

Foreclosure by advertisement, see ante, II.

Right to foreclose by equity suit where power of sale in mortgage does not give right, see ante § 8.

Protection and assertion of homestead right in foreclosure, see Homesteads, IX.

Amount necessary to jurisdiction in equity, see Equity § 16.

Jurisdiction and necessity of leave to sue for foreclosure against bankrupt's property, see Courts § 97.

Foreclosure as affirmative relief to defendants on bill for other purpose, see also Equity § 212.

Dismissal of bill to foreclose mortgage for immoral consideration, see Contracts ¶ 180.

Applicability of foreclosure practice in suits on liens for alimony, see Divorce § 189.

Declination of equity to try question of forgery of title anterior to mortgage, see also Equity ¶ 112.

Revival of suit on death of parties, see Abatement § 20; Equity § 233.

Foreclosure of mortgages in equity, see Jud. Act, chap. XIX, §§ 22-38; Comp. L. 1915, §§ 12676-12692.

Courts having jurisdiction over equity foreclosure, see Jud. Act, chap. XIX, § 22; Comp. L. 1915, § 12676.

¶ 206. The jurisdiction of equity in foreclosure proceedings in Michigan is purely statutory.—Kollen v. Sooy, 172 Mich. 214.

¶ 207. A mortgagee cannot maintain a foreclosure bill as a proceeding auxiliary to an ejectment suit.—Livingston v. Hayes, 43 Mich. 129.

§ 58. After abortive and void foreclosure by advertisement.

See also post ¶ 601.

Right of purchaser on irregular statutory foreclosure to foreclose in equity, see also post ¶¶ 231, 232.

Foreclosure de novo to cure defects, see post § 147.

¶ 208. The holder of a second mortgage began a foreclosure suit without making the prior incumbrancer a party. Pending foreclosure the first mortgage was assigned, and the assignee foreclosed at law and bid in the premises. Part of the description was left out of the foreclosure notice and omitted also from the sheriff's deed by a mistake for which the assignee was not to blame. Afterwards the holder of the second mortgage perfected his foreclosure, and he also bid in the premises. No new rights arose meanwhile. Held, on a bill by the assignee, that the statutory foreclosure might be set aside and a new foreclosure allowed in equity.—Vary v. Chatterton, 50 Mich. 541.

¶ 209. A chancery bill for the foreclosure of a mortgage will be sustained though there had been an attempted foreclosure by advertisement which was void for failure to describe the premises, and complainant purchased the premises at such sale and went into possession thereunder and had remained in possession until the chancery proceeding was brought.—Woodruff v. Coffman, 139 Mich. 634.

B. PARTIES.

§ 59. In general.

Parties complainant, see post §§ 60-63.
Parties defendant, see post §§ 64-69.
Propriety of joinder or dismissal, see post § 70.
Abatement, revival and substitution, see post § 71.
Necessity of foreclosure by suit in equity where there are conflicting equities, see ante ¶¶ 71-76.

¶ 210. Where the complainant in foreclosure dismissed his bill as against one made a party under the general allegation that he claimed some interest in the premises, as subsequent incumbrancer or otherwise, the mortgagor, appealing to the supreme court from the decree in the case, cannot complain of the dismissal, since it in no respect affects his rights.—Martin v. McReynolds, 6 Mich. 70.

§ 60. Parties complainant.

Partners and persons jointly entitled, see post § 61.
Trustees and beneficiaries, under trusts, see post § 62.
Assignees, transferees and purchasers of mortgagee, see post § 63.
Persons entitled to foreclose, see ante § 2.

¶ 211. One holding the equitable title only to a mortgage may foreclose it in chancery.—Martin v. McReynolds, 6 Mich. 70.

¶ 212. One who is not entitled to receive payment or grant acquittances on a mortgage or its accompanying notes, but is simply bound to release the securities when paid or otherwise discharged, is not the proper person to file a foreclosure bill.—Briggs v. Hannowald, 35 Mich. 474.

¶ 213. A widow, to whom her husband has bequeathed the life interest in a mortgage, can foreclose it without its being assigned to her by probate order as a specific legacy; it is enough that she distinctly avers her ownership, and that she acts with the assent of the remainderman, which may be inferred from circumstances. And where the remainderman is her coexecutor his assent to her possession may be inferred likewise.—Proctor v. Robinson, 35 Mich. 284.

¶ 214. One who, having received a deed as security for the payment of a note, has transferred the note and has subsequently received delivery of a note and mortgage running to the owners of the equity of redemption under such deed, as collateral to the debt secured by the deed, has not such an interest or title as authorizes him to file a foreclosure bill in his own name without making the holder of the original demand a party.—Briggs v. Hannowald, 35 Mich. 474.

§ 61. ——Partners and persons jointly entitled.

¶ 215. Partners need not be joined as complainants in the foreclosure of a mortgage given to only one of the firm as trustee for the partnership.—Shelden v. Bennett, 44 Mich. 634.

¶ 216. A mortgage was given to three persons to secure a debt due to them jointly. Two having died, held, that the survivor could file a foreclosure bill alone.—Cote v. Dequindre, W. 64.

¶ 217. The survivor of two assignees of a mortgage may foreclose it, and it is not necessary for him to join the personal representative of the deceased assignee.—Martin v. McReynolds, 6 Mich. 70.

¶ 218. It is immaterial in a suit to foreclose an indemnity mortgage to reimburse the payers of debts that the payment of the debts was by part of the complainants only, and not by all jointly.—Dye v. Mann, 10 Mich. 291.

§ 62. ——Trustees and beneficiaries under trusts.

¶ 219. A trustee may, in equity, foreclose a mortgage for the benefit of his cestuis que trust.—Bennett v. Clark, 181 Mich. 690.

¶ 220. A trustee, holding a mortgage as such, need not make his cestuis que trust parties to a bill to foreclose it.—Sill v. Ketchum, H. 423.

¶ 221. To a suit for the foreclosure of a mortgage held by a trust company, the bondholders of the company are not necessary parties; they are represented by their trustee, and are bound by the decree so long as it

stands unreversed.—Richter v. Jerome, 123 U. S. 233, 31 L. ed. 132, 8 Sup. Ct. Rep. 106.

¶ 222. On the foreclosure of a trust mortgage to secure numerous creditors, one who did not previously accept its terms may be allowed to come in by meeting its conditions and depositing his notes on the hearing and before the decree, if no inequity be thereby done to other claimants under a mortgage junior in time but previously accepted under knowledge, however, that the notes so deposited were among the debts secured by the prior mortgage.—Gillam v. Barnes, 123 Mich. 119.

§ 63. ——Assignees, transferees and purchasers of mortgagee.

Effect of assignment on right to foreclose, see ante § 14.
Averment of assignment, see post § 75.
Assignment of rights under purchase, see post §§ 141, 142.
Substitution of assignee as party complainant in foreclosure suit, see post ¶¶ 277, 278.
Necessity of making assignor party defendant in suit by assignee, see post ¶ 237.
Assignment or transfer of mortgage or debt secured by it, see Mortgages, VI.

¶ 223. The assignee of a mortgage held to be the equitable holder thereof and, as such, entitled to file a bill to foreclose.—John Schweyer & Co. v. Mellon, 196 Mich. 590.

¶ 224. An assignee of a mortgage may sue upon it in equity in his own name where the assignors have intentionally vested him with full title and authority, and there is no conflict between them as to whether the title is absolute or in trust.—Fisher v. Meister, 24 Mich. 447.

¶ 225. Where the assignee of a mortgage files a bill to foreclose it, and the court finds that the assignment was taken as security only, this will not affect the complainant's right to maintain his bill on the case he has stated, but goes only to the amount of the decree.—McKinney v. Miller, 19 Mich. 142.

¶ 226. Even though there has been no written assignment the assignee of a mortgage is entitled to foreclose in equity on proof of his purchase.—Cooper v. Ulmann, W. 251; Dougherty v. Randall, 3 Mich. 581; Martin v. McReynolds, 6 Mich. 70; Pease v. Warren, 29 Mich. 9.

¶ 227. The notes secured by the mortgage need not be indorsed to the assignee of the mortgage to enable him to foreclose.—Pease v. Warren, 29 Mich. 9.

¶ 228. A. gave to B., who had backed a note for A.'s accommodation, a mortgage on real estate to indemnify him, and on A.'s failing to pay the note at maturity B. paid it, and entered up the amount in his general account against A. as a charge against him. B. afterwards assigned the note and mortgage to C. in payment of a debt. Held, that C. was entitled to foreclose the mortgage and to take a decree for deficiency against A.—Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482.

¶ 229. Where one seeks, as assignee, to foreclose a mortgage securing a non-negotiable note, but gives no evidence of title to the debt beyond the mere possession of the note, and of an assignment for certain interests which are not shown to include the debt secured, his bill must be dismissed.—Lashbrooks v. Hatheway, 52 Mich. 124.

¶ 230. W. owned the equity of redemption in land mortgaged to D., but deeded the land to S. in exchange for certain other property, and to equalize the trade and sustain his covenant of title he agreed to pay a certain portion of the amount due on D.'s mortgage, and gave S. a mortgage on the property he received to secure this agreement. S. afterwards quitclaimed the land to a third person subject to D.'s mortgage, which the grantee assumed as part of the purchase price. Held, that on W.'s failure to pay D. what he had agreed to pay on D.'s mortgage, S. was entitled to foreclose the later mortgage given to him to compel such payment to be made to himself.—Stuart v. Worden, 42 Mich. 154.

¶ 231. Where there has been an irregular statutory foreclosure, the purchaser thereat, or his grantee, not the mortgagee, is the proper party to file a foreclosure bill in chancery.—Gilbert v. Cooley, W. 494.

¶ 232. The grantee of the purchaser on an irregular statutory foreclosure is entitled to foreclose in equity if occasion requires.—Morse v. Byam, 55 Mich. 594.

§ 64. Parties defendant.

Assignees and persons claiming under mortgagor, see post § 65.
Representative of deceased mortgagor, see post § 66.
Sureties, guarantors and indorsers of mortgagor, see post § 67.
Persons claiming interest in equity of redemption, see post § 68.
Adverse claimants or prior incumbrancers, see post § 69.
Right of disclaiming party to costs, see post § 128.
Persons concluded by decree and rights of parties not asserting their claim or defense in foreclosure proceedings, see Former Adjudication, V.
Propriety of making other persons than mortgagor parties defendants, see Jud. Act, chap. XIX, § 26; Comp. L. 1915, § 12680.

¶ 233. The holder of the legal title to the mortgage is a necessary party where the holder of the equitable title files a bill to foreclose.—Martin v. McReynolds, 6 Mich. 70.

¶ 234. The mortgagor is a necessary party to a foreclosure bill, notwithstanding the personal remedy against him is barred.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265.

¶ 235. Where no relief is sought against him personally, the mortgagor is not a necessary defendant to a bill to foreclose a mortgage assumed by the grantee of the premises.—Miller v. Thompson, 34 Mich. 10.

¶ 236. Minors whose guardian has assigned a mortgage which he held for them are not necessary parties to a bill by the assignee to foreclose the same.—Livingston v. Jones, H. 165.

¶ 237. A foreclosure by an assignee whose assignment is not absolute requires that the assignor should be made a party defendant.—Cooper v. Smith, 75 Mich. 247.

¶ 238. The cashier of a bank to whom as such officer a mortgage has been assigned as security for an indebtedness to the bank is not a necessary party in a foreclosure by the bank.—Michigan State Bank v. Trowbridge, 92 Mich. 217.

¶ 239. In foreclosure by an assignee of a mortgage the maker of the mortgage and of its accompanying note cannot complain because the payee of a note is not made a party.—Michigan State Bank v. Trowbridge, 92 Mich. 217.

¶ 240. A bill to foreclose a mortgage given to secure a joint and several note is defective for want of parties if filed against only one of the makers of the note, though the mortgage was given by him only. This is especially so where the mortgage has been assigned, and if the defense to the note could only have been enforced by a joint cross-action for damages.—Dederick v. Barber, 44 Mich. 19.

¶ 241. Where a mortgage is made subject to a life estate already vested in a third person, or where a third person had an undivided interest in the property before the mortgage is given, a foreclosure bill should be dismissed as to him.—Pool v. Horton, 45 Mich. 404.

¶ 242. Whether, where an assignee in bankruptcy has proceeded to decree in the federal court on a bill to foreclose a subsequent mortgage, it is competent, without permission of the bankruptcy court, to make him a defendant in a bill to foreclose a prior mortgage, so as thereby to affect his rights under the subsequent mortgage, quære.—Avery v. Ryerson, 34 Mich. 362.

¶ 243. In foreclosing a real-estate mortgage second mortgagees of chattels that were mortgaged as additional security to the mortgage in suit need not be made defendants.—Grand Rapids Savings Bank v. Denison, 92 Mich. 418.

¶ 244. The fact that defendants in a foreclosure suit have deeded away their equity of redemption does not prevent them from defending against the note and mortgage.—Davis v. Wardowski, 164 Mich. 561.

§ 65. ——Assignees and persons claiming under mortgagor.

Transfer of mortgagor's title or estate and assumption of debt, see Mortgages, VI.

¶ 245. Where, to secure performance of the conditions of a lease, a real estate mortgage has been given, to be discharged when certain furniture on the leased premises shall have been fully paid for by the lessee, an assignee of the lease and of the lessee's interest in the furniture is not a necessary party in a suit to foreclose the mortgage.—Wineman v. Phillips, 93 Mich. 223.

¶ 246. A purchaser of mortgaged premises at an execution sale is a proper party defendant in a suit for the foreclosure of the mortgage.—Hayward v. Kinney, 84 Mich. 591.

¶ 247. The fraudulent grantee of a title which is equitably subject to the mortgage is a proper party defendant to a suit to foreclose the mortgage.—Adams v. Bradley, 12 Mich. 346.

¶ 248. The effect of How. St., § 7847, providing that no action of ejectment shall be maintained by a mortgagee or his assigns or representatives for the recovery of the mortgaged premises until the title thereto shall have become absolute upon a foreclosure of the mortgage is merely to take away the remedy of the mortgagee by entry or ejectment, but it does not in any way effect his rights against those claiming an interest in the premises under the mortgagor, and when the mortgagee acquires possession of the mortgaged land by foreclosure sale, the effect of his possession upon one claiming an easement under the mortgagor is just as complete to avoid its rights and interest as was entry or ejectment at common law, and it is immaterial that the holder of the easement was not made a party to the foreclosure suit.—Western Union Tel. Co. v. Ann Arbor R. Co., 90 Fed. 379, reversed in 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

§ 66. ——Representative of deceased mortgagor.

Sufficiency of averments in bill by representative, see post ¶ 298.

¶ 249. The personal representatives of a deceased mortgagor are not necessary parties to a suit to foreclose the mortgage against the heirs unless the personal estate is sought

to be charged with any deficiency.—Abbott v. Godfroy's Heirs, 1 Mich. 178.

¶ 250. The representatives of a defendant in foreclosure who died before the bill was filed need not be brought in where decedent's only interest in the mortgaged premises was a right of dower.—Miller v. Miller, 48 Mich. 311.

§ 67. ——Sureties, guarantors, and indorsers of mortgagor.

¶ 251. Sureties who have undertaken, not for the payment of the mortgage debt, but that the mortgagor shall provide a sinking fund in certain specific securities for its payment, cannot be joined as defendants in a suit to foreclose the mortgage under Comp. L. 1857, § 3567, How. St., § 6704.—Joy v. Jackson & M. Plank Road Co., 11 Mich. 155.

¶ 252. The guarantor of the collection of a debt secured by mortgage should not be made defendant in the foreclosure.—Johnson v. Shepard, 35 Mich. 115.

¶ 253. One who has guaranteed the payment of bonds secured by a mortgage is not, it seems, a necessary party to a suit to foreclose.—Owen v. Potter, 115 Mich. 556.

¶ 254. Under How. St., § 6704, guarantors of bonds secured by the mortgage sought to be foreclosed, may be joined with the principal debtor as defendants.—Union Trust Co. v. Detroit Motor Co., 117 Mich. 631.

¶ 255. Under How. St., § 6704, providing that where a mortgage debt is secured by the obligation of any third person, such person may be made a party to the bill to foreclose, an indorser of a note secured by the mortgage may be joined as defendant; but the statute is not mandatory.—Steele v. Kent Circuit Judge, 109 Mich. 647.

¶ 256. Indorsers of a mortgage note which has been duly protested for nonpayment can be joined as defendants in a foreclosure.—Michigan State Bank v. Trowbridge, 92 Mich. 217.

¶ 257. Those who after a mortgage note has been made have indorsed it by way of additional security to a subsequent taker may be joined as defendants in a foreclosure.—Michigan State Bank v. Trowbridge, 92 Mich. 217.

¶ 258. An indorser on a note secured by a mortgage may be made a party to a bill to foreclose.—Steele v. Kent Circuit Judge, 109 Mich. 647.

¶ 258a. A guarantor of the collection of a note secured by mortgage is not a proper party to the foreclosure of the mortgage, and a decree against him for deficiency in the first instance is erroneous, though, if he has not objected to being made a defendant, it may be that a contingent decree against him would be permissible.—Johnson v. Shepard, 35 Mich. 115.

§ 68. ——Persons claiming interest in equity of redemption.

¶ 259. Where one claims an interest in the equity of redemption, it is proper in a foreclosure suit, to make him a party for the purpose of foreclosing such interest, notwithstanding he also claims the land by tax title.—Horton v. Ingersoll, 13 Mich. 409; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

¶ 260. A mortgagee who files a bill of foreclosure is not bound to bring in parties interested in the equity of redemption, unless where he has actual or constructive notice of their claims, and where he has no such notice they are barred by the foreclosure.—Woods v. Love, 27 Mich. 308.

¶ 261. One may foreclose without reference to subsequent incumbrances if he care only to reach the equity of redemption held by the party whom he has made defendant.—Avery v. Ryerson, 34 Mich. 362.

§ 69. ——Adverse claimants or prior incumbrances.

Priority of adverse claims as issue litigable in foreclosure suit, see post ¶¶ 330-337.
Protection and assertion of right of homestead in foreclosure suit, see Homesteads, IX.

¶ 262. Persons whose claims are prior and adverse to a mortgage are not proper parties to a foreclosure thereof.—Dickerson v. Uhl, 71 Mich. 398.

¶ 263. Adverse claimants or prior incumbrancers cannot be made parties to a foreclosure suit for the purpose of litigating their titles. The only proper parties are the mortgagor and the mortgagee, and those who have acquired rights and interests under them subsequent to the mortgage.—Chamberlain v. Lyell, 3 Mich. 448; Horton v. Ingersoll, 13 Mich. 409; Farmers' & Mechanics' Bank of Michigan v. Bronson, 14 Mich. 361.

¶ 264. In a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties.—Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

¶ 265. A wife in actual occupancy of a homestead has such a right therein as entitles her to be made a party to the foreclosure of a mortgage thereupon.—Haviland v. Chase, 116 Mich. 214.

¶ 266. In a foreclosure suit a third person claiming a right of dower in the premises cannot be made a party.—Ligare v. Semple, 32 Mich. 438.

¶ 267. The wife of a mortgagor, even though she claims a homestead right in the premises, is not a necessary party to a bill to foreclose a purchase-money mortgage given by the husband alone at the time of his purchase.—Amphlett v. Hibbard, 29 Mich. 298.

¶ 268. A man mortgaged an undivided two-thirds of certain land without inserting covenants of title or warranty. His wife afterwards acquired the other undivided third, to which he had no title when he gave the mortgage. Held, that she could not be made a defendant to a foreclosure bill.—McClure v. Holbrook, 39 Mich. 42.

¶ 269. There is no reason for making the holder of a tax title on mortgaged premises a defendant in a suit for the foreclosure of the mortgage, and where complainant fails to show any other claim on his part the bill will be dismissed, with costs, as to such a defendant.—Hayward v. Kinney, 84 Mich. 591.

¶ 270. The description of premises in the mortgage was erroneous in one particular. To a bill to foreclose it and correct the error a person is not a proper party who owns lands which would be affected by the erroneous description, but who has never been owner or incumbrancer of any portion of the mortgaged premises as identified by the proofs.—Ramsdell v. Eaton, 12 Mich. 117.

¶ 271. An attaching creditor is a proper party to foreclosure proceedings of a mortgage existing upon the property but unrecorded at the time of the attachment levy.—Campbell v. Keys, 130 Mich. 127.

¶ 272. A subsequent attachment lien holder was a proper party to proceedings to foreclose a mortgage, under allegations of the bill that he had notice, prior to the levy of his attachment, of the existence of the mortgage and knew that it was a valid and subsisting lien on the premises.—Campbell v. Bane, 119 Mich. 40.

§ 70. Propriety of joinder or dismissal.

See also post ¶ 344.

Necessity of averment as to defendant's interest to show propriety of joinder, see post § 77.

Right of mortgagor to complain of dismissal as to adverse claimant, see also ante ¶ 210.

¶ 273. It is not indispensable to a bill to foreclose several mortgages, given by the same mortgagor on several parcels of land, that all of the defendants should be equally interested in all the matters involved, it is sufficient if each is intended in some material matters set forth in the bill.—Michigan Nat. Bank v. Hill, 181 Mich. 7.

¶ 274. A defendant in foreclosure whose connection with the mortgage or the equity of redemption is not shown by the bill is not a proper party, and is entitled, so far as he is concerned, to have the bill dismissed with costs.—Havens v. Jones, 45 Mich. 253.

¶ 275. The wife of a defendant in foreclosure is properly made a party because she is interested in the question whether the mortgage was for purchase money so that its foreclosure would cut off her right of dower. But if the subpoena served on her has no underwriting to let her know the purpose of the suit (Chancery Rule 122), and if, in consequence, she appears and disclaims, and replication is filed to her disclaimer, she is entitled to the costs of a solicitor's fee on the dismissal of the suit as to her, and, if it is not allowed, to a solicitor's fee on appeal.—Haldane v. Sweet, 55 Mich. 196.

§ 71. Abatement, revival and substitution.

Revivor of suit, see post § 82.

Bringing in new parties on revival, see Abatement § 20.

Abatement of suit by death or transfer of title, see generally Abatement.

Effect of payment after decree for instalment to abate entire suit, see also Abatement ¶ 54.

¶ 276. Where a foreclosure suit, based on default in one instalment, has abated by complainant's death no further proceedings can be had until the rights of the one to whom his administrator has assigned the decree are brought before the court.—Brand v. Smith, 99 Mich. 395.

¶ 277. An assignee of a foreclosure decree based on one instalment and a default therein may under First Chan. Rule 125, be substituted as complainant in the original suit.—Brand v. Smith, 99 Mich. 395.

¶ 278. Under First Chan. Rule 125, providing for the substitution of the assignee of a chose in action as complainant in a chancery suit instituted by his assignor prior to the assignment, a junior mortgagee who becomes an equitable assignee, on paying to the prior mortgagee the amount of the decree obtained by him in a suit to foreclose his mortgage, is entitled to be substituted as complainant in such suit, although he was originally made a defendant therein, and although the decree has been enrolled.—Codd v. Wayne Circuit Judge, 109 Mich. 120.

C. PLEADINGS, EVIDENCE AND TRIAL.

§ 72. Bills in general; multifariousness.

Averment of mortgage and right to foreclose, see post § 73.

Averments as to conditions and contingencies, see post § 74.

Averment of assignment and secession in right, see post § 75.

Description of mortgaged premises, see post § 76.

Averments as to defendant's interest, see post § 77.
Necessity and sufficiency of prayer, see post § 78.
Sufficiency of averments in bill for deficiency decree, see post § 172.
Variance between proof and pleadings, see post § 84.
Effect of prayer for deficiency judgment as rendering foreclosure bill multifarious, see also post ¶ 306.
Joinder of distinct foreclosures as multifariousness, see also Equity §§ 73, 75.
Multifariousness of bill joining subsequent grantees, etc., see also Equity ¶ 270.
Multifariousness of bill praying other incidental relief, see also Equity § 76.
Matters to be stated in bill for foreclosure, see Jud. Act, chap. XIX, § 27; Comp. L. 1915, § 12681.

¶ 279. A bill to foreclose several mortgages given by the same mortgagors on different pieces of property, is not multifarious, where such mortgages grew out of a continuous business transaction, extending over a long period of time.—Michigan Nat. Bank v. Hill, 181 Mich. 7.

¶ 280. Multifariousness is not necessarily imputable to a bill to foreclose four mortgages, held by the complainant as owner and given by one mortgagor, although other persons than the mortgagor, whose interests under the different mortgages are various, were made defendants, a personal decree being asked only against the mortgagor.—Torrent v. Hamilton, 95 Mich. 159.

¶ 281. A bill to enjoin the prosecution of an action at law cannot be treated as a bill for foreclosure where there is nothing in existence on which to enforce a lien.—Michigan Sugar Co. v. Moffett, 183 Mich. 589.

¶ 282. A foreclosure bill that makes certain parties defendants as subsequent purchasers or incumbrancers is not multifarious in alleging that such defendants claim some adverse interest.—Wilkinson v. Green, 34 Mich. 221.

§ 73. ——Averment of mortgage and right to foreclose.

Sufficiency of averments in bill as to pending action for the debt, see also ante ¶ 29.

¶ 283. In a foreclosure bill it is sufficient to set out the condition of the mortgage according to its legal effect.—Jerome v. Hopkins, 2 Mich. 96.

¶ 284. The allegation that the mortgage debt is due is material in a foreclosure suit. —Morris v. Morris, 5 Mich. 171.

¶ 285. Where a foreclosure bill did not state that anything was due on the note executed with the mortgage, or state whether any proceedings had been had at law for the recovery of the debt, it was held demurrable.—Bailey v. Gould, W. 478.

¶ 286. An allegation that no part of the mortgage debt has been collected or paid, when the bill sets out fully the mortgage, and shows the amount of the several instalments, and when they became due, sufficiently shows the amount due.—Martin v. McReynolds, 6 Mich. 70.

¶ 287. An allegation that a deed absolute in form was given the complainant as security for a debt due a copartnership, the members of which were made parties to the proceeding, that the suit was authorized by them, but the debt had not been paid nor any proceeding at law taken to collect it, is sufficient as a bill by a trustee to foreclose a mortgage.—Bennett v. Clark, 181 Mich. 690.

¶ 288. A bill to foreclose a mortgage given by Alexander Eaton, junior, to O. P. Ramsdell, was filed by Orrin P. Ramsdell against Alexander Eaton. The bill was in the usual form, but contained no direct averment that the parties to the suit were identical with the parties to the mortgage. Held, sufficient on pro confesso. The question of identity would have been open to proof if disputed.—Ramsdell v. Eaton, 12 Mich. 117.

§ 74. ——Averments as to conditions and contingencies.

Right to foreclose on mortgages to secure conditional liability, see ante § 5.

¶ 289. Where complainant's right to foreclose a mortgage depends upon the performance of conditions precedent his bill should aver such performance.—Curtis v. Goodenow, 24 Mich. 18.

¶ 290. Where a mortgage is given to secure the sureties on an official bond, it is immaterial that a bill to foreclose it does not correctly state the date of the appointment to the office, if it correctly recites the mortgage and the breach, and the testimony makes out full ground of suit.—Shelden v. Warner, 45 Mich. 638.

¶ 291. Bill by persons who had guaranteed the performance of a covenant to pay certain debts to foreclose an indemnity mortgage. They averred that they had paid on the debts $1,000, "as they were obliged to do by the terms and legal effect" of the covenant, "on account of the default" of the covenantor. It was held that this was a sufficient statement that they had paid after their liability accrued, and that it was not necessary to set forth in the bill the particular sums paid.—Dye v. Mann, 10 Mich. 291.

¶ 292. Where a mortgagee's right to certain money depended upon the title to the premises named in the mortgage being perfected in the two particulars mentioned in

the mortgage, it was held that a bill to foreclose should contain distinct averments in the stating part of the bill of the performance of the two conditions precedent. A bill in the ordinary form, as in case of a mortgage for the payment of money unconditionally, except that in stating the pretenses of defendant to excuse his nonpayment it states that he pretends a noncompliance by complainant with such conditions, and avers that such pretense is unfounded, is not sufficient.—Curtis v. Goodenow, 24 Mich. 18.

§ 75. ——Averment of assignment and succession in right.

Effect of assignment of right to foreclose, see ante § 14.

Rights of assignees as parties complainant, see ante § 63.

¶ 293. In stating an assignment of the mortgage it is sufficient to set it forth according to its legal import and effect, without reference to its form or phraseology.—Martin v. McReynolds, 6 Mich. 70.

¶ 294. The averment in a foreclosure bill that the owner of a bond and mortgage assigned the same to the complainants in consideration of one dollar, and that on the same day the assignment was duly acknowledged before a commissioner of deeds according to the laws of New York, where the same was executed, is sufficient on demurrer. —Livingston v. Jones, H. 165.

¶ 295. A foreclosure bill filed by an assignee of the mortgage stated that the mortgage was executed in May, 1839, and that the mortgagee afterwards, to wit, Feb. 25, 1839, assigned to complainant. It then stated that the assignment was acknowledged Feb. 25, 1841. Held, that the date 1839 was a clerical error, and might be rejected as surplusage.—Bailey v. Murphy, W. 424.

¶ 296. A foreclosure bill filed by an assignee whose assignment shows upon its face that it is not absolute should set forth the existence and amount of the notes to secure which he holds it.—Cooper v. Smith, 75 Mich. 247.

¶ 297. A foreclosure bill filed by an assignee who claims to be the owner of one of four mortgage notes should account for the remaining notes, but, if their payment is shown on the hearing, the defect, as one of pleading, may be disregarded.—Cooper v. Smith, 75 Mich. 247.

¶ 298. A foreclosure bill by persons describing themselves as executors of the last will of a mortgagee cannot be sustained where it does not set out his death or in any way allude to the probate of the will.—Middlesworth v. Nixon, 2 Mich. 425.

¶ 299. It is not ground of demurrer to a foreclosure bill by an assignee that it does not give the date of the assignment of the bond and mortgage.—Sill v. Ketchum, H. 423.

§ 76. ——Description of mortgaged premises.

¶ 300. It is unimportant that a foreclosure bill describes the premises in different terms from those used in the mortgage if the mortgage is sufficiently identified and the premises described in both are substantially the same. If either party wants a judicial settlement of the question what precise parcel the description belongs to, a proper case should be made therefor with proper proof.—Shepard v. Shepard, 86 Mich. 173.

¶ 301. A foreclosure bill may properly describe the mortgaged land with accuracy even though such description varies from that in the mortgage in details that may be rejected as surplusage.—Slater v. Breese, 36 Mich. 77.

¶ 302. A foreclosure bill which describes the mortgaged premises as "Lot No. 6 of Backus' Subdivision of Out-lot No. 8 of the Woodbridge Farm," when the number of the out-lot should have been given as 87, and which fully identifies the property involved, is not fatally defective as to description.—Stevenson v. Kurtz, 98 Mich. 493.

§ 77. ——Averments as to defendants' interest.

Right to dismissal where bill does not show defendant's interest in foreclosure suit, see ante ¶ 274.

Averments in bill for foreclosure as to interest of defendants claiming as subsequent purchasers or incumbrancers, see 1916 C. C. Rule 58, § 1.

¶ 303. The general allegation in a foreclosure bill, that a defendant "has or claims to have rights and interests in the mortgaged premises as subsequent purchaser, incumbrancer or otherwise," is not sufficient to put in issue any right of such defendant which he holds paramount to the mortgage, and a disclaimer is all that is necessary to protect such rights.—Comstock v. Comstock, 24 Mich. 39.

¶ 304. Whether a bankrupt's assignee can be impleaded on foreclosure as representing the bankrupt's interests as a subsequent incumbrancer, by alleging that, "as assignee of A. B. [the bankrupt], he has or claimed to have rights and interests in the premises, * * * or in some part or parts thereof, as subsequent purchaser, incumbrancer or otherwise," quære.—Avery v. Ryerson, 34 Mich. 362.

¶ 305. Bill was filed to foreclose a mortgage, which made persons other than the mortgagor parties, charging that one of them had given a prior mortgage on the same premises, which had been since paid, but caused to be assigned to one of the other defendants for the purpose of keeping it alive against complainant's mortgage; and

asking that it be decreed to be satisfied; but the bill did not show any privity of title to the land between the parties to the first and the parties to the second mortgage, or what was the state of the title at any time, or any obligation on the part of the first mortgagor which would entitle the second mortgagor or his assigns to require him to pay or remove such first mortgage. Held, that the bill showed no title to relief as against the parties to the first mortgage.—Wright v. Dudley, 8 Mich. 115.

§ 78. Necessity and sufficiency of prayer.

¶ 306. A prayer for a deficiency judgment does not render a foreclosure bill multifarious.—Bennett v. Clark, 181 Mich. 690.

¶ 307. Where the bill charges an instrument to be a mortgage, asks to have it foreclosed as such, and contains a prayer for other or further relief, the court may declare it to be a mortgage, although there be no special prayer for that purpose in the bill.—Abbott v. Godfroy's Heirs, 1 Mich. 178.

§ 79. Answer and other pleadings to the bill.

See also post ¶ 319.

Defenses, objections or bar of right, see ante §§ 9-12.

Cross-bills and counterclaims, see post § 80.

Propriety of demurrer, see also ante ¶ 285.

Right of disclaiming party to costs, see post § 128.

Admissions by answer calling plaintiff to prove case, see also Equity ¶ 609.

¶ 308. Defense that foreclosure is barred by statute may be raised by answer as well as by demurrer.—Highstone v. Franks, 93 Mich. 52.

¶ 309. Where the defense to the foreclosure of a mortgage depends on new matter by way of avoidance the defendant must allege it circumstantially and prove it as alleged.—Post v. Springsted, 49 Mich. 90.

¶ 310. Where a mortgage permits the mortgagor to make payment before the debt falls due, at his option, he must distinctly and affirmatively elect to do so, and, if he relies upon such election in defending against a foreclosure, he must not only prove it but allege it in his answer.—Post v. Springsted, 49 Mich. 90.

¶ 311. Where a defense to a mortgage foreclosure is based on an alleged agreement between the complainant's assignor and the defendant the agreement must be clearly set out in the answer. Where both answer and proofs are vague such defense will fail.—Suhr v. Ellsworth, 29 Mich. 57.

¶ 312. The defense that one who is made a party defendant in a bill to foreclose a mortgage, as claiming to have an interest in the mortgaged premises as "subsequent purchaser, incumbrancer, or otherwise," claims title in fee by virtue of a tax deed, may be set up by plea as well as by filing a disclaimer.—Shafer v. Thompson, 109 Mich. 406.

¶ 313. Where a foreclosure bill calls for an answer under oath, the existence and consideration of the debt and securities is put in issue, and anything is responsive that explains the transaction. The defendant is called on to answer the whole series of material averments as well as the special interrogatories.—Matteson v. Morris, 40 Mich. 52.

¶ 314. A junior incumbrancer joined as defendant in foreclosure, and claiming the benefit of the doctrine of marshalling assets, should allege and establish such facts as would entitle him thereto.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 315. Where the answer in a foreclosure suit, fairly construed, avers that the amount of the note and mortgage has been reduced by payments, evidence of such payments is admissible against an objection of lack of affirmative averments thereof.—Stabler v. Clark, 155 Mich. 26.

§ 80. Cross-bills and counterclaims.

Cross relief and set-offs, see post §§ 97, 98.

Defenses, objections or bar of right, see ante §§ 9-12.

Burden of proof on cross-bill, see post ¶ 352.

Sufficiency of proof of set-off against mortgage, see post ¶ 365.

Pleading of set-offs in general, see Set-offs. IV.

Foreclosure as proper cross relief in rescission suit, see Rescission and Cancellation, VI.

¶ 316. A portion of the land covered by a mortgage having been conveyed subject to the payment of the entire mortgage by the grantee, the purchaser of another parcel is not obliged to file a cross-bill in the foreclosure suit to protect his rights, but may set out the facts in his answer, and the court, where it can be done without prejudice to the complainant, should make decree protecting his priority.—Caruthers v. Hall, 10 Mich. 40.

¶ 317. Where a mortgagee who is himself in debt has assigned to his creditor as security the note secured by the mortgage, and then seeks to foreclose the mortgage, the creditor also can file a cross-bill to protect his equities. And on such cross-bill the mortgagee can be held personally liable to the creditor for any deficiency, even though he has not indorsed the note assigned.—Wilcox v. Allen, 36 Mich. 160.

¶ 318. Where in a foreclosure suit a defendant sets up an equitable mortgage on the land as a prior lien to the mortgage in suit, such claim is proper subject for a cross-bill.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 319. A second mortgagee, after instituting foreclosure proceedings to which he made a subsequent mortgagee a defendant, took a quitclaim from the mortgagors and acquired the first mortgage. Whether the subsequent mortgagee, in setting up these facts as a defense, could do so in an answer, or should set them up by plea or cross-bill, quære.—Tower v. Divine, 37 Mich. 443.

¶ 320. Where there were two mortgages on the same property and the second mortgage had already been foreclosed, in a suit to foreclose the first mortgage the mortgagor cannot have a cross-bill filed by the second mortgagee dismissed and have him relegated to his own decree.—Redfield v. Reid, 148 Mich. 545.

¶ 321. In a suit to foreclose a purchase-money mortgage, a counterclaim by vendees for a defect in title to part of the land was denied where it appeared that they had not been ousted, that the record title had not been perfected, that the vendor was entirely solvent, and that if any defect in the title existed in fact there was a perfect remedy against the vendor on the covenants of his deed.—Pfirrman v. Wattles, 86 Mich. 254.

¶ 322. A purchase-money mortgagor, pleading set-off, does not show that he is damnified by setting up the foreclosure in chancery of an incumbrance and the sale of the mortgaged premises, but without alleging that he was a party to the suit or in any way bound thereby.—Griggs v. Detroit & M. Ry. Co., 10 Mich. 117.

¶ 323. In a suit to foreclose a mortgage given to secure an accommodation indorser, a partnership accounting between the parties cannot, if not connected with the case, be brought into it except by setting up such facts in the answer or by cross-bill as would entitle the defendant to the benefit of an equitable set-off.—Hess v. Final, 32 Mich. 515.

§ 81. Amendments and supplemental pleadings.

Amendments and corrections of decree, see post § 104.

Effect of amendment of bill for foreclosure on time of sale, see post ¶ 458.

Amendment of bill to set up other subsequent mortgages held by complainant, where they are drawn in by answers, see Equity ¶ 541.

¶ 324. A mortgage containing an erroneous description having been replaced by one describing the premises correctly, the mortgagee sought to foreclose it against a subsequent purchaser, but, by mistake, gave his solicitor the original instead of the corrected mortgage, and the solicitor filed a bill to correct the description and foreclose. Defendant answered, admitting his purchase under the mortgage, but averring that the mortgage had been fully paid and discharged. Complainant explained his mistake in an affidavit, and filed an amended bill setting up the new mortgage and asking for its foreclosure. The court struck the amended bill from the files. Held error. Complainant was entitled to amend, and defendant having admitted the purchase subject to the mortgage was not in position to object. The second mortgage could properly be construed as given to correct the mistake in the first without destroying the identity of the debt, and to bring out the real equity which defendant must have known was the cause of action.—McMann v. Westcott, 47 Mich. 177.

¶ 325. Failure to allege that a deceased mortgagor's children, joined as defendants in a suit to foreclose the mortgage under an allegation that they claim rights as subsequent purchasers, incumbrancers or otherwise, are heirs at law, may be supplied by amendment on appeal, and cannot be taken advantage of on appeal by the mortgagor's widow.—Gray v. Franks, 86 Mich. 382.

¶ 326. Where a bill to foreclose a mortgage is taken as confessed, and the same day complainant receives from defendant a payment in consideration of which it executes a discharge of the mortgage as to part of the mortgaged premises, it is not necessary that complainant file a supplemental bill in order to prevent a dismissal of the mortgage suit.—Commercial Nat. Bank v. Gaukler, 165 Mich. 403.

¶ 327. Where a bill to foreclose a mortgage is taken as confessed, and the same day complainant receives from defendant a payment in consideration of which it executes a discharge of the mortgage as to part of the mortgaged premises, no ground is thereby given upon which defendant may insist on his motion to dismiss the bill, complainant having meanwhile filed without service a supplemental bill in all respects like the original bill, except that it sets out the fact of the partial discharge.—Commercial Nat. Bank v. Gaukler, 165 Mich. 403.

¶ 328. A defendant in a foreclosure decree who has a residuary interest in the mortgage foreclosed after complainant's demand is satisfied may file a bill to have the benefit of that decree, and also to foreclose the mortgage against the defendants who were not, but should have been, parties to the first suit. Such a bill is not objectionable. It is an original bill as to those who were not parties to the first bill, and a supplemental bill as to those who were.—Griggs v. Detroit & M. Ry. Co., 10 Mich. 117.

¶ 328a. Where a mortgage provides for the payment of taxes, it is not necessary to file a supplemental bill showing the payment of taxes after the filing of the original bill of foreclosure, in order to include such taxes in the decree.—Commercial Nat. Bank v. Gaukler, 165 Mich. 403.

§ 82. Revivor of suit.

Substitution of parties complainant in revived suits, see ante § 71.

Revival of suit on death of parties, see Abatement § 20; Equity § 233.

Personal representative as proper party to revive suit on death of complainant, see Abatement ¶ 103.

Appearance to petition for revivor as appearance to foreclosure suit, see Appearance ¶ 32.

¶ 329. In case of a mortgagor's death after payment of the first decree upon a foreclosure for an instalment due on the mortgage, and before proceedings for a further decree on an additional instalment, held, that if a bill of revivor is not absolutely essential, averments of equivalent import, by way of the statutory petition, are at least requisite.—Brown v. Thompson, 29 Mich. 72.

§ 83. Issues and matters litigable.

¶ 330. Prior adverse claims cannot be litigated on foreclosure.—Dickerson v. Uhl, 71 Mich. 398.

¶ 331. Foreclosure is not a proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a previous mortgage from which the complainant does not seek to redeem.—Bell v. Pate, 47 Mich. 468.

¶ 332. A title that is adverse and paramount to that of both mortgagor and mortgagee cannot be litigated in a foreclosure suit; but the question whether an asserted claim is such an adverse one as to come within this rule depends, not upon what is set up in the answer in regard to it, but rather upon what the bill charges and the proofs show to be its real character.—Wilkinson v. Green, 34 Mich. 221.

¶ 333. The dower right of a third party cannot be litigated in foreclosure; but its existence may be passed upon when material to the case.—Ligare v. Semple, 32 Mich. 438.

¶ 334. The holder of a mortgage dated and recorded before a deed of the same property is entitled to treat all subsequent rights as subordinate; and on his bill of foreclosure such rights need not be litigated.—Shelden v. Warner, 45 Mich. 638.

¶ 335. It is not admissible in a foreclosure suit, whatever the pleadings, to proceed to litigate and settle the right of a party who sets up a legal title, which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee, and if it were, a bill which simply brings in the adverse claimants under the usual allegation in foreclosure bills against subsequent purchasers and incumbrancers, i. e., as claiming subordinate interests, is not properly framed to raise such an issue or to support a decree upon the title of such adverse claimants.—Summers v. Bromley, 28 Mich. 125.

¶ 336. Where a foreclosure bill is filed against subsequent purchasers from a grantee whose deed was not recorded until after the mortgage, complainant is not concerned with the good faith of their grantor, and need not investigate the merits of subsequent interests.—Shelden v. Warner, 45 Mich. 638.

¶ 337. Whether the title obtained by one who buys from the purchaser on statutory foreclosure after the time for redemption has expired can be passed upon in a foreclosure proceeding for a second instalment under the mortgage, quære.—Miles v. Skinner, 42 Mich. 181.

¶ 338. The failure by foreclosing assignees of a mortgage to produce mortgage notes or to account for their nonproduction cannot be complained of by the assignor; the only question which he can contest being the superiority of complainant's rights to his.—Moreland v. Houghton, 94 Mich. 548.

¶ 339. By agreement between a mortgagee of land and a third person who owned certain personalty thereon, the mortgagee was to sell the personalty and apply $1,000 of the proceeds on the mortgage debt, which was done. On foreclosure for the balance due it was held that neither the mortgagor nor his grantees could inquire into the disposition of the amount received above the $1,000 which in fact belonged to the third person.—Hayes v. Stockwell, 73 Mich. 366.

¶ 340. Damages sustained by complainant from a third person's failure to perform his agreement to purchase the mortgage cannot be litigated in foreclosure.—Winsor v. Ludington, 77 Mich. 215.

¶ 341. The question whether a discharge of the mortgage sought to be foreclosed by suit was forged, as alleged, is for the chancery court as an incident of the suit and is not to be sent to a jury.—Keller v. Hannah, 52 Mich. 535.

¶ 342. In an action to foreclose a mortgage, where the answer asserts want of consideration, the defense that the transactions upon which the mortgage was issued were founded upon an illegal consideration is within the issues, and proof thereof may be made.—Dierkes v. Wideman, 143 Mich. 181.

§ 84. Variance between proof and pleadings.

See also ante ¶ 315.

¶ 343. The allegation under Chancery Rule 91 that a defendant claims an interest in the mortgaged premises "as subsequent purchaser, incumbered or otherwise" will not entitle the complainant to show that a deed

to such defendant subsequent to the mortgage, but recorded first, is fraudulent. If he claims the deed to be fraudulent he must set forth in the bill the facts which show the fraud.—Wurcherer v. Hewitt, 10 Mich. 453.

¶ 344. A note given by two persons was secured by a mortgage from only one of them. The foreclosure bill described the note as given by the mortgagor, but no objection was made for nonjoinder, and the bill made profert of the note and mortgage, and described the mortgage by its record. Held, that this was not a case of misdescription, and therefore not one of fatal variance; and the nonjoinder is unimportant unless as bearing upon personal responsibility.—Botsford v. Botsford, 49 Mich. 29.

¶ 345. A foreclosure suit can be defended only on the grounds set up in the answer.—Higman v. Stewart, 38 Mich. 513.

¶ 345a. Bill to purchase a mortgage collateral to a bond conditioned to pay certain joint notes of complainants and defendants, the former being sureties, the latter principals. Defense, that defendants had empowered complainants to take and sell goods of the defendants until their claim was satisfied, and that complainants had done so. Held, that under such pleadings complainants might show that these goods had been attached by creditors of the defendants, and that in replevin they had been unable to hold them for want of sufficient interest in themselves to take them from the sheriff, as these facts were not in avoidance merely, but entirely disproved and negatived the defense set up that the mortgage was discharged.—Hall v. Nash, 10 Mich. 303.

§ 85. Presumptions and burden of proof.

See also post ¶ 440.

Presumptions as to rights and title of purchaser, see post § 145.

Presumption that foreclosure sale was in accordance with law, see post ¶ 590.

Presumptions and burden as to payment or release, see Payment, V; Releases, IV; Mortgages, VIII.

Presumptions and burden as to taking without notice and for value, see Notice and Record Title, I; and see also Negotiable Instruments, XIII.

Presumptions and burden as to fraud, see generally Fraud, III; and see also Fraudulent Conveyances, I, V, B.

Presumptions as to consideration for contracts generally, see Contracts, V, D.

¶ 346. The burden of proving fraud alleged as a defense to a mortgage is on the mortgagor.—Perrett v. Yardsdorfer, 37 Mich. 596.

¶ 347. The burden of proving the consideration and genuineness of mortgages for the foreclosure of which suit is brought rests on the complainant, where the defendant files an answer under oath denying positively the execution of the mortgages and the existence of any consideration for them.—Matteson v. Morris, 40 Mich. 52.

¶ 348. The burden of showing that a mortgage sought to be foreclosed was only given as security for certain book accounts is upon defendant.—Coon v. Bouchard, 74 Mich. 486.

¶ 349. The holder of one of several notes secured by a mortgage that is discharged of record, in foreclosing against the present owner of the premises, can introduce proof to disturb the discharge without setting out the invalidating facts in the bill; he must show a prima facie title as assignee, and if the defendant relies on a discharge he must allege and prove it.—Spear v. Hadden, 31 Mich. 265.

¶ 350. On foreclosure by assignee the mortgagee was sworn as a witness and testified that the mortgage was made to him and assigned to complainant at the request of one of the mortgagors, without any consideration moving from or to him for the mortgage or assignment. Held, that this evidence cast upon complainant the burden of proof to show a consideration for the mortgage.—Bishop v. Felch, 7 Mich. 371.

¶ 351. The burden of showing that the amount due on a mortgage under foreclosure is less than the amount secured or than what remained unpaid on balance of accounts is on the defendant.—Lyon v. McDonald, 51 Mich. 435.

¶ 352. Where a foreclosure case is tried on a bill and cross-bill, and the defendant, on information and belief, alleges in the cross-bill that the amount called for in the original bill is too much, it is for the defense to prove the allegation if opportunity is given. If no proof is offered the complainant is not obliged to tender evidence to disprove it.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 353. The defendant in a suit to foreclose a mortgage has the burden of proving that the consideration therefor was less than appears therein if complainant claims that amount, and it is against him if his own theory of computation is as favorable to complainant as to himself.—Wiswall v. Ayres, 51 Mich. 324.

§ 86. Admissibility and sufficiency of evidence.

On default or confession, see post § 87.

Right to prove against complainant defenses available against party in whose behalf complainant sues, see ante ¶ 33.

Sufficiency of evidence on appeal, see Appeal § 431.

Parol evidence as to obligation and terms of mortgage, see Evidence, V.

¶ 354. Complainant must produce the mortgage and the accompanying securities, if any, or must adequately excuse nonproduction, and show that they are still in force.—Bailey v. Gould, W. 478; Bassett v. Hathaway, 9 Mich. 28; Young v. McKee, 13 Mich. 552; Hungerford v. Smith, 34 Mich. 300; Mickle v. Maxfield, 42 Mich. 304; George v. Ludlow, 66 Mich. 176.

¶ 355. A very strong showing of the continuing obligation of a mortgage should be required, if the securities cannot be produced, where the mortgagor is dead, and the defendant is an alleged subsequent purchaser, and nearly twenty years have passed since the debt matured.—Hungerford v. Smith, 34 Mich. 300.

¶ 356. Complainant's failure, in a foreclosure case, to make out a complete title to the mortgage as a valid security bars relief.—Cooper v. Smith, 75 Mich. 247.

¶ 357. Where a mortgagor is an employee of the mortgagee, and the latter's agent keeps the accounts, and it is understood that moneys coming through him to the mortgagor are to be applied on the mortgage, the mortgagee, to entitle himself to a decree on foreclosure, must make a clear case and a full exposition of the accounts, especially if several years have been allowed to pass without attempting to enforce payment, or to secure it except by labor.—Webber v. Ryan, 54 Mich. 70.

¶ 358. In action to enforce a mortgage contingently securing an accommodation party, evidence that an execution issued against the maker and was returned unsatisfied and testimony by the maker himself that when he was sued he was not financially able to pay and has not been since that time, is sufficient to show insolvency.—Albion State Bank v. Knickerbocker, 125 Mich. 311.

¶ 359. When the answer does not admit that the mortgage debt is due, any proof is receivable to disprove it which would be receivable under the general issue at the common law.—Morris v. Morris, 5 Mich. 171.

¶ 360. Evidence showing that a second mortgage was intended to be applied as a payment upon a prior one is admissible in a suit to foreclose both.—Blair v. Carpenter, 75 Mich. 167.

¶ 361. Where a defense to a mortgage foreclosure is based on an alleged agreement between the complainant's assignor and the defendant, the agreement must be shown by the proofs to be a legally binding contract.—Suhr v. Ellsworth, 29 Mich. 57.

¶ 362. The fact that a mortgage was assessed for taxation for the exact amount of the principal has no tendency to show that no interest was due at the time of the assessment, especially where it appears from the testimony of the local officers that all mortgages were customarily so assessed, and that it was too.—Rose v. Lockerby, 116 Mich. 277.

¶ 363. A defense to a foreclosure suit, that the defendant was entitled to credit to the amount of a certain mortgage which had figured in dealings between the parties in question, was not entertained where settlement had been made beginning 30 years prior to the filing of the bill, and where the person who mostly knew of vital matters had died.—Northrup v. Gray, 122 Mich. 700.

¶ 364. On an appeal from an accounting for the use of land by a grantee in possession under a deed intended as a mortgage, the charges for annual rental were increased fifty per cent from an allowance of $200.00 where numerous witnesses estimated it from nothing to $720.00 and defendant's witnesses averaged $136.00 while plaintiff's averaged $641.00.—Miller v. Peter, 184 Mich. 142.

¶ 365. Where a grantee with warranty who has given a purchase-money mortgage claims, on foreclosure, deduction of the amount of a valid subsisting prior mortgage, such equitable set-off must be clearly proved and the amount to be deducted must be certain.—Smith v. Fiting, 37 Mich. 148.

§ 87. ——On default or confession.

Appearance of defendant not personally served, see post § 89.

Taking proofs on default, see Defaults § 23.

Impropriety of dismissal of bill confessed by all defendants in interest, see Defaults ¶ 55.

Procedure on bill being taken as confessed or right of plaintiff admitted in answer, see 1916 C. C. Rule 58, §§ 2, 4.

¶ 366. Upon a default by a defendant brought in by publication there can be no decree without proofs; and the complainant should also be sworn as to payments.—Brown v. Thompson, 29 Mich. 72.

¶ 367. On a bill standing admitted which alleges the amount due and unpaid to date of the bill, but where complainant thereafter paid taxes, it is necessary to take proofs in the regular way of the amount of such tax payments and interest thereon.—Hoock v. Sloman, 145 Mich. 19.

¶ 368. On a bill taken as confessed by a part of the defendants, the evidence taken on trial of the issues by the others is available against the defaulted ones; and a reference to take such proofs against them is not necessary.—Michigan Ins. Co. v. Whittemore, 12 Mich. 427.

¶ 369. A mortgage was given to secure the payment of judgments confessed by the mort-

gagor, but which were void for want of compliance with the statute. Bill being filed to foreclose, and no proof made of any indebtedness, the bill was dismissed.—Austin v. Grant, 1 Mich. 490.

§ 88. Trial and hearing in general.

Question of forgery of discharge of mortgage as one for court, see ante ¶ 341.

Making computation in open court, see also Equity ¶ 732.

Power of chancellor to take proofs without reference for computation, see Equity § 167, ¶ 692.

Reference to commissioner where defendant is infant or absent and not personally served, see 1916 C. C. Rule 58, § 3.

¶ 370. The court may dispense with a reference to compute the amount due in a foreclosure case, and make its own computation if it sees fit.—Ireland v. Woolman, 15 Mich. 253; Vaughn v. Nims, 36 Mich. 297.

§ 89. Appearance of defendants not personally served.

Necessity of jurisdiction in personam for obtaining deficiency judgment, see post § 171.

Statutory provision for appearance of defendants not personally served with process, see Jud. Act, chap. XIX, §§ 2-7; Comp. L. 1915, §§ 12656-12661.

¶ 371. Two things only are required by R. S. 1838, p. 373, § 89, How. St., § 6685, of nonresident defendants to entitle them to appear and defend in mortgage cases; appearance before the premises are sold under a decree, and payment of such costs as the court shall direct. The costs only are discretionary with the court.—Bailey v. Murphy, W. 305.

¶ 372. R. S. 1838, p. 373, § 89, How. St., § 6685, providing for appearance of nonresident defendants in suits for mortgage foreclosure extends to all nonresident defendants and makes no distinction between mortgagors and subsequent incumbrancers.—Bailey v. Murphy, W. 305.

¶ 373. A nonresident defendant was let in to defend by answer after a sale had been made, the sale being ordered to stand until final hearing. Held, that the case admitted of all rights of defense which might be established by answer, including that of redemption.—Stone v. Welling, 14 Mich. 514.

D. DECREE AND ANCILLARY AND INCIDENTAL RELIEF.

§ 90. Form, requisites and items of decree.

Instalments and charges to accrue or accrued since suit, see post § 91.

Taxes and other disbursements, see post § 92.

Interest, see post § 93.

Sufficiency and requisites of decree for deficiency, see post § 173.

Providing in decree for payment to pledgor of mortgage of surplus over debt secured by pledge realized on foreclosure of mortgage, see post ¶ 507.

Persons concluded and persons entitled to assert conclusiveness of foreclosure decree, see Former Adjudication, V.

Decree for partition in foreclosure suit as nonconformable to bill, see Equity ¶ 820.

Causes, claims and defenses barred by foreclosure decree, see Former Adjudication, IV.

Particular facts concluded by decree, see Former Adjudication, VI.

Collateral attack on decree, see Former Adjudication, VIII.

Foreclosure decrees operative as bar or estoppel, see Former Adjudication, II.

Validity of foreclosure decree rendered during infancy of feme covert who became of age after time for appeal, see Judgments, VII.

Effect of decree of foreclosure on rights of junior mortgagee's assignee, see Former Adjudication, V.

How decree is to be urged, pleaded or proved, see Former Adjudication, VII.

Validity of foreclosure decree based on stipulation of guardian ad litem waiving jurisdictional irregularities in suit against his minor ward, see Guardian ad Litem.

Decrees in foreclosure suits which may be appealed, see Appeal § 55.

Party entitled to complain on appeal of error, where error does not affect all parties, see Appeal §§ 219-223.

¶ 374. Comp. L. 1897, §§ 516, 522 and 523, providing respectively for the contents of a decree of foreclosure and sale of mortgaged premises, the manner of the sale, and the form of the deed, should be construed together and the decree should follow the provisions in force at the time it was entered and form the basis of the sale.—Lachman v. Ottawa Circuit Judge, 125 Mich. 27.

¶ 375. The ordinary allegations of a foreclosure bill do not authorize a decree declaring chattels upon the mortgaged premises to belong to the realty.—Crippen v. Morrison, 13 Mich. 23.

¶ 376. A decree that directed land mortgaged as a whole to be sold in separate undivided interests, each to satisfy the same principal, with interest at different rates, was set aside.—Spear v. Hadden, 31 Mich. 265.

¶ 377. A foreclosure decree authorizing a sale of the premises at any time after thirty-two days after such decree unless the amount found due shall be paid, is not invalid as not allowing a reasonable time for redemption, where the mortgage was wholly due nearly two years before the decree was rendered, and where the suit was brought twenty-one months prior to the decree.—Fifth National Bank v. Pierce, 117 Mich. 376.

¶ 378. Where in a foreclosure suit a settlement is made between complainant and one or more defendants, and by written stipulation filed in the cause the controversy is adjusted as to a portion of the premises so that it is not to be affected by the decree, the court has no jurisdiction to make a decree affecting such portion.—Thayer v. McGee, 20 Mich. 195.

§ 91. ——Instalments and charges to accrue or accrued since suit.

¶ 379. It is proper to include in the decree a sum which has fallen due on the mortgage since the commencement of suit and which remained unpaid.—Howe v. Lemon, 37 Mich. 164.

¶ 380. The decree on foreclosure may properly cover all amounts due at the date when it is granted, even though there has to be a new inquiry into any instalments that accrue after decree.—Vaughn v. Nims, 36 Mich. 297.

¶ 381. Foreclosure decree is given for everything due when it is granted, though suit was begun when only an instalment of the debt had matured.—Johnson v. Van Velsor, 43 Mich. 208.

¶ 382. Where a mortgage securing two notes is foreclosed before one of them has fallen due its amount may nevertheless be included in the decree if it falls due before the decree is rendered.—Hanford v. Robertson, 47 Mich. 100.

¶ 383. Upon a bill filed to foreclose a mortgage payable in instalments at a time when only one instalment had become due and remained unpaid, and which seeks a foreclosure for that payment only, the decree cannot include other instalments not due when the bill was filed and concerning which no issue was made.—Smith v. Osborn, 33 Mich. 410.

¶ 384. Where guarantors of the principal and interest of bonds secured by a mortgage are sued in foreclosure before the maturity of the principal, such principal, if maturing pending the suit, may be included in the decree.—Union Trust Co. v. Detroit Motor Co., 117 Mich. 631.

§ 92. ——Taxes and other disbursements.

¶ 385. Where an assignment of a mortgage contains an agreement that the mortgagee and assignor shall pay all taxes thereafter assessed upon the mortgaged land, and that on his default the assignee may pay them, the latter, on a foreclosure of such agreement, cannot have a decree for the amount paid by him in clearing the land from tax liens accruing before the assignment.—Macomb v. Prentis, 78 Mich. 255.

¶ 386. Taxes and insurance moneys paid after the commencement of foreclosure proceedings, and before the decree therein, are properly included in the amount for which foreclosure is awarded, where the mortgage provides for their payment, and that the amount so paid shall be a lien.—Jehle v. Brooks, 112 Mich. 131.

¶ 387. The amount paid by a mortgagee for taxes and his reasonable attorney fees, are properly included in a decree of foreclosure, where the mortgage expressly provides for such charges.—Farwell v. Bigelow, 112 Mich. 285.

¶ 388. A decree of foreclosure and sale was filed in the supreme court January 7, 1911, ordering the mortgagee to pay all taxes, assessments, etc., due and unpaid. The taxes paid by the mortgagee after the decree and before the sale were added to the amount decreed. If the mortgagee had not paid these taxes by May 1, 1911, its right of redemption from the tax sale would have been lost. Held, the decree authorized the addition of the sum paid for said taxes to the amount of the decree.—Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574.

¶ 389. Where a mortgagee has taken a tax-title for the purpose of protecting the mortgage, it is proper in decreeing payment on foreclosure to provide that, on payment of the cost of the tax title with suitable interest, the certificate of the tax purchaser shall be assigned to defendant.—Baker v. Clark, 52 Mich. 22.

¶ 390. Where a mortgagee pays taxes on the land, he succeeds to the lien therefor on the land, and in equity is entitled to reimbursement out of any surplus on foreclosure sale.—Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574.

¶ 391. The mortgagor remaining in possession paid no taxes or interest or anything on the principal, allowed the bill of foreclosure to be taken as confessed and made no tender or offer to pay and redeem. The decree of foreclosure included all taxes paid by the mortgagee whether the same were contracted before or after the date of the mortgage. Defendant objected to the inclusion in the decree of the taxes incurred prior to the date of the mortgage. Held, under the equities of the case it was within the power of the chancery court to declare such taxes an equitable lien to be added to the amount of the mortgage.—Hopkins v. Saunders, 172 Mich. 227.

§ 93. ——Interest.

Right to interest in general, see Interest, I.
Determination and computation of interest rate in foreclosure decree, see Interest. II.
Rate and computation of interest allowable on judgments, see Interest.

¶ 392. Where land which was under lease for a term was sold, and a mortgage taken

back for the purchase price, and it was agreed between the parties that during the leasehold term the mortgagee should pay to the mortgagors the interest on the purchase price, held, that on a foreclosure of the mortgage the amount of this interest should be deducted from the amount due on the mortgage, and a sale be decreed for the balance only.—Disbrow v. Jones, H. 102.

¶ 393. Where a mortgagor has made a tender of payment which was not accepted and which he had not kept good, and the mortgagee afterwards tendered a conveyance and demanded payment, it was decreed on foreclosure that the mortgagor pay the principal of his debt with simple interest to the time of payment, less the period that intervened between the dates of the tender and of the mortgagee's subsequent offer to reconvey; and that the mortgagor's costs of both courts be deducted.—Ferguson v. Popp, 42 Mich. 115.

¶ 394. In a foreclosure suit by an executor, a personal decree cannot be rendered for interest against which the statute of limitations had run prior to the testator's death.—McIntire v. Conrad, 93 Mich. 526.

§ 94. Production, discharge and filing of notes and mortgage or indemnity instead.

¶ 395. Where a case was contested on the sole ground that the mortgage and notes were of no original validity, and they were not put on file, the supreme court declined to reverse the decree for complainant on that ground, but required them to be produced and filed, or their absence accounted for by affidavit, before affirming it.—Young v. McKee, 13 Mich. 552.

¶ 396. Where the notes secured by a mortgage were missing, and a foreclosure decree was allowed upon the theory that they were still in existence, complainant was required to indemnify defendant against their enforcement in case they reappeared in the hands of strangers.—Yerkes v. Blodgett, 48 Mich. 211.

¶ 397. Where it is shown that accompanying the mortgage sought to be foreclosed there was a note signed by the mortgagors, which is not produced, a defendant who purchased the premises from his codefendants subject to the mortgage, which latter he orally agreed to pay, is entitled to indemnity in substantial compliance with How. St., §§ 7518, 7519.—Walker v. Gillett, 98 Mich. 59.

¶ 398. On foreclosure of a trust mortgage to secure creditors by consolidating outstanding indebtedness into new note to be substituted for the old debts, some of which were represented by notes in the hands of indorsees of an insolvent bank creditor, where the mortgage contemplated that the notes could not be presently substituted but that substitution might be had when the bank's receiver could get them in from the indorsees, and where it was a consideration of the mortgage and a condition of it, though not a precedent one, that the old notes should come back to the mortgagor in order to protect him from liability thereon as an indorser, decree in favor of the insolvent for its share of the proceeds should be made with a provision that the notes be surrendered to the mortgagor lest they be not paid from the proceeds so decreed and the mortgagor be left liable personally.—Gillam v. Barnes, 123 Mich. 119.

§ 95. Adjudications as to title and priorities.

¶ 399. Where several notes of the same date but falling due at different times are secured by one mortgage, a foreclosure decree cannot give priority to any of them.—Wilcox v. Allen, 36 Mich. 160.

¶ 400. Where a subsequent purchaser of land from a mortgagor thereof has procured quitclaims from the mortgagor's grantors for the purpose of perfecting his title of record, but under such circumstances as would make it fraudulent for him to set them up as establishing an adverse and paramount title, the mortgagee, on proper allegations in his foreclosure bill, may have such adverse title declared null.—Wilkinson v. Green, 34 Mich. 221.

¶ 401. A grantee took a warranty deed of the premises from grantors whose title was defective, and on the strength of it he obtained from others for next to nothing some quitclaims by which his title was perfected. The property had been mortgaged, but he had assumed the mortgage and reserved from the purchase price enough to pay it. Both mortgage and deed purported to cover the whole title. Held, that on foreclosure it was not inequitable that the decree also should cover the whole title, including the interests which had been quitclaimed.—Taylor v. Whitmore, 35 Mich. 97.

¶¶ 402, 403. A man gave two promissory notes, dated alike and secured by a mortgage, though one of them was also secured by surety. Held, on foreclosure, that the one secured by the mortgage only must be first satisfied before the proceeds of a sale of the land could be applied to the payment of the other.—Hanford v. Robertson, 47 Mich. 100.

§ 96. Decree where building removed from mortgaged premises.

¶ 404. A bill to foreclose a mortgage on land from which the buildings had been removed, and which before such removal had been covered by the lien of the mortgage, will warrant a decree that the buildings be ordered sold if the lot did not bring enough to satisfy the mortgage; and the decree so ordering cannot be said to be made in litigation of the title to property, which cannot be

done in foreclosure proceedings.—Partridge v. Hemenway, 89 Mich. 454.

¶ 405. In case of the removal of buildings from mortgaged premises to other lands, which are embraced in a later mortgage, the decree should direct that the land covered by the prior mortgage should first be sold, and, if enough money is not realized from the sale to pay the mortgage, the buildings should be sold, and from the proceeds the balance of such mortgage be first paid, and the surplus, so far as is necessary, applied to the payment of the later mortgage. —Johnson v. Bratton, 112 Mich. 319.

§ 97. Cross reliefs and set-offs.

Defects in title and damages on covenants, see post § 98.
Cross-bills and counterclaims, see ante § 80.
General law of set-off, see Set-off.
Right of mortgagee to avail of mortgagor's set-off against superior lien of codefendant, see Set-off, II.
Bill after decree to allow set-off, see Set-off, IV.

¶ 406. On foreclosure of a mortgage given to secure indorsements not connected with partnership dealings, an accounting as to partnership matters between the parties cannot be had to raise a counterclaim when no special equities are set up entitling defendants to the benefit of an equitable set-off.—Hess v. Final, 32 Mich. 515.

¶ 407. Three persons who had held land in partnership sold it, and gave separate conveyances to the purchaser, who, in pursuance of an arrangement to that effect, gave back a mortgage for the purchase price to one of them. The purchaser afterwards bought up a mortgage given by one of them on an undivided one-third of the land, and sought to make a set-off of this in a suit to foreclose his own mortgage. But the set-off was refused, the court holding that claims under that mortgage could be better litigated in a separate suit; and the decree was so framed as to leave that mortgage untouched.—Adams v. Bradley, 12 Mich. 346.

§ 98. ——Defects in title and damages on covenants.

¶ 408. One who receives a conveyance of lands with covenant against incumbrances and gives back a mortgage for the purchase price is not confined to his remedy upon the covenant, but may set off the amount of a prior mortgage which he has paid against his own mortgage when suit is brought to foreclose the latter.—Detroit & M. R. Co. v. Griggs, 12 Mich. 45.

¶ 409. A mortgagor for the purchase price cannot set off the amount of prior incumbrances which he has neither paid nor shows that he has been or is in danger of being damnified by.—Griggs v. Detroit & M. Ry. Co., 10 Mich. 117.

¶ 410. The grantee of land was allowed to withhold part of the consideration for a specified time in order to take up an outstanding title, and to secure the money withheld he gave a mortgage. Held, that it was no defense to its foreclosure that to perfect his title he had paid the amount withheld to a person who claimed to have obtained a quitclaim of the outstanding title, when it was neither averred in the answer nor shown by the proofs that the latter claim was valid or truthful.—Richardson v. Tolman, 44 Mich. 379.

¶ 411. Certain land that had been sold for unpaid taxes of 1856 was conveyed in 1872 with a warrant against incumbrances, and the grantees returned a purchase-money mortgage. A purchaser under the tax title had also mortgaged the premises, and the grantees claim to have been put to expense to perfect their title in other respects. On foreclosure of the purchase-money mortgage, the existence of the adverse tax title and the antecedent mortgage was alleged as a defense, and the right was claimed to detain the purchase money to the extent of which damages would be recoverable upon the covenants. Held, that if the grantees were entitled to any such damages, they must resort to the covenants in their deed.—Smith v. Fiting, 37 Mich. 148.

¶ 412. In a foreclosure of a purchase-money mortgage the defending vendees were held not entitled to an equitable offset for a defect in title to part of the land, where it appeared that they had not been ousted, that the record title had not been perfected, that the vendor was entirely solvent, and that if any defect in title existed in fact there was a perfect remedy against the vendor on the covenants of his deed.—Pfirrman v. Wattles, 86 Mich. 254.

¶ 413. In a suit to foreclose a purchase-money mortgage, a set-off by way of damages for the failure of the vendor to execute a bond indemnifying the vendee against any legal claim of title, as provided in the contract of purchase, will not be allowed, where it does not appear that the vendee has been disturbed in his possession, nor that any adverse title has been set up.—Sturgis Nat. Bank v. Levanseler, 115 Mich. 372.

¶ 414. R., after conveying part of a lot, conveyed the entire lot by warranty to W., who, knowing not of the former conveyance, supposed he was getting title to the entire lot, which he mortgaged to R. to secure payment of part of the purchase price. Upon a bill filed by R. to reform the deed and mortgage so as to restrict them to the part of the lot owned by him when he made the deed, and to foreclose the mortgage so reformed, it appeared that W. had made improvements on the part of the lot obtained by him, and that R. was financially unable to take a conveyance and place W. in statu quo; and a

foreclosure decree reducing the mortgage debt by the amount of damage sustained by W. through his failure to get title to the entire lot was held proper.—Rockwell v. Wells, 104 Mich. 57.

¶ 415. The defendant owner had mortgaged his land to C. and afterwards mortgaged it to M. with an agreement that M. should withhold enough to pay and discharge the C. mortgage. M. did not do it, but foreclosed his mortgage and therein the owner made the defense that such payment had not been made. It was not sustained and the M. mortgage was foreclosed for the full amount. Subsequently plaintiff, an assignee, came into possession of a mortgage subject to the equities of the C. and M. mortgages as they existed between the owner and plaintiff's assignor. The owner had sold and had repurchased the land from plaintiff's assignor on the representation that the lands were unincumbered and had given a purchase-money mortgage, which was the one assigned. Held that on foreclosure of the purchase-money mortgage credit for the amount of the C. mortgage should be given, since in making the defense on the former foreclosure defendant owner, the present plaintiff being then a codefendant, had been diligent to protect his rights.—Cooley v. Harris, 92 Mich. 126.

¶ 416. A mortgagee shortly before his death without consideration transferred the mortgage to his son for the purpose of defeating his creditors. Complainant assignee after the death of the mortgagor filed a bill to foreclose. Defendant mortgagor filed a cross-bill setting up a claim of set-off against the mortgagee and demanding that the administrator of the mortgagee be brought in as a party for the purpose of enforcing against complainant assignee the rights of the mortgagee's estate against the property assigned to complainant. The administrator filed an answer in the nature of a cross-bill asking that the property in complainant assignee's hands be held to have been taken subject to the right of claimants against the mortgagee's estate and the costs of administration. The administrator took no steps at law in the matter and the cause went to hearing on the merits without objection. Held, the court had jurisdiction in the proceeding to enter a decree allowing the mortgagor's claim of set-off in fixing the terms upon which he should be allowed to redeem; to decree to the administrator the sums claimed by him; and to order the balance paid over to complainant assignee.—Terry v. Terry, 170 Mich. 330.

§ 99. Supplemental and further decrees.

Proceedings for further decree on instalments, see post § 100.

¶ 417. One of the defendants in a foreclosure decree, who had a residuary interest in the mortgage foreclosed after complainant's demand should be satisfied, filed a bill, the object of which was to have the benefit of that decree, and also to foreclose the mortgage against parties who were not but should have been parties to the first suit. A decree was made in the case, in the ordinary form of foreclosure decrees, and it was held not objectionable, it appearing that since the original decree payments had come due as well on the mortgage as on complainant's debt secured by it.—Griggs v. Detroit & M. Ry. Co., 10 Mich. 117.

§ 100. Proceedings for further decree on instalments.

Sale for default of instalments, see post § 118.

Propriety of foreclosure by advertisement of instalment mortgage on default of single instalment, see ante § 22.

Rights of purchaser on foreclosure for instalment, see post § 138.

Default to foreclosure of one instalment as admission limited to that one only, see Defaults § 17.

Effect of payment after decree for instalment to abate entire suit, see also Abatement ¶ 54.

Statutory provisions for decree on subsequent defaults on instalments, see Jud. Act, chap. XIX, § 36; Comp. L. 1915, § 12690.

Dismissal of bill as to instalments not yet accrued where amount accrued with costs is paid before decree, see Jud. Act, chap. XIX, § 33; Comp. L. 1915, § 12687.

Decree of court for foreclosure to be enforced in case of default in subsequent instalments where decree stayed as to instalments due by payment, see Jud. Act, chap. XIX, § 34; Comp. L. 1915, § 12688.

¶ 418. Where after decree in a foreclosure suit another instalment falls due on the mortgage, and a petition is presented under R. S. 1838, p. 376, § 117, How. St., § 6714, for a further order of sale, the petition should set forth briefly all the facts necessary to enable the mortgagor, as well as the court, to understand its object.—Albany City Bank v. Steevens, W. 6.

¶ 419. A copy of the petition for a further decree upon an additional instalment due, with notice of the time of presentation to the court, must be served on the mortgagor, or if it cannot be served personally by reason of his absence from the state, it should be served on his solicitor.—Albany City Bank v. Steevens, W. 6.

¶ 420. The dictum in Albany City Bank v. Steevens, Walk. Ch. 6, to the effect that a copy of the petition for a further decree on an additional instalment after payment of a prior decree need not be served on defendants made parties as subsequent incumbrancers, is incorrect. Such proceeding is essentially a new suit, except in form, and notice must be given to every person whose interests are to be affected by the decree

as in the original suit.—Brown v. Thompson, 29 Mich. 72.

¶ 421. In case of default in payment of a subsequent instalment of the mortgage debt, one to whom the mortgagee's administrator has assigned the mortgage and decree of foreclosure for the first instalment, may, under the interest clause in the mortgage, declare the entire debt due and payable; and the court has power, upon the assignee's petition, to direct by further order founded upon the first decree, a sale of the mortgaged premises to satisfy the rest of the mortgage debt. —Brand v. Smith, 99 Mich. 395.

¶ 422. When a decree is for the payment of a sum by instalments, a sale cannot be ordered for default in paying one of them until an opportunity has been afforded the party to contest the alleged default, and a decree upon one hearing will not authorize a sale for a subsequent instalment, without a new hearing and adjudication.—Perkins v. Perkins, 16 Mich. 162.

¶ 423. Where a mortgage is payable in instalments, each is so far separate from the rest that in a foreclosure suit upon an instalment a payment before decree of the amount due ends the suit (Comp. L. 1871, § 5157, How. St., § 6711), and it is only by virtue of the ensuing section that such a payment after decree does not have the same effect.—Brown v. Thompson, 29 Mich. 72.

§ 101. Ancillary or incidental relief.

Appointment of receiver, see post § 102.

Provision for preservation of crops until possession is given to purchaser, see post ¶ 553.

Foreclosure as proper cross relief in suit filed to cancel mortgage, see Rescission and Cancellation, VI.

Reformation incidental to foreclosure, see Reformation of Instruments, I.

Recovery of illegal or mistaken payment, see Payment, VI.

Suit to compel foreclosure of prior mortgage on other lands as remedy to secure proper marshalling of securities, see Marshalling Assets.

Mandamus as ancillary remedy, see Mandamus, IV.

Grounds for injunction, see Injunctions, II.

Injunction decrees and terms of restrain or command, see Injunctions, V.

Reformation of mortgage and notes incidentally to foreclosure, see Reformation.

Granting relief for amount due on bill to restrain foreclosure, see also Equity ¶ 822.

¶ 424. Where a bill was filed for the sole purpose of foreclosing a mortgage, which mortgage failed, it was held that though complainant retained a vendor's lien upon the premises it could not be enforced in that suit.—Converse v. Blumrich, 14 Mich. 109.

¶ 425. Where a former employee of an insolvent corporation intervened with a labor claim in foreclosure proceedings against such corporation after the rendition of a decree for the sale of the mortgaged property, and of certain accounts and bills receivable transferred to the mortgagee, after the labor for which the intervener claimed had been performed, the intervener's claim may be allowed without opening the decree, where it directs that one holding a junior claim be paid out of the proceeds a specified sum, exceeding in amount the intervener's claim; his debt could properly be made a charge upon the fund apportioned to such junior claimant. —Michigan Trust Co. v. Grand Rapids Democrat, 113 Mich. 615.

¶ 426. A., who held a mortgage under circumstances that made him B.'s trustee, brought a foreclosure suit. Held, that the owner of the equity of redemption could not, in such suit, be heard to assert that the money to be derived from the sale should be secured in some way for B.'s benefit; that the matter was not germane to the suit.—Nugent v. Nugent, 50 Mich. 377.

§ 102. Appointment of receiver.

General grounds for receivership, see Receivers, I.

Procedure for appointment of ancillary or pendente lite receivers and sufficiency of main pleadings to support appointment, see Receivers, II, A.

Administration and management of property by receiver, see Receivers, IV.

Authority of court to appoint receiver ex parte to take possession of real estate under foreclosure, see Receivers, II. A.

Procedure for appointment of ancillary or pendente lite receivers and sufficiency of main pleadings to support appointment, see Receivers, II, A.

Receivership ancillary to foreclosure of corporate mortgage, see Corporations § 237.

¶ 427. Since the passage of the statute prohibiting the mortgagee from bringing ejectment, it is questionable whether a clause in a mortgage which gives the mortgagee, in case of default, the right to take possession, in person or by attorney, of the mortgaged lands, and to operate, or cause to be operated, the works and mines thereon, can be carried into effect by the appointment of a receiver; it certainly cannot be done until after default, which, unless admitted, could not be determined on a motion to appoint a receiver.—Beecher v. Marquette & P. Rolling Mill Co., 40 Mich. 307.

¶ 428. Under the practice existing when the mortgagee of real estate had a possessory right, equity would not interfere to grant a receiver unless the premises were scanty security and the mortgagor was insolvent.—Brown v. Chase, W. 43; Hazeltine v. Granger, 44 Mich. 503.

¶ 429. A mortgagee is not entitled to have a receiver of the property appointed pending foreclosure, even though it appears that the mortgagor's grantee does not intend to apply the rents and profits to the payment of the incumbrance.—Fifth Nat. Bank v. Pierce, 117 Mich. 376.

¶ 430. The mortgagor being entitled to possession until his title is divested by complete foreclosure, a receiver cannot be appointed in the foreclosure suit to take charge of, harvest and market a growing crop of wheat and to apply the proceeds on the mortgage debt.—Wagar v. Stone, 36 Mich. 364.

¶ 431. The right of a mortgagee to a receiver pending the foreclosure of the mortgage, depends upon whether there is danger of ultimate loss to bondholders by permitting the property to remain in possession of its owners until the final decree and sale. —Union Trust Co. v. Charlotte General Elec. Co., 152 Mich. 568.

¶ 432. A neglect to apply for a receiver within a reasonable time, to take possession of mortgaged premises, is construed as a waiver of the right to make the application. —Brown v. Chase, W. 43.

§ 103. Construction and effect of decrees.

Titles and rights taken by sale under decree, see post, IV, V.
Effect as res adjudicata, see Former Adjudication.
Effect against collateral attack, see Judgments, VII.

¶ 433. A. held a second mortgage on one parcel, which also covered additional lands over which it was prior to an incumbrance held by the party claiming the first parcel under the first mortgage; on the foreclosure of the junior incumbrance, A. was made a party to the suit under the general allegation that he held or claimed some interest in the premises, etc. Held, that he had a right to treat this averment as relating only to his interest which was subject to the mortgage being foreclosed, and that his further interest would not be affected by the decree in that suit.—Dawson v. Danbury Bank, 15 Mich. 489.

¶ 434. It is the practice on foreclosure to allow a reasonable time for payment, definitely fixed by the decree.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶¶ 435, 436. Where a decree in a foreclosure suit refuses to determine the priority of right between the mortgagee and a defendant claiming under a deed alleged by him to be paramount to the mortgage, and leaves it open to action, it is in effect a dismissal of the bill as to such defendant.—Comstock v. Comstock, 24 Mich. 39.

§ 104. Amendments and corrections.

Amendments of pleadings, see ante § 81.
Amendments, opening or vacating decrees, see Judgments, V.
Bills for correction or relief, see Judgments, VI; Equity, X, D.
Bills of revivor and supplement and petitions for rehearing, see Equity, XI.
Reformation incidental to foreclosure, see Reformation of Instruments, I.

§ 105. Assignment of decree and rights thereunder.

Effect of assignment of mortgage, see ante § 14.
Sale under assigned decree, see post § 119.
Assignment of rights under purchase, see post § 141.
Assignment of deficiency decree, see post § 177.

¶ 437. Where, after a mortgage has been foreclosed for one instalment of the debt, a complainant dies, and the amount due on the decree is paid to his estate, the decree is personalty, and may be sold and assigned by his administrator, and the assignment will carry with it the mortgage and the accompanying note; and by such assignment the assignee stands in all respects in the same position as complainant stood, and with the same right to enforce the decree as to future instalments.—Brand v. Smith, 99 Mich. 395.

¶ 438. A husband, after separating from his wife, assigned a foreclosure decree covering her land, which he had purchased before their marriage under an agreement with her to hold it until, by the sale of the land, she could repay him the money paid for the decree. The assignee paid no consideration for the assignment. Held, that he took it subject to the wife's equities.—Moore v. Smith, 103 Mich. 387.

¶ 439. Defendants contending that the purchase of the mortgaged premises was made by complainant in the interest of her infant ward, held, that the relations between complainant and her ward did not concern defendant; that the deed of the land was made to complainant, and decedent's agreement to purchase the decree, and hold it, was made with her personally, and not as guardian.—Moore v. Smith, 103 Mich. 387.

¶ 440. A widow sued to set aside a foreclosure by her husband's assignee of a foreclosure decree and to have an accounting from her husband's administrator for services rendered by her to her husband before their marriage and respecting her interest in the mortgaged premises. She had bought the premises subject to the decree and before the marriage and he had taken an assignment of the decree and agreed with her, according to her testimony, that he would pay off the mortgage and hold the place for her and that she might sell it by repaying him what he had expended. At the time of the assignment her services were worth at least $1,000.00 by her testimony while he paid but $500.00. Held not to raise an inference that she was to pay him the amount of the de-

cree absolutely and without set-off of his debt to her.—Moore v. Smith, 103 Mich. 387.

¶ 441. A mortgage foreclosure suit having gone to decree, the mortgagor applied to B. for $3,000 to purchase the decree. B. paid that amount to the mortgagee, and one of the foreclosure codefendants paid the balance, and B. took from the mortgagee an assignment of the mortgage and decree. No agreement was made as to when the $3,000 should be repaid, or extending time for sale under the decree or limiting the right of B. in any way to enforce the decree. No obligation whatever was taken from the codefendant who paid the balance. Held, that this did not amount to the making of a new mortgage, so as to require a new decree before sale.—Walker v. Wayne Circuit Judge, 112 Mich. 384.

E. SALE.

§ 106. In general; propriety.

Direction or order to sell, see post § 107.
Notice and proof of notice, see post §§ 108, 109.
Time and conduct of sale and bidding, see post §§ 110-112.
Sale in parcels or in gross, see post §§ 113-115.
Selling in inverse order of alienation, see post §§ 116, 117.
Sale for default of instalments or under assigned decree, see post §§ 118, 119.
Sale in statutory foreclosure by advertisement, see ante, II, C.

¶ 442. Under Comp. L. 1897, § 11020, a mortgagee may sell the mortgaged property though partition proceedings are pending and upon failure to redeem to become a party to the proceedings and succeed to the rights of the mortgagor.—O'Connor v. Keenan, 132 Mich. 646.

§ 107. Direction or order to sell.

Reference to commissioner for report as to situation of mortgaged premises, see Jud. Act, chap. XIX, § 35; Comp. L. 1915, § 12689.

¶ 443. The direction in a decree of sale that notice of sale be given "according to the course and practice of the court" intends same notice as on a sheriff's sale and is sufficiently clear.—Ireland v. Woolman, 15 Mich. 253.

§ 108. Notice and advertisements or posting.

Affidavits or proof of notice and publication, see post § 109.
Notice of sale in statutory foreclosure by advertisement, see ante, II, B.
Lack of notice as ground for objection to confirmation, see post ¶ 495.
Notice of sale, see 1916 C. C. Rule 58, § 5.

¶ 444. A foreclosure sale is illegal if made without a notice to defendants before the date fixed by the decree for the payment, in default of which sale may be made.—Shier v. Prentis, 55 Mich. 175.

¶ 445. Notice of sale under decree of foreclosure need not be personal.—Sanford v. Haines, 71 Mich. 116.

¶ 446. A notice of sale of mortgaged premises is sufficient if published in a "weekly newspaper of legal and business information," which has been for many years a medium for the publication of legal advertisements; publication in a daily newspaper of general circulation is not necessary.—Hoock v. Sloman, 155 Mich. 1.

¶ 447. The omission to state in an advertisement of a mortgage sale that only an undivided portion will be offered instead of the entire parcel is not a jurisdictional defect that can be objected to in a collateral proceeding, but an irregularity that should be complained of in the same case.—Brown v. Phillips, 40 Mich. 264.

¶ 448. Whether the practice of beginning publication of notice of sale before default in payment as provided by the decree is permissible, quære.—Perrien v. Fetters, 35 Mich. 233.

¶ 449. Where a sale that has been duly advertised is put off until another time, with a notification to those in attendance that it will be thus held open, a second formal advertisement of it is not needed to make it valid if it takes place at the adjourned date.—Isbell v. Kenyon, 33 Mich. 63.

¶ 450. Under How. St., §§ 6109, 6747, relating to posting notices of mortgage sale, such a sale in another township than that in which the premises are is invalid if the affidavit of posting shows that the notices were posted only in the township where the sale was made.—New York Baptist Union v. Atwell, 95 Mich. 239.

§ 109. ——Affidavits or proofs of notice and publication.

Curing defects in affidavits of notice by recital in report of sale, see post ¶¶ 622, 623.
Affidavits and proof of notice in statutory foreclosure by advertisement, see ante § 31.

¶ 451. Due notice of sale is indispensable in foreclosure cases, and is a step in the nature of execution. Strict proof of it should always be made and put on record, and this should be unambiguous on its face.—Perrien v. Fetters, 35 Mich. 233.

¶ 452. An affidavit of publication of notice of sale annexed to a report of sale under a foreclosure decree and therein referred to must be considered as proof of the facts therein stated.—Perrien v. Fetters, 35 Mich. 233.

¶ 453. An affidavit which shows publication in a daily newspaper "once in each week for seven successive times," and gives the date of the first publication, is not sufficient to prove compliance with the requirement that publication be made once in each week for six successive weeks.—Perrien v. Fetters, 35 Mich. 233.

§ 110. Time for sale.

Statute shortening time within which sale might be ordered and adding right of redemption after sale applies to foreclosure suits begun before enactment, see Statutes, VI.

Statutory provision for time of sale in equity foreclosure, see Jud. Act, chap. XIX, § 23; Comp. L. 1915, § 12677.

Time for sale, see 1916 C. C. Rule 58, § 5.

¶ 454. A foreclosure sale cannot be allowed to take place within less than a year from the time when all defendants have been properly brought in.—Burt v. Thomas, 49 Mich. 462.

¶ 455. The one year and six weeks that must elapse before the sale on foreclosure may be computed from the date of taking out the subpoena, if it is taken out with the intention in good faith of serving it as soon as possible, and there is no laches in obtaining service.—Culver v. McKeown, 43 Mich. 322.

¶ 456. Whether or not Comp. L. 1871, § 5147, How. St., § 6701, strictly requires a year's interval between the service of subpoena and sale in foreclosure, its purpose is certainly to give the mortgagor time to make payment and save the lands, and that purpose is not served by allowing a sale within six months after he first has notice that a bill has been filed, even though it has been on file for six months previous; the court has discretion to postpone the sale until the expiration of a year from service of subpoena.—Detroit Fire & Marine Ins. Co. v. Renz, 33 Mich. 298.

¶ 457. Where a party brought in by an amended bill as defendant in foreclosure is charged with a personal liability, the year allowed before foreclosure sale should run from the date of filing the amended bill.—Canfield v. Shear, 49 Mich. 313.

¶ 458. Where a foreclosure bill has been amended by adding new parties, and again by correcting the last name of one of the added parties from Hamlin to Hammond, a sale cannot be decreed until one year after filing of the last amendment (How. St., § 6701).—Gray v. Federal Bank of Canada, 83 Mich. 365.

¶ 459. Where there were two mortgages on the same premises and the second mortgagee forecloses first neither the mortgagor nor the court can say when the mortgagee under his decree shall sell, and he may properly await the foreclosure of the first mortgage.—Redfield v. Reid, 148 Mich. 545.

¶ 460. Eleven days after decree foreclosing a first mortgage before sale thereunder is not an unreasonably short time, where there had previously been a decree entered on foreclosure of a second mortgage with ample time for redemption under it and where the land was worth less than enough to satisfy both decrees.—Redfield v. Reid, 148 Mich. 545.

§ 111. Sale and bids.

Necessity for bidder to make immediate payment of amount bid, see post ¶ 638.

Apparent authority of attorney to bid in for client, see Attorneys ¶ 64.

Agent's buying in adversely to principal, see Agency § 92.

Attorney buying in as trustee for client, see Attorneys § 32.

Recovery back of overpayments, see Payment, VI.

Statutory provisions as to manner and conduct of sale in equity foreclosure, see Jud. Act, chap. XIX, § 20; Comp. L. 1915, § 12683.

¶ 461. Every one will be conclusively presumed to understand that bidders at a chancery foreclosure sale stand on equal terms.—Ledyard v. Phillips, 32 Mich. 13.

¶ 462. How. St., § 6750, providing for a resale if the highest bidder at a chancery sale objects or refuses to make immediate payment, does not contemplate that each bid shall be accompanied with the amount thereof, and time may be allowed within which to produce the amount.—Converse v. Clay, 86 Mich. 375.

§ 112. Agreements as to bidding or buying in.

Transfer of bid on foreclosure sale as ground for avoiding sale, see post ¶ 608.

Necessity for agreement for increased bid to secure resale on objection made to price at confirmation, see post ¶ 498.

Invalidity of agreements to suppress competition in bids, see Contracts § 87.

Fraudulent breach of agreement to buy in and hold title for debtor or another, see also Fraud; Trusts.

¶ 463. An agreement between a complainant and defendant in foreclosure by which the former is to bid in the premises and convey them to the latter for the amount of his claim does not preclude any other person interested from paying the decree and defeating the arrangement.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 464. In a suit by an assignee of a mortgagee to foreclose mortgages assigned to him and also a mortgage on another tract given direct by the assignor a previous agreement,

whereby some of the mortgages were foreclosed and the premises bid in by the assignee with the understanding that the amount bid was not to bind the assignee on his claim and he was not to take the premises as against the mortgagee, is good against a defendant in the foreclosure suit who had purchased the tract which was mortgaged direct to the complainant under an agreement that the mortgagor would assume the mortgage; but the defendant is entitled to have the other properties sold first.—Holliday v. Snow, 129 Mich. 494.

§ 113. Sale in parcels or in gross.

Of undivided interests, see post § 114.
Mortgages covering both realty and personalty, see post § 115.
Sale in parcel or in gross in foreclosure by advertisement, see ante §§ 35-37.
Burden of proving that premises sold on foreclosure as one parcel were not occupied as such, see post ¶¶ 684, 685.
Sale of property in bulk as ground for avoiding foreclosure, see post ¶¶ 610, 611.
Direction that sale be in gross, see Jud. Act, chap. XIX, § 37; Comp. L. 1915, § 12691.
Direction that sale be in parcels, see Jud. Act, chap. XIX, § 35; Comp. L. 1915, § 12689.

¶ 465. Sale on foreclosure in equity may be made as an entirety or in parcels, as the court may think most likely to bring the highest price.—Macomb v. Prentis, 57 Mich. 225.

¶ 466. A decree allowing a sale as an entirety will not be disturbed for that reason where the land was originally described as one lot, and there is no showing that it should be sold in parcels.—Vaughn v. Nims, 36 Mich. 297.

¶ 467. A foreclosure sale as an entirety of property which consists of a number of distinct lots held by different owners is a violation of section 11139, Comp. L. 1897, How. 2nd ed., § 13934, and is invalid.—Walker v. Schultz, 175 Mich. 280.

¶ 468. A mortgage foreclosure sale of "Lots 17, 18, and the southerly 40 feet of lot 16" as one parcel is void under Comp. L. 1897, § 11139, which requires that distinct tracts shall be sold separately and no more sold than necessary to satisfy the amount due, where such lots were occupied separately and by different tenants, and were worth much more than the amount of the mortgage debt, and there was nothing to show that they could not be sold to advantage separately.—O'Connor v. Keenan, 132 Mich. 646.

§ 114. ——Of undivided interests.

¶ 469. Land mortgaged as a whole cannot on foreclosure be sold in separate undivided interests.—Dalrymple v. Sheehan, 20 Mich. 224; Spear v. Hadden, 31 Mich. 265.

§ 115. ——Mortgages covering both realty and personalty.

Necessity for resort to chattel mortgage before foreclosure of mortgage on realty, see ante ¶ 4.

¶ 470. Upon the foreclosure of a mortgage covering a hotel and the furniture used therein, the court may direct that the personal property be sold separate and apart from the realty though at the same time.—Anderson v. Smith, 108 Mich. 69.

§ 116. Selling in inverse order of alienation to marshal assets.

Persons entitled to require, see post § 117.
Sale of parcels in inverse order of alienation in foreclosure by advertisement, see ante § 37.
Doctrine of marshalling assets in general, see Marshalling Assets.
Between what persons doctrine of marshalling assets is to be applied, see Marshalling Assets.
Exhausting securities of debtor before resort to foreclosure of mortgage given by debtor's wife, see Marshalling Assets.
Proof of order of sale of parcels on foreclosure, see Marshalling Assets.

¶ 471. Where nothing appears to show the propriety of any other disposition, a sale of mortgaged premises should be made in the inverse order of their alienation or incumbrance by the mortgagor.—Mason v. Payne, W. 459; Cooper v. Bigly, 13 Mich. 463; Ireland v. Woolman, 15 Mich. 253; McKinney v. Miller, 19 Mich. 142; Payne v. Avery, 21 Mich. 524; Sibley v. Baker, 23 Mich. 312.

¶ 471a. In marshalling securities covering several parcels, the land may be sold in such order as will best carry out the principles of equity.—Dalrymple v. Sheehan, 20 Mich. 224.

¶ 472. Where a part of the mortgaged premises has been alienated by the mortgagor subsequent to the mortgage, the rule in equity, on a foreclosure and sale, is to require that part of the premises in which the mortgagor has not parted with the equity of redemption to be first sold, and then, if necessary, that which has been alienated.—Mason v. Payne, W. 459; Gantz v. Toles, 40 Mich. 725.

¶ 473. On a bill to foreclose a mortgage where it appeared that the mortgaged land embraced four separate parcels, upon one of which stood a dwelling house, the decree below was modified so as to direct that the same should be sold in parcels, the parcel upon which the dwelling house was situated to be sold last and only in case the others did not sell for enough to satisfy the decree and costs.—Strong v. Ehle, 86 Mich. 42.

¶ 474. Where a husband mortgaged his farm to secure his debt, and afterwards conveyed the north forty-five acres, which in-

cluded the homestead, to his wife, with the usual covenants of warranty, which deed was duly recorded, after which he mortgaged the south thirty-five acres to secure a debt of his own, his wife joining in both mortgages, in a contest between the two mortgagees and the wife, growing out of the attempted foreclosure of both mortgages, the general rule will be applied, and the south thirty-five acres sold before resorting to the north forty-five acres.—J. I. Case Threshing Machine Co. v. Mitchell, 74 Mich. 679.

¶ 475. A. had a first and B. a second mortgage on land over which a railroad company had a right of way, subject to both mortgages, and at a foreclosure sale by advertisement under A.'s mortgage the premises were offered in two parcels, the part exclusive of the railroad's way being sold first and being bought by B.'s administrator for enough to satisfy the first mortgage, the strip remaining unsold. The company was represented at the sale. Held, on a foreclosure in equity of the second mortgage, that B. could have the railroad parcel sold.—Watson v. Grand Rapids & I. R. Co., 91 Mich. 198.

§ 117. ——Persons entitled to require.

¶ 476. Where a portion of the land covered by a mortgage is conveyed subject to the payment of the entire mortgage by the grantee, the subsequent purchaser of another parcel has a right to insist that the parcel so before conveyed shall be first sold to satisfy the mortgage before resort is had to the parcel so purchased by himself.—Caruthers v. Hall, 10 Mich. 40.

¶ 477. An exception of the mortgage from the covenants of warranty contained in a subsequent deed of the lands could not affect the grantee's equitable rights in reference to the order of sale of the property covered by said mortgage.—Cooper v. Bigly, 13 Mich. 463.

¶ 478. Where part of mortgaged premises is covered by a second mortgage held by complainant in foreclosure and another part by a third mortgage held by a defendant, the latter cannot complain that the foreclosure decree provides for the sale first of the parcel covered by the second mortgage, but requires the sale of that parcel to be subject to the payment of the second mortgage.—Slater v. Breese, 36 Mich. 77.

¶ 479. One of two joint mortgagors who takes in payment for land sold to the mortgagee an assignment of a part interest in the mortgage is entitled, as between himself and his assignor, to have his interest in the mortgage first satisfied on foreclosure.—Quinnin v. Brown, 72 Mich. 304.

¶ 480. In foreclosing a mortgage upon several parcels of land, including a homestead, the homestead can only be sold to pay the deficiency remaining after a sale of all the other parcels; and a second mortgagee of the others cannot require it to be first sold.—Armitage v. Toll, 64 Mich. 412.

¶ 481. A mortgagor of two parcels of land who has parted with the equity of redemption of one of them which has been extensively improved by the present owner, cannot force the mortgagee to sell the one parcel under a decree of foreclosure so as to profit by the enhanced value and reduce the lien upon the other parcel.—Leonard v. Wayne Circuit Judge, 126 Mich. 377.

¶ 482. One who joins in a mortgage of his own and of another's property to secure the other's debt is entitled to have the other's lands sold first to satisfy the debt.—Carley v. Fox, 38 Mich. 387.

¶ 483. A wife who includes her separate property with her husband's homestead in a mortgage to secure the husband's debt, does not thereby make it the primary fund out of which the debt should be satisfied, and her land should be sold only in case the husband's land is insufficient.—Graham v. Lamb, 120 Mich. 577.

¶ 484. A second mortgagee cannot insist that on the foreclosure of a prior mortgage resort shall first be had to a parcel of land not covered by his mortgage, and which the mortgagor had aliened after the first but before the second mortgage; such land is not to be sold until after that covered by the second mortgage.—Sager v. Tupper, 35 Mich. 134.

¶ 485. Lands conveyed by a husband to his wife were by her mortgaged to secure his debt, and at the same time he gave his creditor a mortgage on his stock in trade. It was not shown that the deed to the wife was without a bona fide consideration. Held, that a second mortgagee of the stock in trade, who in bidding in the property recognized the first chattel mortgage and took the property subject to it, could not claim an equity in the land superior to the wife's, though the debt secured by his mortgage was contracted prior to the husband's deed to the wife and though credit was given to the husband on the faith of his owning the land.—Grand Rapids Savings Bank v. Denison, 92 Mich. 418.

¶ 486. On the foreclosure of a first mortgage conveying three parcels of land, on the first and second of which a second mortgage, and on the second and third of which a third mortgage, has been given—the second mortgage having been before foreclosed, and both the first and second parcels sold subject to the first mortgage, the second parcel being, at the instance of the third mortgagee, sold last—the third mortgagee has no right to demand that the parcel not covered by his mortgage (the first parcel) shall be sold first. The purchaser under the prior fore-

closure of the first and second parcels, has a right to insist that the third parcel shall be first sold. Where the purchaser under said prior foreclosure sale purchased subject to the first mortgage, but with an agreement with the complainant, who then owned both the first and second mortgages, that when the first mortgage was foreclosed said third parcel should be first sold, his right to have the sale on such foreclosure made according to this agreement, which is the order of sale established by law in the absence of any agreement, would not be affected thereby.—Sibley v. Baker, 23 Mich. 312.

§ 118. Sale for default of instalments.

Proceedings for further decree on instalments, see ante § 100.

¶ 487. It seems that equity will not interfere to prevent a foreclosure and sale of the whole premises for a single instalment.—Disbrow v. Jones, H. 48.

§ 119. Sale under assigned decree.

Assignment of decree and rights thereunder, see ante § 105.

Assignment or transfer of mortgage or debt secured by it, see Mortgages, VI.

¶ 488. Before the assignee of a foreclosure decree can proceed to a sale of the mortgaged premises, he must present a petition to the court setting forth the assignment, and ask for a sale under the decree, and a sale made without such a petition is void.—Moore v. Smith, 103 Mich. 387.

F. REPORT OF SALE, CONFIRMATION AND DEED.

§ 120. Report of sale.

Confirmation and objections, see post § 121.

Necessity for report of sale to show deficiency before decree therefor, see post ¶ 717.

Curing defects in affidavit of posting notice by recital in report of sale, see post ¶¶ 622, 623.

¶ 489. Although by operation of an order nisi, a foreclosure sale has been confirmed, a clerical error in the report may be corrected.—Walsh v. Colby, 153 Mich. 602.

¶ 490. An error in reciting the date of a foreclosure decree in the commissioner's report of sale is immaterial where the record furnishes the means of correcting it.—Ruggles v. First Nat. Bank, 43 Mich. 192.

§ 121. Confirmation, objections.

Necessity of confirmation to make title of purchaser absolute, see also post ¶¶ 540, 541.

Grounds for avoidance of statutory sale by advertisement, see ante §§ 40-42.

Validity of delayed confirmation made without notice, see also post ¶ 586.

¶ 491. Our statutes do not dispense with the practice of obtaining an order confirming sales.—Demaray v. Little, 17 Mich. 386.

¶ 492. A foreclosure sale cannot be made absolute so long as objections duly taken to the report of the commissioner have not been passed on.—Howard v. Bond, 42 Mich. 131.

¶ 493. An order allowing a writ of assistance, and reciting that the defendant had been served with a certified copy of the order confirming the report of sale, will not, of itself, amount to an order of confirmation.—Richards v. Morton, 18 Mich. 255.

¶ 494. The usual order nisi is a sufficient order of confirmation in a chancery foreclosure sale, if any order is needed where the defendant has not appeared.—Torrans v. Hicks, 32 Mich. 307.

¶ 495. Confirmation of a foreclosure sale cannot be objected to on the ground that the sale was effected secretly and without notice, where defendant had notice. It was his duty to inform his solicitor.—Farmers' Bank v. Quick, 71 Mich. 534.

¶ 496. It is not good practice, in directing the correction of a commissioner's report of a foreclosure sale, to order that on filing the corrected report "the said sale be and the same is hereby in all respects confirmed." But it does not make the proceedings void. —Ruggles v. First Nat. Bank, 43 Mich. 192.

¶ 497. In a foreclosure suit a decree of sale was entered in 1891. The order confirming the report of sale was not entered or the decree enrolled until 1910, when upon ex parte hearing a nunc pro tunc order was entered enrolling the decree and an order nisi entered confirming the report of sale. At said time the complainant in said foreclosure suit and one of the original solicitors were dead. Held, said orders were properly entered and validated the foreclosure proceedings so as to protect plaintiff holding title under the foreclosure sale, with respect to the rights of parties in an ejectment suit in which defendant's sole claim to title was through tax deeds cutting off plaintiff's title. —Powell v. Pierce, 168 Mich. 427.

¶ 498. On appeal from an order confirming a foreclosure sale, a contention by defendant that the mortgaged premises are worth more than the sum for which they were sold, is untenable where defendant's petition contains no offer to increase the bid if a resale is ordered, and complainant offers to accept the amount due, with interest and costs.—Hoock v. Sloman, 155 Mich. 1.

§ 122. Deed and recordation.

Deed and recordation in statutory foreclosure by advertisement, see ante, II, D.

Deed in statutory foreclosure by advertisement, see ante, II, D.

Statute requiring deed to issue if premises not redeemed within six months from date of sale as applied to foreclosure decree entered prior to its enactment, see Statutes, VI.
Commissioner's deed as prima facie title, see also Evidence ¶ 2902.
Statutory provisions as to deed and recordation in equity foreclosure, see Jud. Act, chap. XIX, § 30; Comp. L. 1915, § 12684.

¶ 499. Since a decree of foreclosure should follow the statute in force when the decree was entered, and the sale must follow the decree, an indorsement on the resultant deed of terms of redemption fixed by a statute not yet in effect when the decree was entered is improper and is properly expunged from such deed.—Lachman v. Ottawa Circuit Judge, 125 Mich. 27.

¶ 499a. A circuit court commissioner's deeds recorded on the same day as his report are conformable to Pub. Acts, 1899, No. 200, providing that he shall upon sale execute deeds, indorsing thereon the time when the sale shall become effective, and shall within 20 days after such sale deposit the same with the register of deeds.—Miller v. Walker, 141 Mich. 433.

¶ 500. Where a second deed is ordered to be executed for the purpose of correcting a clerical error in a first deed executed to a purchaser at foreclosure sale, such order is not void because of the provision requiring that a deed upon foreclosure sale shall be filed with the register of deeds within twenty days after the sale, and indorsed when same shall become operative.—Walsh v. Colby, 153 Mich. 602.

G. DISPOSAL OF PROCEEDS; PAYMENTS.

§ 123. In general; rating and rank of liens.

Right in surplus moneys, see post § 124.
Payment into court, see post § 125.
Application and procedure for distribution, see post § 126.
Disposal of proceeds of sale in statutory foreclosure by advertisement, see ante, II, E.
Application of process of mortgage foreclosure where mortgage given to secure several items, see Marshalling Assets.
Recovery of illegal or mistaken payment, see Payment, VI.
Application of proceeds, see Jud. Act, chap. XIX, § 38; Comp. L. 1915, § 12692.
Statutory provisions as to disposal of proceeds of sale in equity foreclosure, see Jud. Act, chap. XIX, § 31; Comp. L. 1915, § 12685.
Reference to commissioner to determine rights and priorities in surplus arising from sale of mortgaged premises, see 1916 C. C. Rule 58, § 6.

¶ 501. Under Comp. L. 1871, § 6913, How. St., § 8498, where several distinct payments or notes are secured by the same mortgage, no one of them has any preference over the others in consequence of its falling due sooner; but all, whether held by the same or different persons, have equal claim to be paid ratably out of the land.—English v. Carney, 25 Mich. 178; McCurdy v. Clark, 27 Mich. 445.

¶ 502. On foreclosure of simultaneous mortgages a ratable application of the proceeds of the sales thereunder should be decreed if there is not enough to pay both.—Van Aken v. Gleason, 34 Mich. 477.

¶ 503. The fact that a mortgagee who has assigned his mortgage has indorsed one of the notes secured by it in blank, and the other without recourse, does not affect the equal security afforded by the mortgage to the notes pro rata. The sum realized from a foreclosure sale, therefore, should be applied upon the pro rata principle, and such indorser need pay only his proportionate share of any deficiency, instead of paying the whole amount of the note indorsed in blank.—English v. Carney, 25 Mich. 178.

¶ 504. Where there are several notes falling due at different times, the fact that one note becomes due first will not, of itself, give it a preference over the rest, where the mortgaged premises are insufficient to pay the whole.—Cooper v. Ulmann, W. 251.

¶ 505. Where three banks as parties in interest under a trust mortgage, had agreed in substance that they would protect the property by payment of taxes and interest, and if the first mortgage should be foreclosed they would bid the premises in at the amount necessary, and pay pro rata the expense incident thereto, and where, after making one payment, one of the banks went into the hands of a receiver who subsequently refused to bid in the property and the same was thereupon purchased by the other two banks, the receiver was not entitled to a first lien on the property for the amount advanced by the bank to protect the property; but the proceeds of any sale over the amount required for the first mortgage were directed to be applied to the payment of the sums advanced to protect the property, before anything was paid upon the second mortgage.—Noeker v. Howry, 119 Mich. 626.

§ 124. Rights in surplus moneys.

Right of dowress to dower in surplus on foreclosure sale, see Dower § 13.
Rights in surplus moneys, see Jud. Act, chap. XIX, § 31; Comp. L. 1915, § 12685.

¶ 506. A person acquiring the equity of redemption and redeeming a mortgage is entitled to any surplus received at the mortgage sale. Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574.

¶ 507. Where the assignee of a mortgage assigns it as security for a debt that is less than the amount due on the mortgage, he is entitled to the excess, and in a suit by his assignee to foreclose the mortgage, the decree should provide for the payment to him of the surplus, if any, arising on the sale of the mortgaged premises, to the amount of his claim.—Moreland v. Houghton, 96 Mich. 346.

¶ 508. A junior incumbrancer who, to protect his interest, buys on chancery foreclosure, paying, because illegal solicitor's fees are included, more than the amount due, cannot claim the excess, but the latter belongs to the person entitled to any surplus on the sale.—Macomb v. Wilkinson, 83 Mich. 486.

¶ 509. An assignee of a second mortgage who took it with notice of its invalidity, and who is unable to produce it or the accompanying note, or give any proof of its validity, cannot claim the surplus realized on the foreclosure of the first mortgage.—Kent v. Mellus, 69 Mich. 71.

¶ 510. A levy of execution on the mortgaged lands, made at a time when the mortgagor (and judgment debtor) had no title to it, and not followed by any sale by virtue of it, will not entitle the judgment creditor to the surplus moneys after foreclosure, notwithstanding the mortgagor, pending the foreclosure proceedings, became vested with the title to the land subject to the mortgage.—Smith v. Smith, 13 Mich. 258.

¶ 511. The surplus arising from a foreclosure sale was claimed by the mortgagor's divorced wife and by an execution creditor. Held, that, as the record did not show the cause of divorce, the nature of the wife's interest could not be ascertained, and the supreme court could not award the surplus as dowable property under How. St., § 6246.—Bowles v. Hoard, 71 Mich. 150.

¶ 512. Bill by the mortgagee, who had become purchaser at foreclosure sale at a sum exceeding the amount due on the decree, to be relieved from payment of the surplus on the ground that he was equitable owner of the fee, and that the bids had been run up by fraudulent combination. Bill dismissed as not supported by the proofs.—Buchos v. Walker, 19 Mich. 224.

§ 125. Payment into court.

Right to interest on surplus where left with court for longer than three months, see Jud. Act, chap. XIX, § 32; Comp. L. 1915, § 12686.

¶ 513. Where a third mortgagee, at the prior foreclosure of a second mortgage, bids a sum greater than the amount due on the decree in such foreclosure, the surplus is to be paid into court and to be applied on some one of the securities on the proper petition being presented.—Sibley v. Baker, 23 Mich. 312.

¶ 514. In foreclosure of a mortgage securing several creditors, all of whom are brought in by service or publication, but some of whom do not appear, it is not the proper practice to decree that the proceeds of sale be held in court to await proofs of the interests of the other parties.—Shelden v. Erskine, 78 Mich. 627.

¶ 515. Equity will require the proceeds of a foreclosure sale of a first mortgage on real estate of insolvent decedent to be paid to the register of the circuit court instead of to the holder of such mortgage, and to be held by such register, subject to the order of the court, for such period of time as may be required to allow the general creditors of decedent's estate to assert their claims against such proceeds, where such mortgagor for the purpose of defrauding his creditors, while insolvent furnished his daughter money with which she secured an assignment of such mortgage to herself; even though she was not the holder at the time of such foreclosure.—Hatch v. Daugherty, 145 Mich. 569.

¶ 516. Where in a suit to foreclose a land contract, the rights of different classes of bondholders holding liens inferior to the complainant's are not presented, the foreclosure decree should provide that moneys received on the sale of the property in excess of the complainant's claim should be paid into court to abide a determination of the rights of the bondholders.—Schmidt v. Gaukler, 156 Mich. 243.

§ 126. Application and procedure for distribution.

Petition and proceedings to obtain surplus on statutory sale by advertisement, see ante § 54.

Payment, release and satisfaction of mortgages and subrogation to rights thereby, see Mortgages, VIII.

Application and procedure for securing surplus moneys arising from sale of mortgaged premises, see 1916 C. C. Rule 58, § 6.

¶ 517. All the parties to a foreclosure suit are entitled to notice of an application for surplus moneys after foreclosure and sale, that they may appear and contest the right of the applicant and assert their own; and an order for the payment of the moneys to the petitioner without such notice, or the appearance of the parties, is erroneous.—Smith v. Smith, 13 Mich. 258.

¶ 518. If the owner of the equity of redemption dies after sale the surplus moneys are personal estate; and his personal representatives should be made parties to a peti-

tion to obtain them.—Smith v. Smith, 13 Mich. 258.

¶ 519. The remedy of a purchaser at a foreclosure sale who has paid a surplus to the administrator of the estate of the deceased mortgagor and who subsequently finds a party in possession of part of the purchased premises, and seeks to recover the surplus, is to be sought in the court having jurisdiction of the foreclosure proceeding and not in a separate proceeding in equity.—Chandler v. Graham, 123 Mich. 327.

H. COSTS, FEES AND EXPENSES.

§ 127. Cost and expenses in general.

Disclaiming parties, see post § 128.
Items and costs, see post § 129.
Fees and expenses in statutory foreclosure by advertisement, see ante § 56.
Costs on appearance of defendants not personally served, see ante ¶ 371.
General law of costs and procedure to determine, tax or enforce payment, see Costs.
Necessity of tender or offer to carry costs on decree for redemption, see Costs § 33.
Costs to appellee on affirmance releasing his personal liability, see Costs ¶ 284.
Decree reserving question of personal liability as final decree for cost purposes, see Costs ¶ 399.
Allowance to defendant personally of costs on appeal without charging on property, see also Costs ¶ 546.
Costs unnecessarily incurred in proceedings to determine rights and priorities in surplus arising from foreclosure sale, see 1916 C. C. Rule 58, § 6.

¶ 520. Costs of foreclosure are usually paid out of the proceeds of the sale.—Botsford v. Botsford, 49 Mich. 29.

¶ 521. Where complainant has a sale adjourned he should pay the expense of adjournment himself.—Hart v. Lindsay, W. 72.

¶ 522. Costs on granting a new foreclosure should be given to and not against the opposing party where the occasion for allowing the foreclosure arose out of a mistake in the complainant's proceedings.—Vary v. Chatterton, 50 Mich. 541.

¶ 523. Where both parties were at fault in a foreclosure suit in litigating needless questions not within the pleadings, costs were denied to both.—Summers v. Bromley, 28 Mich. 125.

¶ 524. Where a subsequent purchaser contests the amount due in a foreclosure suit, and fails, the decree may require him to pay costs if the mortgaged premises prove insufficient.—Ireland v. Woolman, 15 Mich. 253.

¶ 525. The grantee of a portion of mortgaged premises, who is made a defendant in a suit to foreclose a second mortgage on the remainder of the land, in which complainant seeks to subject the land so sold to sale under the first mortgage before resorting to the unsold portion, and who claims a contrary order of sale in her answer, which is decreed, is entitled to reasonable costs.—J. I. Case Threshing Machine Co. v. Mitchell, 74 Mich. 679.

¶ 526. Where a defendant in foreclosure is brought in under the general clause as a party interested in the equity of redemption, and neither disclaims nor sets up any title that would give him a definite interest in the litigation, but actively defends and puts the complainant to the trouble of producing or meeting proofs that he has no concern with, he makes himself personally liable for costs.—Botsford v. Botsford, 49 Mich. 29.

¶ 527. A tender which did not comply with all the requirements necessary to discharge the mortgage, yet showed willingness on the mortgagor's part to make such payment as would discharge the mortgage at any time when it would be received without suit, warrants denial of costs to complainant in foreclosure.—Castle v. Castle, 78 Mich. 298.

§ 128. ——Disclaiming parties.

¶ 528. A defendant unnecessarily made a party as a subsequent incumbrancer should have the bill dismissed as to him with costs on disclaimings.—Ramsdell v. Eaton, 12 Mich. 117.

¶ 529. The mortgage covered two parcels of land. A defendant answered, claiming one of them by paramount title, and disclaiming as to the other, and as to the last a decree was taken. It was held that the bill should have been dismissed as to this defendant with costs, as he was under the necessity of appearing and answering to protect his interest in the parcel claimed by him.—Gregory v. Stanton, 12 Mich. 61.

¶ 530. In a foreclosure suit against the mortgagor and his tenant, where the latter appears and disclaims, he cannot recover costs against the mortgagor who did not appear, since if he was entitled to costs it was against the complainant and not against his codefendant.—Halpin v. Wayne Circuit Judge, 132 Mich. 54.

§ 129. ——Items and amount.

¶ 531. Charges for complainant's traveling expenses and for sundry expenses not specified cannot be included in the legitimate costs of a foreclosure suit which a defendant let in to defend must pay.—McDonald v. McDonald, 45 Mich. 44.

¶ 532. On a second mortgagee's bill to foreclose and incidentally to restrain another mortgagee who is lawfully proceeding to a foreclosure by advertisement of a part of the land, the expenses incurred in such

advertising, which have been lost by reason of the injunction suit, are allowable to defendant, the prior mortgagee, as costs.—J. I. Case Threshing Machine Co. v. Mitchell, 74 Mich. 679.

¶ 533. Rule for computing costs and commissions on mortgage sales laid down.—Hart v. Lindsay, W. 72.

§ 130. Attorney fees.

Right under stipulation in mortgage, see post § 131.

Determination and taxation of amount, see post § 132.

Right to surplus arising from inclusion of illegal attorney fees, see ante ¶ 508.

¶ 534. Attorney's fees cannot be allowed for an imperfect foreclosure.—Collar v. Harrison, 30 Mich. 66.

¶ 535. Unless a sale has actually been made, an attorney's fee cannot be allowed on foreclosure.—Myer v. Hart, 40 Mich. 517; Canfield v. Conkling, 41 Mich. 371.

§ 131. ——Right under stipulation in mortgage.

Validity and effect of stipulation for attorney's fee in foreign mortgage, see Conflict of Laws ¶ 10.

Effect of fee clause on negotiability of note, see Negotiable Instruments, II.

¶ 536. As all allowances in the nature of fees depend upon statutory authority, a stipulation in a mortgage for an attorney fee in event of proceedings to foreclose is void, in the absence of legislation.—Vosburgh v. Lay, 45 Mich. 455; Parks v. Allen, 42 Mich. 482; Louder v. Burch, 47 Mich. 109; Millard v. Truax, 47 Mich. 251; Millard v. Truax, 50 Mich. 343; Kennedy v. Brown, 50 Mich. 336.

¶ 537. Where the power of sale in a mortgage stipulates for the payment of an attorney's fee in case of foreclosure, such provision must be held to refer only to foreclosure, under the power, and the fee cannot be allowed in a chancery foreclosure.—Sage v. Riggs, 12 Mich. 313; Hardwick v. Bassett, 29 Mich. 17; Van Marter v. McMillan, 39 Mich. 304; Botsford v. Botsford, 49 Mich. 29; Damon v. Deeves, 62 Mich. 465.

¶ 538. Chancery will not enforce an agreement in a mortgage for the payment, in case of foreclosure in that court, of a specified sum of money as a reasonable solicitor's or attorney's fee therefor, in addition to all other legal costs; where such agreement is illegal and beyond the sanction of the statutes and rules of court regulating such fees.—Kittermaster v. Brossard, 105 Mich. 219.

§ 132. Determination and taxation of amount.

¶ 539. In fixing fees for complainant's solicitors in a foreclosure proceeding, the circuit judge declined to hear testimony as to the details of the services rendered, and fixed the fee on the affidavit of the solicitors that they believed their services were worth a certain sum. Held, the case should be remanded and the trial court was instructed to take such detailed testimony as would enable him to arrive at a proper fee.—Union Trust Co. v. Electric Park Amusement Co., 163 Mich. 687.

IV. TITLES AND RIGHTS OF PURCHASERS.

§ 133. In general.

Doctrine of "relation back" to date of mortgage, see post § 134.

After redemption barred, see post § 135.

Right to growing crops, see post §§ 136, 137.

Purchaser on foreclosure for instalment, see post § 138.

Mortgagee as purchaser, see post § 139.

Purchase by mortgagor or his agent, see post § 140.

Assignment of rights under purchase, see post §§ 141, 142.

Estoppel to question title, see post § 143.

Procedure to obtain possession, see post § 144.

Presumptions and evidence of title, see post § 145.

Necessity of notice of sale as element in title of purchaser, see ante ¶ 451.

Right of purchaser to suit to secure proper marshalling of securities, see Marshalling Assets.

General doctrine of notice and bona fide purchaser, see Notice and Record of Title, I.

Rights of purchaser against mortgagee acquiring rights after lis pendens filed, see Lis Pendens.

Right of life tenant as foreclosure purchaser adverse to remainderman, see Life Estates, II.

Parol contracts to purchase and hold in trust or to reconvey, see Frauds, Statute of, I, G; Trusts, III.

Title and rights of parties in mortgage, see Mortgages, IV.

Effect of license by mortgagor in possession after decree to seller of fixture to remove it, see Fixtures ¶ 97.

Right of purchaser to require mortgagee to resort first to parcel covered by mortgage and previously sold where sale was unrecorded, see Notice and Record of Title, I.

Right of tenant in common as purchaser on foreclosure on property held in common, see Tenants in Common, II.

Agreement with mortgagor in possession as preserving personal character of thing annexed to land, see Fixtures ¶ 89.

Inurement of foreclosure title to earlier grantee from purchaser, see Estoppel § 21.

Inurement of after-acquired title to perfect foreclosure deed, effect of invalidity of mortgage, see Estoppel ¶¶ 52, 53.

Effect of foreclosure on rights and title under tax deeds taken in another's name for benefit of owner of equity, see Mortgages, V.

¶ 540. No right becomes fixed in the purchaser until the sale becomes absolute by confirmation.—Demaray v. Little, 17 Mich. 386.

¶ 541. A purchaser on foreclosure cannot demand possession until the commissioner's report of sale is confirmed.—Howard v. Bond, 42 Mich. 131.

¶ 541a. A widow buying in at a foreclosure of a mortgage given by her husband, paying the sale price out of the estate, and taking title in her own name, holds the land as against her infant son in the same manner and right as if there had been no foreclosure and the payment had been made out of the same moneys on the mortgage debt.—Terry v. Tuttle, 24 Mich. 206.

¶ 542. Statutory foreclosure proceedings cannot operate to change or reverse priorities.—Covey v. Leslie, 144 Mich. 165.

¶ 543. The possessory rights of one who receives a deed of mortgaged premises prior to the filing of lis pendens in foreclosure, and who was not made a party, are not affected by the foreclosure proceedings.—Thompson v. Smith, 96 Mich. 258.

¶ 544. In so far as Baker v. Pierson, 6 Mich. 522, may have been understood as holding that on a purchase by a second mortgagee of the title passing under foreclosure of mortgages prior and junior to his, he took title to all of the liens, it should be corrected and the rule confined to a holding that such a decree neither binds nor avails an omitted party, leaving open the question as between the other parties to the decree whether the transfer of the title of the first mortgagee to one of the others passes their liens covered by the decree or lets them stand enforceable in their hands.—Walsh v. Robinson, 135 Mich. 16.

¶ 545. Equities which, if they existed, were proper subjects for adjudication in a foreclosure suit, and which formed part and parcel of the security which was therein enforced, passed by the foreclosure sale if not excepted from it.—Richter v. Jerome, 123 U. S. 233, 31 L. ed. 132, 8 Sup. Ct. Rep. 106.

¶ 546. A purchaser of real estate at a statutory mortgage sale acquires an inchoate title, subject to be defeated by redemption; and when his title becomes absolute by the failure to redeem, it relates back to the time of the purchase.—Stout v. Keyes, 2 D. 184.

¶ 547. Legal title to mortgaged real estate does not vest at once in the purchaser at the sale on statutory foreclosure, but only at the end of the period of redemption, during which period the proceedings may be abandoned, or a subsequent mortgagee may demand an assignment of the mortgage.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

§ 134. Doctrine of "relation back" to date of mortgage.

See also ante ¶ 546.

¶ 548. Title by foreclosure dates from the giving of the mortgage and not from the completion of the foreclosure.—Gamble v. Horr, 40 Mich. 561.

¶ 549. The title of a purchaser on valid foreclosure of a mortgage regularly recorded relates back to the delivery of the mortgage as against all intervening purchasers and incumbrancers who are made parties or who become interested pendente lite.—Ruggles v. First Nat. Bank, 43 Mich. 192.

§ 135. After redemption barred.

¶ 550. Comp. L. 1871, § 5154, How. St., § 6708, declaring that the commissioner's deed in a mortgage sale shall be an entire bar against the mortgagor and mortgagee, does not mean to give the purchaser title by barring the true owner, when neither mortgagor nor mortgagee had any title.—Summers v. Bromley, 28 Mich. 125.

¶ 551. A foreclosure purchaser whose title has become absolute may fix his own price for a conveyance, and it is immaterial that he includes invalid attorney fees in the consideration.—Macomb v. Wilkinson, 83 Mich. 486.

§ 136. Right to growing crops.

Effect of collateral agreement, see post § 137.

¶ 552. The purchaser at a foreclosure sale in chancery becomes the owner of the crops then growing on the premises.—Scriven v. Moote, 36 Mich. 64; Ledyard v. Phillips, 47 Mich. 305.

¶ 553. Growing crops pass with the soil under foreclosure deed, and on proper application the court may perhaps provide for their preservation until possession is given to the purchaser.—Ruggles v. First Nat. Bank, 43 Mich. 192.

¶ 554. The confirmation of a foreclosure sale covering growing crops relates back to the sale, and entitles the purchaser to control the crops from that time if no equities prevent, and after due notice to interested parties.—Ruggles v. First Nat. Bank, 43 Mich. 192.

¶ 555. Unharvested crops on the mortgaged premises ordinarily pass with the sale in the absence of any agreement otherwise.—Dayton v. Dakin's Estate, 103 Mich. 65.

§ 137. ——Effect of collateral agreement.

¶ 556. The mortgagor of land cannot claim crops growing on it at the time of foreclosure sale, on the strength merely of an alleged parol agreement with the purchaser, who before foreclosure held an execution title to the land, that the latter would reconvey on payment of his advances with interest; even a mortgagee, unless estopped, could buy in the title and hold it like any other purchaser, and any previous equities would be cut off by the sale.—Scriven v. Moote, 36 Mich. 64.

¶ 557. An agreement whereby the mortgagor transfers to the mortgagee all the crops growing on the mortgaged premises, except enough to pay for harvesting and other running expenses, does not preclude the mortgagee, in case he becomes the purchaser on foreclosure, from taking the entire interest sold under the mortgage, without any reservations in the mortgagor's favor.—Ledyard v. Phillips, 47 Mich. 305.

¶ 558. A parol agreement between a mortgagor and the mortgagee of land in process of foreclosure, that the mortgagee might enter and plant a crop before his right to possession was complete upon consideration that the mortgagor might take his share in a certain crop then growing, is binding; and the subsequent sale of the land on foreclosure to the mortgagee will not carry the crop as an incident thereof contrary to such agreement, though ordinarily it would do so. —Dayton v. Dakin's Estate, 103 Mich. 65.

§ 138. Purchaser on foreclosure for instalment.

Successive foreclosures for instalments, see ante § 15.
Right to foreclose by advertisement on default in single instalment, see ante § 22.
Proceedings in equity for further decree on instalments, see ante § 100.
Presumption that sale for default on single instalment was made subject to other instalments, see post ¶ 595.
Title of purchaser on statutory foreclosure as matter litigable in foreclosure suit for second instalment, see ante ¶ 337.

¶ 559. Where one who forecloses for one of several instalments owing upon his mortgage sells subject to the other instalments, the purchaser takes the land charged with the payment of the subsequent instalments. —McCurdy v. Clark, 27 Mich. 445.

¶ 560. In foreclosing by advertisement a mortgage securing separate notes, the mortgagee can preserve his lien for subsequent foreclosures by selling the premises subject to the payment of the principal indebtedness; if he sells them discharged from further incumbrance he can depend on the mortgagor's personal liability.—Miles v. Skinner, 42 Mich. 181.

¶ 561. Where a foreclosure by advertisement for the first instalment due on a mortgage and for interest on the other instalments has become absolute, and the land has been bid off and not redeemed, the mortgagor's wife may, with her own money, buy it from the purchaser on foreclosure, and if the sale was not made subject to succeeding instalments, she acquires full title.—Miles v. Skinner, 42 Mich. 181.

¶ 562. Where a mortgage is foreclosed for an instalment only it remains in force as to notes secured by subsequent instalments; and indorsers of such notes may look to the security for indemnity if called on to pay them.—Bridgman v. Johnson, 44 Mich. 491.

¶ 563. Under R. S. 1838, p. 501, ch. 8, a foreclosure sale by advertisement of mortgaged premises for one of several instalments, unless made subject to the lien of the other instalments, forever freed the premises from the mortgage.—Kimmell v. Willard's Adm'rs, 1 D. 217.

¶ 564. Where a purchaser on foreclosure, by way of keeping good his lien during the period of redemption, pays taxes and insurance which, under the mortgage, the mortgagor himself was bound to pay, he cannot, when further instalments fall due, again resort to the power of sale for the purpose of securing repayment; since the payments are regarded as made for the purchaser's benefit.—Walton v. Hollywood, 47 Mich. 385.

¶ 565. A mortgagee may protect himself against the loss of the mortgage security on a statute foreclosure for one of several instalments, either by bidding off the premises for the whole sum secured by the mortgage, or by having them exposed to sale, charged expressly with the payment of the future instalments.—Kimmell v. Willard's Adm'rs, 1 D. 217.

¶ 566. Where one who forecloses for a single instalment upon his mortgage neglects to sell subject to the other instalments, his foreclosure may bar the equity of redemption of the mortgagor, and of subsequent purchasers and incumbrancers, but, as between him and the purchaser at the sale, the latter has purchased only an instalment of the mortgage, and the remaining instalments retain their relative positions; a subsequent foreclosure for another instalment would do nothing towards an adjustment of the respective interests of the parties; if each bid off the whole land neither would become owner of any particular part of it or of any definite undivided interest in it, but each would still have a lien, which, though foreclosed as to those holding subordinate rights, would remain, as to the other, a mere lien; neither could redeem from the other, and neither could gain nor lose precedence or position by the foreclosure sale. —McCurdy v. Clark, 27 Mich. 445.

¶ 567. A statutory foreclosure by the assignee of two instalments of a mortgage which, though maturing earlier, do not have priority, cannot affect the relative rights of the assignee and of the mortgagee who still holds a third instalment.—Jennings v. Moore, 83 Mich. 231.

§ 139. Mortgagee as purchaser.

¶ 568. A mortgagee as purchaser under a foreclosure sale stands in the same position as any other purchaser.—Hogsett v. Ellis, 17 Mich. 351.

¶ 569. One who has received the mortgage title to lands under an arrangement which, in legal effect, makes his rights no more than those of a mortgagee, is not thereby precluded from becoming a purchaser at a chancery sale on the foreclosure by a third person of another mortgage, and holding the title like any other purchaser; and such a purchase would cut off all previous equities of the other party.—Moote v. Scriven, 33 Mich. 500.

¶ 570. At a foreclosure sale the complainant mortgagee has the same rights, in bidding, as any third person, and takes the same interest if he becomes a purchaser.—Ledyard v. Phillips, 47 Mich. 305.

¶ 571. A foreclosure deed to the mortgagee gives him the same estate as a foreclosure of the equity of redemption, and is as effective as against the owner of the equity as if executed by such owner.—Ruggles v. First Nat. Bank, 43 Mich. 192.

§ 140. Purchase by mortgagor or his agent.

Passing title to mortgagor and merger of mortgage, see Mortgages, VII, D.

Inurement to benefit of second mortgagee of title acquired by mortgagor by repurchase from purchaser at foreclosure of first mortgage, see Mortgages, VII, D.

¶ 572. A legal title acquired by virtue of a foreclosure sale cannot be attacked in an action at law on the ground that the party purchasing thereunder acted as agent for one whose duty it was to pay the mortgage, and that, therefore, the transaction amounted merely to a redemption.—Gage v. Sanborn, 106 Mich. 269.

§ 141. Assignment of rights under purchase.

Under invalid foreclosure, see post § 142.

Assignment of mortgage and its effect, see ante § 14.

Assignment of decree and rights thereunder, see ante § 105.

Assignment or transfer of mortgage or debt secured by it, see Mortgages, VI.

Sufficiency of quitclaim deed to pass equitable title of purchaser during time for redemption, see Deeds § 33.

¶ 573. A purchaser at a sale under foreclosure by advertisement ordinarily acquires an equitable interest in the land which he may transfer in full to an assignee during the period of redemption, in which case the assignee, if there is no redemption, will take the legal title when it matures as the original purchaser would have done.—Roff v. Miller, 189 Mich. 558; McCreery v. Roff, Id.

¶ 574. A purchaser of land at a sale on mortgage foreclosure acquires an equitable interest in the premises, which he may convey by quitclaim deed prior to the expiration of the redemption period, and which, when so conveyed, will ripen into a legal title in his grantee, if the land is not redeemed.—Gage v. Sanborn, 106 Mich. 269.

¶ 575. A mortgagor's wife who has joined in the mortgage to release her dower loses her original right by foreclosure, and has as good a right as any one to buy in the property from the foreclosure purchaser after the foreclosure becomes absolute.—Gantz v. Toles, 40 Mich. 725.

¶ 576. A foreclosure purchaser of land which was mortgaged with the consent of the contract purchaser is entitled to possession as against the latter, and the grantee of the purchaser on foreclosure is equally entitled to possession so far as relates to all matters preceding the sale.—Ketchum v. Robinson, 48 Mich. 618.

¶ 577. The assignment of a mortgage after a sale has been made on statutory foreclosure, though before the period for redemption has expired, will not operate to annul the proceedings.—Gage v. Sanborn, 106 Mich. 269.

§ 142. ——Under invalid foreclosure.

Defective foreclosures, see post, V.

¶ 578. Void proceedings having been taken to foreclose a mortgage, and the holder of the mortgage having bid in the premises, he afterwards sold them and gave a warranty deed thereof. It was held that this deed conveyed his mortgage interest in the lands.—Niles v. Ransford, 1 Mich. 338.

¶ 579. Although a statutory foreclosure be irregular, so as to be no bar to the equity of redemption, yet the purchaser succeeds to all the interest of the mortgagee.—Gilbert v. Cooley, W. 494; Hoffman v. Harrington, 33 Mich. 392.

¶ 580. The purchaser under an irregular statutory foreclosure succeeds to all of the rights of the mortgagee including, in the case of a mortgage executed prior to 1843, the right of possession.—Hoffman v. Harrington, 33 Mich. 392.

¶ 581. A purchaser under a defective foreclosure of a mortgage made since 1843 is only in the position of a mortgagee, and can only recover possession by new foreclosure proceedings.—Nims v. Sherman, 43 Mich. 45.

¶ 582. The rights of the grantee of a purchaser at an irregular foreclosure are simply those of a mortgagee.—Morse v. Byam, 55 Mich. 594.

¶ 583. The purchaser under a defective sale becomes vested with the rights of the mortgagees in the mortgage.—Richards v. Morton, 18 Mich. 255.

¶ 584. A purchaser under a foreclosure by advertisement whose title fails because of the insufficiency of the power of sale in the mortgage, succeeds to all the mortgagee's rights.—Lariverre v. Rains, 112 Mich. 276.

¶ 585. There having been no right to foreclose upon a mortgage upon which nothing was due when it was foreclosed, no legal title was obtained by the foreclosure.—Bowen v. Brogan, 119 Mich. 218.

¶ 586. A decree of foreclosure was granted and sale made in 1861 to complainant's solicitor. In 1866, thirty odd days after the mortgagor's death, and without making his representatives parties, a report of sale was filed, an order nisi of confirmation entered, and conveyance made by the commissioner who had made the sale. Held, in an action of ejectment that the purchaser's title was good against one claiming under the deceased mortgagor.—Hochgraef v. Hendrie, 66 Mich. 556, affirming lower court by equal division.

§ 143. Estoppel to question title.

General principles of estoppel, see Estoppel.
Estoppel of purchaser of equity of redemption in possession under his purchase to question title of mortgagor, see Mortgages, VII.

¶ 587. One who indemnifies a mortgagee against a tax title cannot afterwards set up the tax title against his title as purchaser on foreclosure.—Wyman v. Baer, 46 Mich. 418.

¶ 588. An assignee of a decree of foreclosure who, without giving notice of the assignment, permits a sale under the decree and is present and bids at such sale, and receives and retains the proceeds of the sale, is estopped from questioning the regularity of the sale.—Farr v. Lachman, 130 Mich. 40.

¶ 589. S. bought land from W., who claimed it under a defective foreclosure, and after consulting N., who was in possession. N. did not tell S. that he owned the equity of redemption or that he held other than as a tenant of W., and on the other hand gave S. to understand that he would give up possession without foreclosure. Held, that although S. purchased on this understanding N. was not estopped from afterwards insisting on his legal title; since it could not pass by parol.—Nims v. Sherman, 43 Mich. 45.

§ 144. Procedure to obtain possession.

Summary proceedings to put purchaser in possession, see Forcible Entry.
Grounds for summary proceedings to put purchaser in possession, see Forcible Entry § 9.
Writ of assistance to put purchaser in possession, see Assistance, Writ of § 1.
Writ of assistance against stranger coming in after decree, see Assistance, Writ of § 4.
Necessity and character of notice and demand required to sustain summary proceedings for possession by purchaser, see Forcible Entry §§ 10, 11.
Effect of agreement as to continuance of occupancy as a bar to summary proceedings, see Forcible Entry § 12.
Exclusion from summary proceedings of issues as to validity of the foreclosure, see Forcible Entry § 36.
Inadmissibility in summary proceeding by purchaser of defense by mortgagor that by fraud his redemption was defeated, see Forcible Entry ¶ 140.
Court decree to compel surrender of possession of premises to foreclosure purchaser, see Jud. Act, chap. XIX, § 24; Comp. L. 1915, § 12678.

§ 145. Presumptions and evidence of title.

Presumptions and burden of proof in equity foreclosure, see ante § 85.
Evidence in equity foreclosure, see ante §§ 86, 87.

¶ 590. It will be presumed that a foreclosure sale was made in accordance with the statute.—Walsh v. Colby, 153 Mich. 602.

¶ 591. A mortgagor in possession under color of title is presumed in the absence of evidence to the contrary to be owner of the inheritance, and a purchaser on valid foreclosure acquires the same interest which he holds.—Wyman v. Baer, 46 Mich. 418.

¶ 592. The presumption that a public officer has done his duty can only apply to such acts of a sheriff as are required by law; hence, where mortgaged premises are sold in foreclosure proceedings, there is no presumption that the mortgage contained a power of sale.—Bryan v. Straus Bros. & Co., 157 Mich. 49.

¶ 593. When the mortgage is shown and a sale effected apparently in accordance with its terms, a presumption arises that will protect purchasers whose rights are collaterally attacked.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 594. A title obtained under a foreclosure of the first mortgage is presumptively prior in right to a subsequent mortgage, and its validity cannot be assailed in a suit to foreclose the latter without special averments showing why it ought to be postponed.—Dawson v. Danbury Bank, 15 Mich. 489.

¶ 595. A foreclosure sale for instalments due on a mortgage is not presumed to have been made subject to other instalments.—Millard v. Truax, 50 Mich. 343.

¶ 596. Parties claiming under a purchase at a mortgage sale need not, in support of their title, produce the note secured by the mortgage.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 597. The mortgage and the power of sale must be proved in order to support the title of a purchaser at the mortgage sale.—Hebert v. Bulte, 42 Mich. 489; Snyder v. Hemmingway, 47 Mich. 549.

V. DEFECTIVE FORECLOSURES, AND CURING OR AVOIDING SAME.

§ 146. In general.

Foreclosure de novo to cure defects, see post § 147.
Occasion and grounds to set aside sale, see post §§ 148-151.
Equities of applicant and doing equity as condition, see post §§ 152, 153.
Diligence and laches or waiver and estoppel, see post §§ 154, 155.
Mode of procedure, motion, petition or original suit, see post §§ 156-160.
Ejectment as remedy to cure or avoid foreclosure, see post § 161.
Presumptions, burden of proof and evidence as to regularity, see post § 162.
Assignment of rights under invalid foreclosure, see ante § 142.
Sufficiency of confirmation of foreclosure sale after delay of twenty years to validate foreclosure proceedings, see ante ¶ 497.
Suit to compel proper marshalling as condition precedent to valid foreclosure, see Marshalling Assets.
Remedies and rights of persons injured by fraud in foreclosure, see Fraud, III.

¶ 598. Those who conduct the foreclosure must observe good faith and pay a proper regard to the interests of all who may be affected by the proceedings; and no defect or misstep in matters of substance will be cured or excused by any proof that it happened by mistake and was not induced by a bad purpose.—Grover v. Fox, 36 Mich. 461.

¶ 599. A trustee's sale under power not purporting to be under the foreclosure statute (How. St., § 7847), and the trust being one to sell and pay a debt and account for surplus proceeds, is on its face imperfect, even if regarded as an attempted foreclosure and does not cut off equity of redemption, or give right of entry.—Pierce v. Grimley, 77 Mich. 273.

§ 147. Foreclosure de novo to cure defects.

See also post ¶ 609.
Equity foreclosure after abortive and void foreclosure by advertisement, see ante § 58.

¶ 600. Where in a statutory foreclosure a mistake occurs which renders the proceedings irregular and voidable, the mortgagee may waive the proceedings and commence de novo either by advertisement or in equity.—Atwater v. Kinman, H. 243.

¶ 601. Delay for nearly twenty years after the maturity of a mortgage in seeking chancery foreclosure was excused where, in ignorance of the fact that the mortgage contained no power of sale, a foreclosure by advertisement had been carried through and ejectment on the sheriff's deed had been prosecuted to judgment.—Hayward v. Kinney, 84 Mich. 591.

§ 148. Occasion and grounds to set aside sale.

Lack or imperfection of notice, see post § 149.
Inadequacy of price, see post § 150.
Surprise, mistake or fraud, see post § 151.

¶ 602. A much stronger case must be made to set aside the sale after confirmation of report of sale than before.—Bullard v. Green, 10 Mich. 268.

¶ 603. Special circumstances, appealing to equitable considerations, must always exist, where the sale is not void, to justify an order for the resale.—Page v. Kress, 80 Mich. 85.

¶ 604. Reopening a foreclosure sale is so far within the discretion of the lower court that the supreme court is not disposed to disturb an order permitting it, where the discretion has not been abused.—Nugent v. Nugent, 54 Mich. 557.

¶ 605. It seems that a foreclosure sale is not necessarily invalidated by neglect to reengross the foreclosure bill after amending it by adding a new party defendant.—Carpenter v. Ingersoll, 43 Mich. 433.

¶ 606. A foreclosure sale will be set aside where it is advertised to be made by the mortgagee and not by the sheriff, but the sheriff assumed the authority and made the sale without authority from the mortgagee.—Watson v. Lynch, 127 Mich. 365.

¶ 607. A statutory foreclosure by an assignee of a mortgage, the assignment of which was executed in another state and was not so certified as to entitle it to be recorded here, although actually recorded, is void.—Dohm v. Haskin, 88 Mich. 144.

¶ 608. Transfer of a bid made on foreclosure sale will not be ground for ordering a new sale.—Culver v. McKeown, 43 Mich. 322.

¶ 609. A foreclosure was had for an instalment of interest. The owner of the equity of redemption disputed the validity of the proceedings and filed a bill to have them annulled. While this bill was pending the

owner of the mortgage foreclosed by advertisement for the principal. The owner of the equity when the second foreclosure was begun filed his supplemental bill, setting up a tender in full of the mortgage. The foreclosure proceedings nevertheless went on to a sale. The chancery court having found the tender, held, that it was proper to set aside the foreclosure proceedings with costs to complainant.—Louder v. Burch, 47 Mich. 109.

¶ 610. The sale of two lots as one parcel in foreclosure proceedings will not be set aside where, from the circumstances, it is shown that a single ownership and holding of the property was desirable.—Butters v. Butters, 153 Mich. 153.

¶ 611. A foreclosure sale cannot stand as a valid sale in bulk, if, having been made in parcels, it is incapable of being sustained as a sale in parcels; a sale must be contemplated as it was.—Grover v. Fox, 86 Mich. 461.

¶ 612. Resale ordered on condition that the bid of the purchaser be advanced to a specified sum, and that he be paid the amount with interest and counsel fee.. A bid was obtained on the resale for the sum specified, but the amount actually paid was only sufficient to satisfy the first purchaser; payment of the balance being delayed by consent of the mortgagor until confirmation of sale. Held, that this delay was no ground for setting aside the second sale.—Demaray v. Little, 19 Mich. 244.

¶ 613. In foreclosure against a nonresident brought in by publication complainant failed to offer testimony or to be sworn as to payments made on the mortgage. Held, that such failure did not oust the court of jurisdiction to pronounce a decree, and could not be collaterally made use of.—Colton v. Rupert, 60 Mich. 318.

¶ 614. The owner of a mortgage agreed, in writing, with the widow of the owner of the equity of redemption, that he would bid the property in on foreclosure and pay her a certain amount, less the sum then due on the mortgage. Instead of doing so he allowed the property to be struck off to another person for much less than its value and for less than half of what he had agreed to pay her, and took a conveyance of it from the purchaser. The sale was not such a public sale, with competition, as the law contemplates. Held, that the widow and heirs of the owner of the equity of redemption were entitled to have the sale vacated; and as this was not a proceeding to enforce the agreement with the mortgagee or to determine who would have been entitled to the moneys which he was to have paid to the widow, the question whether the agreement was not a fraud upon the rights of the heirs or of creditors does not arise.—Fix v. Loranger, 50 Mich. 199.

§ 149. ——Lack or imperfection of notice.

See also post ¶ 659.

Notice of foreclosure in statutory proceedings, see ante, II, B.

Notice in equity foreclosure proceedings, see ante §§ 108, 109.

¶ 615. A foreclosure sale may be set aside for want of notice of the order for sale or of the confirmation thereof.—Nugent v. Nugent, 54 Mich. 557.

¶ 616. Where a foreclosure sale was so managed that advantage was taken of the absence of one who had a lien on a portion of the land, and who had no notice of the proceedings, and the remainder of the land, though it would have abundantly satisfied the whole debt, was bid in at nominal prices, and the portion on which he had a lien was bid in at its full value in order to cut off his equities, it was held that equity would relieve, and that the sale should be reopened on petition of the incumbrancer upon his compliance with proper terms, as by giving security that on a resale he would bid for the parcels first charged with the satisfaction of the demand a sum equal to its amount, and repay to the foreclosure purchaser all sums spent by him in improving the land since its purchase, less a reasonable rent for that time.—Gilbert v. Haire, 43 Mich. 283.

¶ 617. A foreclosure by advertisement without effort to find mortgagor in the same town where but a small instalment of interest was due, without any actual notice to the mortgagors, who were unable to read English, that the mortgagee had elected to declare the principal sum due, and without any statement in the notice of sale that he had so elected, severely criticized; and the foreclosure and deeds thereunder were set aside for a misnomer in the notice of sale.—Zlotoeczski v. Smith, 117 Mich. 208.

¶ 618. The action of the circuit court in setting aside a foreclosure sale for want of notice to the mortgagor, the notice of sale having been published in a paper which had no circulation in his neighborhood, and for inadequacy of the price realized, is within its discretionary powers, and will not be interfered with unless the discretion is abused.—Brewer v. Landis, 111 Mich. 217.

¶ 619. If the notice of sale on statutory foreclosure is insufficient the consequence will be the continuance of the right of redemption until foreclosure by lapse of time or in equity.—State Bank of Bay City v. Chapelle, 40 Mich. 447.

¶ 620. A mortgagee cannot set aside a foreclosure sale on the ground that no notice of sale was posted and that the sale was not made by any one authorized by the decree where he and his attorney had entire charge of the sale.—Mallar v. Mallarian, 138 Mich. 345.

¶ 621. On a bill to review a foreclosure decree on the ground that complainant had no notice of the proceedings until served with a petition for execution for the deficiency, although the officer's return showed service, where complainant was given an opportunity to appear and introduce any defense he might have, but made no defense, and did not avail himself of an offer to have the entire mortgaged property transferred to him upon payment of the mortgage debt, and did not ask for a resale, the decree was not vacated on the ground merely of such want of notice.—Dickerson v. Corning, 122 Mich. 631.

¶ 622. A defect in the affidavit of posting of notice of foreclosure sale, which fails to prove posting of notice in the township in which the premises are situated, is not cured by a recital in the commissioner's report of the sale, nor can it be cured by parol.—New York Baptist Union v. Atwell, 95 Mich. 239.

¶ 623. Defects in the printer's affidavit of the due publication of notice of a foreclosure sale are not cured by the fact that the officer who conducted the sale has stated in his report thereof that due publication was had of the notice of sale.—Perrien v. Fetters, 35 Mich. 233.

§ 150. ——Inadequacy of price.

See also ante ¶ 618.
See also post ¶¶ 648, 650.

¶ 624. Inadequacy of price is not ground for setting aside a foreclosure sale where there is no showing that a larger or even as large a price could be obtained on a new sale.—Farmers' Bank v. Quick, 71 Mich. 534.

¶ 625. A foreclosure sale may properly be reopened for gross inadequacy of price, especially if the petitioner for a resale gives bonds to produce a purchaser at a higher price.—Nugent v. Nugent, 54 Mich. 557.

¶ 626. Where a mortgagee is the purchaser on foreclosure, and the sale is objected to for inadequacy of price, an order reopening the sale will not be disturbed on appeal.—Nugent v. Nugent, 54 Mich. 557.

¶ 627. A sale of $350 will not be set aside on the ground of inadequacy of consideration when the petition states the premises to be worth $700, and the evidence is that they have since been sold by the purchaser at that price on long time, but that for cash they would not sell for over $400.—Bullard v. Green, 10 Mich. 268.

¶ 628. A resale will not be ordered where mortgaged property, the fair value of which was shown not to exceed $900, was sold on foreclosure for $890, and where one who was present at the first sale was subsequently willing to pay $1,000.—Page v. Kress, 80 Mich. 85.

¶ 629. A resale of property under foreclosure will not be ordered upon an offer of increase of price alone, when the property has not been sold at a sacrifice.—Page v. Kress, 80 Mich. 85.

§ 151. ——Surprise, mistake or fraud.

See also post ¶ 648.

¶ 630. The sale will not be set aside on the ground of surprise when the surprise springs from the negligence and inattention of the party himself who complains of it.—Bullard v. Green, 10 Mich. 268.

¶ 631. Sale set aside on the ground of surprise where defendant had obtained an agreement from complainant to postpone it, upon which he relied, but the instructions to postpone were not received by the solicitor in season, and the sale was made at much less than the value.—Demaray v. Little, 19 Mich. 244.

¶ 632. The equities must be clear and strong to warrant setting aside a chancery sale at the instance of a purchaser on the ground of misapprehension of his rights, where the premises sold were farming lands, and the amount bid was large, and the next highest bid was within one hundred dollars of that on which the premises were struck off, and was made with full knowledge, and where, therefore, the probabilities of serious loss are great if the sale should be reopened.—Ledyard v. Phillips, 32 Mich. 13.

¶ 633. A falsely antedated deed and certificate made ten months after sale will not cure defects in a deed made at the time of the sale.—Grover v. Fox, 36 Mich. 461.

¶ 634. A master's deed following the decree in that it included lands discharged from the mortgage by a stipulation filed in the suit is void as to persons aware of the facts.—Thayer v. McGee, 20 Mich. 195.

§ 152. Equities of applicant and doing of equity as condition.

See also ante ¶ 616.
Tendering or depositing amount due to redeem, see post § 153.

¶ 635. A mortgagee who bids off land at a foreclosure sale upon a decree granted him for the amount due, and who, having prior incumbrances thereon, pays more than the amount due under the decree, supposing that the surplus will be returned to him to apply on his prior incumbrances, but who gives out at the sale that whoever purchases must take the land subject to these prior incumbrances, has no equities that will support his application to have his purchase set aside on the ground that he has been misled as to his right to have the surplus money returned to him.—Ledyard v. Phillips, 32 Mich. 13.

¶ 636. Where one who had been made a party to a foreclosure suit as a subsequent

purchaser sought to set aside the sale on the ground that he had failed earlier to appear and defend because he supposed complainant's attempt was to reach the interest of one of the mortgagors and not that of the remaining mortgagor and himself, his claim was regarded as inconsistent with the fact that the deed to him was expressly subject to the mortgage.—Montague v. Haviland, 101 Mich. 80.

¶ 637. Where, upon a long-delayed petition to set aside sale the only question was whether the decree included some interest that was also included in a mortgage to complainant by petitioner's wife, the decree should not have been set aside, nor should the sale have been vacated except upon such conditions as would finally settle all the rights of the parties, and an accounting was therefore ordered to find and charge the amount due.—Montague v. Haviland, 101 Mich. 80.

¶ 638. Where two parcels were struck off to a certain bidder upon whose failure to produce the money on the spot they were sold to another, the amount of the first bid, tendered soon after, being refused, held, that a resale was properly ordered, but that it was unreasonable to require as a condition thereof that the first bidder should deposit with the register within ten days a sum equal to the amount of his two bids and a bond conditioned that the premises should on the resale bring the amount of the prior sale together with all the costs of the cause and the resale.—Converse v. Clay, 86 Mich. 375.

¶ 639. A mortgagee who deliberately buys property on foreclosure for a grossly inadequate price cannot have the sale set aside and resale had because of the defendant's redeeming and immediately reselling the property so as to avoid a deficiency decree. —Mallar v. Mallarian, 138 Mich. 345, Hooker, J., dissenting.

¶ 640. A husband, after the death of his wife who had mortgaged her land for his debt, entered into a collusion agreement with a third person by which the mortgage was foreclosed by advertisement, the foreclosure purchaser paying part of the price by executing to the mortgagee a new mortgage for the principal secured by the old one, the husband paying the rest. Subsequently the substituted mortgage was paid by the grantee of the purchaser's assignee in bankruptcy. Held, upon a bill filed by the wife's heirs, on coming of age, to set aside the foreclosure sale, that the entire transaction of substituting the second mortgage for the first should be taken together, and it would be inequitable to grant the relief asked, without at the same time reviving the mortgage extinguished by the sale complained of.—DeMey v. Defer, 103 Mich. 239, writ of error dismissed in 168 U. S. 703, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941.

§ 153. ——Tendering or depositing amount due to redeem.

Procedure and method of payment on redemption, see post § 188.

¶ 641. Where a party comes to have a foreclosure set aside and for leave to redeem he must bring into court the amount admitted to be due. The deposit will only be dispensed with where there is uncertainty as to the amount due.—Schwarz v. Sears, H. 440.

¶ 642. Where no fraud is alleged in a bill filed to set aside a statutory foreclosure sale, and the only irregularity charged is that the amount claimed to be due on the notice of sale is excessive, the mortgagor must be prepared to do equity by paying the amount actually due, or by submitting to a resale.—Huyck v. Graham, 82 Mich. 353.

¶ 643. Complainant in a bill to set aside as irregular for want of sale in parcels a deed on statutory foreclosure, must be prepared to make payment of the amount actually due, or, in default thereof, a resale in parcels will be decreed.—Hawes v. Detroit Fire & Marine Ins. Co., 109 Mich. 324.

¶ 644. Petition being filed to set aside a sale under a decree in chancery on the ground of inadequate consideration, and the complainant—who was the purchaser—not having sought to take advantage of petitioner's embarrassments, and not appearing to have been at any time unwilling to receive the amount due upon the decree and the amount paid to redeem from prior sales, and to transfer to petitioner all rights acquired by the purchase, it was held that, under these circumstances at least, it was a fatal objection to the petition that it did not offer to pay the decree, or to increase the bid if a resale was ordered.—Leonard v. Taylor, 12 Mich. 398.

§ 154. Diligence and laches of applicant.

See also ante ¶ 601.

¶ 645. Defendants seeking to set aside a sale in a foreclosure case must move promptly after they become aware of the facts of which they complain.—Lyon v. Brunson, 48 Mich. 194.

¶ 646. A party claiming to be aggrieved by a sale in chancery which has been duly confirmed will not be relieved on an allegation of irregularity in the sale, where there is unreasonable delay in applying for relief, and it is not clearly shown that he has a substantial and meritorious ground of complaint.—Goodwin v. Burns, 21 Mich. 211.

¶ 647. A mortgagor relying on irregularities of procedure to invalidate a foreclosure and sale must act with the utmost promptness in order to obtain relief.—Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574.

¶ 648. A foreclosure sale in chancery will not be set aside on the ground of surprise and inadequate consideration, after a long unexcused delay, which has continued until an execution has been issued for a deficiency, and a sale made under which third persons have acquired vested interests, and the complainant has made payments to redeem from former sales.—Leonard v. Taylor, 12 Mich. 398.

¶ 649. A sale was made January 28th and confirmed April 13th. Another sale, upon another mortgage of the same property, was made January 21st, and confirmed February 1st, all in the same year. The party complaining knew of the sales at or about the time they took place, and he had knowledge of all the facts on which his claim for relief was based in June. In October he filed his petition to set the sales aside. Held too late. —Goodwin v. Burns, 21 Mich. 211.

¶ 650. Although the price was shown to have been inadequate, the sale would not be set aside on a petition presented six months after the sale, and which does not sufficiently excuse this delay.—Bullard v. Green, 10 Mich. 268.

¶ 651. A delay of fourteen years in taking steps to redeem from a statutory foreclosure claimed to be void by reason of including in the sum the land sold for an attorney fee and unpaid taxes, amounts to gross laches, defeating complainant's right to redeem.—Emmons v. Van Zee, 78 Mich. 171.

¶ 652. Where in a foreclosure sale a number of lots are sold as an entirety to the mortgagee and complainants who have derived title from the mortgagor seek to assert title against defendant who claims title through a quitclaim deed from the mortgagee after foreclosure, neither party having attempted to perfect title for a period of years, no paramount laches arises which impairs the rights of either party as they existed at the time of the invalid foreclosure, and a decree is entered allowing complainants to redeem by paying the mortgage debt on each lot with accrued interest since the date of the mortgage.—Walker v. Schultz, 175 Mich. 280.

¶ 653. A delay of five years in filing a bill to review foreclosure was prejudicial to the consideration of a claim for credits based upon the unsupported testimony of the complainants, even though the secretary of the building and loan association in question to whom the payments were claimed to have been made, and who at the time of the trial was at a distant place, was shown to have been dishonest; but where the books had always been open to complainants.—Dailey v. Saginaw Bldg. & Loan Ass'n, 133 Mich. 403.

¶ 654. A delay of five years in the filing of a bill by a husband and wife to review foreclosure, was prejudicial to the consideration of a claim to certain credits, based upon the unsupported testimony of the complainants, where the bill recited that upon discovery of certain receipts an investigation and adjustment were made, and where a release of all claims against the building and loan association given by the husband was recognized by the bill.—Dailey v. Saginaw Bldg. & Loan Ass'n, 133 Mich. 403.

¶ 655. A mortgage was given in 1888 and foreclosed in 1892. Held, that after the death and disability of many of the parties the decree of foreclosure could not, for laches, be attacked by bill in 1906.—Miller v. Peter, 158 Mich. 336.

§ 155. Estoppel and waiver of objections.

Estoppel by disclaimer to question irregular foreclosure, see also Estoppel ¶ 181.

¶ 656. A nonresident mortgagor who accepts after foreclosure sale the surplus due him, and who takes no steps to have the proceedings set aside within the time allowed by law, waives all irregularities and sanctions the validity of such proceedings.—Colton v. Rupert, 60 Mich. 318.

¶ 657. Where a purchaser at a chancery foreclosure sale takes possession of the premises, pays laborers for work done thereon at the time of the sale, and makes arrangements and advances money to have a wheat crop sown for the following year, he so far affirms the sale as to preclude himself from insisting that it is still inchoate, and that an order granted afterwards for opening it is therefore discretionary and not subject to appeal.—Ledyard v. Phillips, 32 Mich. 13.

¶ 658. A mortgagor's petition for a resale of the premises, which were bid in by the mortgagee upon foreclosure, will be denied, notwithstanding the latter promised to redeed to the mortgagor upon payment being made within a specified time after sale, or to give still further time for redemption on payment of a specified sum, where it appears that the mortgagor made no offer of payment within the period limited, nor requested further time, but talked and acted as though he had abandoned his purpose to redeem, in reliance upon which the mortgagee paid prior incumbrances and taxes upon the land, and went to a considerable expenditure of money, time, and trouble.—Stebbins v. Heath, 115 Mich. 661.

¶ 659. The right of defendant in foreclosure to all the time the decree allows him for making payment cannot be presumed waived in order to sustain a sale prematurely made without notice to him.—Shier v. Prentis, 55 Mich. 175.

¶ 660. The requirement that a foreclosure sale be made in parcels is in the redemptioner's interest and for the protection of his right to redeem each parcel separately; but where, for a valuable consideration, one has waived his right to redeem, in advance, he cannot object that sale was not made in parcels; the objection cannot be raised by the mortgagee as against his own proceedings, when no one else is in position to raise it.—Clark v. Stilson, 36 Mich. 482.

§ 156. Mode of procedure; motion, petition or original suit.

Motions or petitions and hearing and relief thereon, see post § 157.
Kind and sufficiency of bill required or proper for relief, see post § 158.
Parties to suits for relief, see post § 159.
Hearing and decree on bill for relief, see post § 160.
Ejectment as remedy to cure or avoid foreclosure, see post § 161.
Presumptions, burden of proof and evidence as to regularity, see post § 162.
Occasion and propriety of bill of review, see Equity § 240.

¶ 661. One who attacks a judicial sale as invalid after strangers have acquired rights under it must do so by some original proceeding in which an issue can be formed and tried in the ordinary way and the persons concerned brought in as parties. And this applies to a motion to set aside a foreclosure sale after complainant's death and after a stranger has occupied the land.—Crawford v. Tuller, 35 Mich. 57.

¶ 662. When it appears that third parties have acquired rights in the premises under the foreclosure sale sought to be set aside, it is necessary to bring an original proceeding in which the persons concerned may be brought in as parties and afforded an opportunity to be heard.—Lawrence v. Jarvis, 36 Mich. 281.

¶ 663. An order setting aside a foreclosure sale and opening the case cannot be made without instituting an original proceeding and thereby bringing in such third persons as have acquired rights under the sale.—Jewett v. Morris, 41 Mich. 689.

¶ 664. The defendant in a foreclosure suit may proceed by petition to have the sale set aside for alleged irregularities in the proceedings, although the rights of third persons have intervened.—Brewer v. Landis, 111 Mich. 217.

¶ 665. Where the original parties to the suit and the purchaser have notice, and opportunity to be heard, and new rights have not intervened, the manner in which an objection to a foreclosure sale is brought to the attention of the court is not of particular importance where the decree stands and only the sale is attacked; and either bill or petition will suffice.—Butters v. Butters, 153 Mich. 153.

§ 157. Motions or petitions and hearing and relief thereon.

Hearing and relief on original bill, see post § 160.
Propriety of petition to set aside sale, see also ante ¶ 664.

¶ 666. On application by petition to set aside a sale the court cannot inquire into the regularity of the proceedings resulting in the decree, nor whether the decree was for a greater or less sum than it should have been.—Bullard v. Green, 10 Mich. 268.

§ 158. Kind and sufficiency of bill required or proper for relief.

Necessity of original proceedings to set aside sale as defective, see also ante ¶¶ 661-663.
Bills to redeem and for accounting, see Mortgages, IX.

¶ 667. If a mortgagor wishes to test in the court of chancery the validity of a statutory foreclosure he must file a bill to redeem. He cannot file a bill to set aside the sale and have the property resold, although the mortgagee may have abused the power to sell and purchased the property himself.—Schwarz v. Sears, W. 170.

¶ 668. A mortgagee may not so execute the power of sale contained in his mortgage as to compel the mortgagor to pay more than he owes or forfeit his estate; and if it is attempted, either through mistake or fraud, a court of equity, if appealed to properly and in season, will prevent the forfeiture by allowing the party to pay the true sum in redemption of the estate.—Sanford v. Flint, 24 Mich. 26.

¶ 669. A bill attacking a foreclosure decree and sale, and seeking leave to redeem, is in effect a bill in the nature of a bill of review; and where it is filed after long delay, and without security, and is neither verified nor accompanied by a sworn showing, should be dismissed.—Sanford v. Haynes, 71 Mich. 116.

¶ 670. A bill to set aside a foreclosure and to foreclose a second mortgage will be treated as a bill to redeem and the complainant be permitted to redeem where the foreclosure is held valid but the delay and evasion of the purchaser has prevented the complainant from redeeming during the

statutory period.—Brown v. Burney, 128 Mich. 205.

¶ 671. Where a mortgagor files a bill to set aside a foreclosure sale, where a number of lots were sold as an entirety, it is treated as a bill to redeem and the mortgagor is required to pay the debt secured by the mortgage before the security pledged for the debt is released to him.—Walker v. Schultz, 175 Mich. 280.

¶ 671a. A foreclosure under the power of sale, if made for an excessive amount, may be set aside before the proceedings under it are perfected, on a bill filed by the debtor for leave to redeem on paying the amount due.—Schwarz v. Sears, H. 440.

¶ 672. A bill to set aside a sheriff's deed upon statutory foreclosure and to have the foreclosure proceedings declared void, and praying general relief, may, if the facts permit, be sufficient as a bill to redeem.—Drayton v. Chandler, 93 Mich. 383.

¶ 672a. A bill filed to set aside a statutory foreclosure sale for irregularities must be considered as a bill to redeem, whether redemption is prayed for or not.—Huyck v. Graham, 82 Mich. 353.

¶ 673. A second mortgagee has an absolute right, at any time after a prior incumbrance comes due, to redeem from and be subrogated to it until his own mortgage, as well as the former, shall be paid up and his whole claim refunded. And where a statutory foreclosure has been had that is void for irregularities, and the purchaser's assignee refuses to recognize his right to redeem, he can maintain a bill against such assignee for an accounting as to the amount due and for the removal of the apparent cloud caused by the foreclosure and for leave to redeem on equitable terms.—Sager v. Tupper, 35 Mich. 134.

¶ 674. A bill by the minor children of a decedent alleged that their father was possessed of certain real estate at the time of his decease, which was free from incumbrance; that an instrument purporting to be his will, by the terms of which all of his property was left to his wife, was admitted to probate, and a distribution made in accordance therewith; that complainants were not represented by a guardian ad litem, or otherwise; that the instrument was not decedent's will, but was obtained by fraud; that the widow had executed a real estate mortgage to defendant, and that the latter had foreclosed the same, and had himself purchased at the sale. The prayer was that the mortgage and sale be set aside so far as the complainants' interests were affected thereby. The bill contained no averments of the value of decedent's estate, of complainants' interest in the mortgaged premises, or of damage to them resulting from the sale. The widow and older children were not joined as parties to the litigation. Held, that a demurrer was properly sustained.—Stille v. Hess, 112 Mich. 678.

§ 159. Parties to suits for relief.

See also ante ¶ 674.

Proper party to have bill of review of foreclosure, see also Equity ¶ 984.

Proper defendants to bill to review foreclosure decree, see Equity ¶¶ 986, 987.

¶ 675. Mortgagor's wife is a necessary party to a bill to set aside a sale made on the statutory foreclosure of a mortgage for irregularity in not selling the land in parcels.—Hawes v. Detroit Fire & Marine Ins. Co., 109 Mich. 324.

§ 160. Hearing and decree on bill for relief.

Hearing and relief on petition or motion in foreclosure suit, see ante § 157.

¶ 676. A foreclosure sale ought not to be set aside on merely disposing of the plea to the bill of review filed to set it aside.—Thomas v. Burt, 52 Mich. 489.

¶ 677. Where the bill attacking the foreclosure sale by advertisement under a building and loan association mortgage does not ground the claim, that the amount stated in the notice of sale was excessive, on improper methods of computation, but on failure to note proper credits, it is within the discretion of the trial judge to permit, on argument, the submission of sworn computations by counsel.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

¶ 678. On a bill to annul a foreclosure for an instalment, pending which the mortgagee proceeds to a second foreclosure for the principal, the court has power to adjust the whole controversy in its decree.—Louder v. Burch, 47 Mich. 109.

¶ 679. On setting aside a foreclosure by advertisement because sale was not made in parcels, a decree was directed that a necessary party be joined as complainant within 30 days or the bill would be dismissed, that on such joinder complainant might be allowed to pay the amount due on the mortgage within 60 days, and in default thereof that sale should be decreed to be made in parcels.—Hawes v. Detroit Fire & Marine Ins. Co., 109 Mich. 324.

¶ 680. Where a mortgage sale, pending partition proceedings, has been held void for failure to sell in separate parcels, the mortgagor was given 60 days within which to pay the debt, and upon failure to do so, the mortgagee might proceed to hold another sale.—O'Connor v. Keenan, 132 Mich. 646.

§ 161. Ejectment as remedy to cure or avoid foreclosure.

Foreclosing by ejectment, see ante § 16.

¶ 681. Ejectment by the purchaser at a defective foreclosure would lie, where the mortgage antedated the statute forbidding its use for foreclosing mortgages.—Mundy v. Monroe, 1 Mich. 68; Todd v. Davis, 32 Mich. 160; Hoffman v. Harrington, 33 Mich. 392; Baldwin v. Cullen, 51 Mich. 33.

¶ 682. Where land has been regularly sold under a mortgage the mortgagor cannot, in an action of ejectment for it, attack the mortgage as fraudulent, or as discharged before foreclosure. The remedy for such defects, if not lost by laches, would be in equity.—Yale v. Stevenson, 58 Mich. 537; Damon v. Deeves, 66 Mich. 347.

§ 162. Presumptions, burden of proof and evidence as to regularity.

Proof of mistake or good purpose, see also ante ¶ 598.

¶ 683. On collateral attack regularity is presumed in foreclosure proceedings if the reverse is not shown.—Ruggles v. First Nat. Bank, 43 Mich. 192.

¶ 684. One who attacks the validity of a foreclosure sale on the ground that the lands were sold as one parcel has the burden of proving that they were not so occupied, unless that fact is apparent from the description in the mortgage.—Gage v. Sanborn, 106 Mich. 269.

¶ 685. A complainant in suit to set aside a foreclosure sale who claims that the mortgage sale by advertisement is void because separate lots were sold in one parcel, has the burden of proof to show that they were not occupied as one parcel; and it is not sufficient to show that part of one lot was fenced and cultivated, and that the adjoining lot was unfenced.—Harris v. Creveling, 80 Mich. 249.

VI. DEFICIENCY JUDGMENTS AND EXECUTIONS, AND ACTIONS ON THE DEBT.

§ 163. Existence of personal debt and deficiency.

Form and requisites of mortgage and debt, see post § 164.
Debt extinguished or barred or revived, see post § 165.
Estoppel to enforce deficiency judgment, see post § 166.
Persons liable for deficiency, see post §§ 167, 168.
Power to make deficiency decree and statutory provisions, see post § 169.
Procedure for obtaining deficiency judgment and execution thereon, see post §§ 170-176.
Assignment of deficiency decree, see post § 177.
Petition or suits to relieve from deficiency decree, see post § 178.
Actions at law pending or following foreclosure, see post §§ 179-181.
Right to redeem and immediately resell to avoid deficiency decree where mortgagee buys on foreclosure at grossly inadequate price, see ante ¶ 639.
Sale on foreclosure for instalment with discharge of premises from further incumbrance as imposing personal liability on mortgagor, see ante ¶ 560.
Deficiency judgment on foreclosure sale as claim against estate of mortgagor, see Estates of Decedents ¶ 453.
Bond to pay deficiency on foreclosure, see also Bonds ¶¶ 31, 32.
Nonliability on appeal bond from foreclosure decree for resultant deficiency, see Appeal § 569.
Amount of appeal bond, inclusion or exclusion of possible deficiency, see Appeal § 83.

¶ 686. A man and his wife conveyed certain lands in consideration of the payment, by the grantees, of the husband's debts. The grantees gave back a written agreement to the wife that the lands should be reconveyed to her alone on repayment of their advances. This agreement purported to make the wife covenant to pay the advances, but she did not sign it. The transaction was conceded to be a mortgage. Held, that under Comp. L. 1871, § 4208, How. St., § 5656, declaring that no mortgage shall be construed as implying a covenant for the payment of the sum secured thereby, the wife could not be held personally liable for any deficiency on foreclosure sale.—Howe v. Lemon, 37 Mich. 164.

¶ 687. In foreclosing a lien for redemption from a statutory foreclosure, no personal decree can be made against the original mortgagors for any deficiency, as the lien is confined to the land, and does not revive their personal liability extinguished by such foreclosure.—Powers v. Golden Lumber Co., 43 Mich. 468.

¶ 688. On a bill to foreclose as against the owner of the equity of redemption, omitted from a former foreclosure, the first mortgage, which complainant had bought, and the second mortgage, which he owned, a deficiency judgment against the original first mortgagor was improper; where the first foreclosure sale produced the full amount owing on the first mortgage. [Note. Official syllabus 5 states that the full amount was obtained, but this fact does not appear in the opinion.]—Walsh v. Robinson, 135 Mich. 16.

¶ 689. A person who attached real property which was mortgaged and agreed to

buy such mortgage, could not be held liable for a deficiency decree on foreclosure under How. St., § 6704, since he was not a purchaser of such property subject to the mortgage, his only interest therein being by virtue of his attachment lien, and such lien being liable to be defeated at any time by redemption.—Winsor v. Ludington, 77 Mich. 215.

§ 164. ——Form and requisites of mortgage and debt.

¶ 690. A decree for deficiency cannot be granted where the mortgage does not purport to secure a written promise.—Shelden v. Erskine, 78 Mich. 627.

¶ 691. It is only where a personal decree is sought against sureties or other persons than the mortgagor that a personal decree must be based on some written obligation (How. St., § 6704).—Shelden v. Warner's Estate, 59 Mich. 444.

¶ 692. Payment by a mortgagor of a deficiency under How. St., § 6702, cannot be decreed where there are several mortgagees who are not jointly interested in the mortgage.—Shelden v. Erskine, 78 Mich. 627.

§ 165. ——Debt extinguished or barred or revived.

Bar of cause of action or right to foreclose, see ante § 12.

Inclusion in foreclosure decree of interest barred by statute of limitations, see ante ¶ 394.

Discharge in bankruptcy as defense to decree for deficiency, see Bankruptcy §§ 10-13.

Limitations against decree as barring execution for deficiency, see Executions § 6.

¶ 693. Where the right of action for a debt is barred, there can be no personal decree on foreclosure of the mortgage that secures it.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265; Baent v. Kennicutt, 57 Mich. 268.

¶ 694. At the request of the administrator of a mortgagor's estate, the mortgagee, who had secured a decree in foreclosure proceedings, consented to postpone the sale as long as the administrator should keep the yearly interest paid and take good care of the premises. Two years later, the administrator found himself unable to pay the interest, and an arrangement was made whereby the heirs of the mortgagor quitclaimed the premises to the mortgagee, and the latter leased the same to the administrator under an agreement that the estate should be entitled to a deed upon payment of the amount due under the decree, with interest, taxes, and insurance. A year later, the administrator, being unable to make the payment, voluntarily surrendered possession to the mortgagee. Upon the final account of the administrator, the amounts paid as interest money were disallowed, and these payments were thereafter recovered back in an action instituted on behalf of the estate. Subsequently the heirs of the mortgagor filed a bill in equity to declare the foreclosure decree satisfied by reason of their quitclaim to the mortgagee. Held, that complainants' contention was inequitable; that the mortgagee, having been obliged to refund the interest money, the payment of which by the administrator was an essential part of the transaction, should be permitted to pursue his remedy under his decree, and to enforce against the estate a claim for a deficiency arising after sale.—Quick v. Raymond, 116 Mich. 15.

§ 166. ——Estoppel to enforce deficiency judgment.

¶ 695. Where persons interested in a chancery foreclosure sale interfere to prevent a fair sale to the highest bidder, as by arranging with persons intending to bid, to protect their interests, whereby such persons are deterred from bidding, they are estopped from claiming a deficiency on the sale, and will be enjoined from proceeding at law to recover it.—Innes v. Stewart, 36 Mich. 285.

¶ 696. A bank foreclosed a mortgage on some mill property and obtained a decree for sale. In order that the property might be leased and made profitable as soon as possible, the mortgagor's assignee, believing that nothing could be realized beyond the debt, proposed to the bank to anticipate the date fixed for the foreclosure sale, provided he could be sure of a bid high enough to cover expenses. The bank promised to bid, and at the sale the property was bought in its interest, subject to the mortgage. It was afterwards sold, however, under the foreclosure decree at a sum much below the mortgage debt, and the bank thereupon notified the assignee that payment of the deficiency would be claimed out of the assets which he held. On his petition an order was made satisfying the decree by the property sold, and on appeal this order was affirmed on the ground that, in arranging with the bank to anticipate the sale, the assignee was left to suppose that the bank, by taking title, would have no further claim against him.—East Saginaw Savings Bank v. Grant, 41 Mich. 101.

§ 167. Persons liable for deficiency.

Agreements or promises collateral to the debt, see post § 168.

Liability of guarantors of mortgagor, see also post ¶ 742.

Liability of married woman for deficiency where she signed mortgage note with her husband, see post ¶ 745.

Liability of mortgagor's sureties, see also ante ¶ 691.

Liability of mortgagor's wife, see also ante ¶ 686.

Remission of part of decree to avoid bill of review by persons liable for deficiency, see Appeal ¶ 2154.

¶ 697. There may be a personal decree for deficiency after sale against a subsequent grantee of mortgaged premises who has assumed the mortgage, if he has been made a party and is found in the jurisdiction.—Crawford v. Edwards, 33 Mich. 354; Miller v. Thompson, 34 Mich. 10; Taylor v. Whitmore, 35 Mich. 97; Carley v. Fox, 38 Mich. 387; Winans v. Wilkie, 41 Mich. 264; Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299; Unger v. Smith, 44 Mich. 22; Canfield v. Shear, 49 Mich. 313.

¶ 698. A personal decree may be rendered in a foreclosure case against a grantee of the mortgagor, who has accepted a deed stating that it is subject to the mortgage, which the grantee assumes and agrees to pay.—Corning v. Burton, 102 Mich. 86.

¶ 699. A grantee of a mortgagor who is liable because of having assumed mortgage and agreed to pay it cannot escape liability by inserting in his deed of the mortgaged premises a like agreement by his grantee to pay the mortgage debt.—Corning v. Burton, 102 Mich. 86.

¶ 700. A personal deficiency decree will not be entered against a grantee of land where it appears that the mortgagor conveyed the mortgaged premises as security, the grantee separately agreeing to pay the mortgage if demanded, the mortgagee not being a party to such pledge agreement, as in such case there is no equity between the mortgagor and the grantee under the pledge. A court of chancery has the power under the statute to enter a deficiency decree against one who equitably owes the debt through an assumption of the mortgage debt as part of the purchase price of land, but such action is always dependent upon an existing equity either between the person and the mortgagee or more frequently between him and the mortgagor.—Webber v. Lawrence, 118 Mich. 630.

¶ 701. No personal decree against a wife can be rendered in proceedings foreclosing a mortgage where she joined in the note and the mortgage solely for the purpose of waiving her dower rights, she having no other interest in the property.—Simons v. McDonnel, 120 Mich. 621.

§ 168. ——Agreements or promises collateral to the debt.

¶ 702. Absolute personal decrees against parties claimed to be collaterally liable for a mortgage debt cannot be granted in the original foreclosure decree.—Johnson v. Shepard, 35 Mich. 115; Vaughan v. Black, 63 Mich. 215.

¶ 703. In order to authorize a decree for deficiency against a third party, under How. St., § 6704, providing that "if the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill," the obligation or evidence of debt of such party must be one upon which he can be sued at law to recover the mortgage debt.—Winsor v. Ludington, 77 Mich. 215.

¶ 704. Complainant in foreclosure is a stranger to any agreement binding an infant defendant to the other defendants, or to any settlement of accounts between them, and cannot sue upon such an agreement or settlement in order to obtain a personal decree against the infant for a deficiency.—Wood v. Truax, 39 Mich. 628.

¶ 705. The liability of a surety on bonds of a corporation, for a deficiency, can be adjudicated, on a bill to foreclose a trust mortgage, where the question was raised by the pleadings and has been litigated by the parties.—Michigan Trust Co. v. Lansing Lumber Co., 121 Mich. 488.

§ 169. Power of chancery to make deficiency decree; statutory provisions.

Petitions or suits to set aside or relieve from deficiency decrees, see post § 178.

Statutory provision for deficiency decree, see Jud. Act, chap. XIX, § 24; Comp. L. 1915, § 12678.

¶ 706. Under the original equity jurisdiction there was no power to enter a personal decree even against the mortgagor himself, the conferring of such power being a statutory innovation.—Kelly v. Gaukler, 164 Mich. 519.

¶ 707. A decree in personam against the mortgagor is a statutory innovation, as is also the enforcement, on foreclosure, of collateral obligations of third persons. But the statutory jurisdiction over this latter class of persons is permissive only, and not obligatory, and will not be enforced to their prejudice.—Johnson v. Shepard, 35 Mich. 115; Gage v. Jenkinson, 58 Mich. 169.

¶ 708. The provision authorizing the enforcement of payment for deficiency is statutory, and cannot be enlarged.—Shelden v. Erskine, 78 Mich. 627.

¶ 709. The right to a personal decree for a deficiency in a mortgage foreclosure proceeding is purely statutory.—Prentis v. Richardson's Estate, 118 Mich. 259.

¶ 710. Under the original equitable jurisdiction, and prior to the act of April 23, 1833, there was no power to make a personal decree against even the mortgagor. His personal obligation could be enforced only in a suit at law.—Johnson v. Shepard, 35 Mich. 115.

¶ 711. The power to make a personal decree against the maker of a mortgage upon real estate or against others charged with

its payment comes entirely from the statute providing for chancery foreclosure.—Kollen v. Sooy, 172 Mich. 214.

¶ 712. If a mortgage is collateral to any actual personal obligation, however shaped, that could be enforced at law, it may be enforced in foreclosure proceedings and a personal decree obtained, and if the mortgagor dies his estate is liable for the deficiency (How. St., § 6702).—Shelden v. Warner's Estate, 59 Mich. 444.

§ 170. Procedure for obtaining deficiency judgment and execution thereon.

[Note. The simplification of procedure by the Judicature Act has made many of the earlier decisions relating to the taking of deficiency judgments and executions obsolete. They have nevertheless been collated here in order that the digest may be complete and may show the decisions on former as well as present practice. Editor.]

Necessity of jurisdiction in personam, see post § 171.

Sufficiency of averments in bill and notice, see post § 172.

Sufficiency and requisites of decree, see post § 173.

Equity suits to enforce personal liability, see post § 182.

Petitions or suits to set aside or relieve from deficiency decrees, see post § 178.

Mode of service of notices, see Notices; Process, II.

Necessity of verification of petition for deficiency judgment, see also Equity § 67.

Supplementary proceedings at law to subject property to deficiency judgment, see Creditors' Suits § 21.

¶ 713. The proceeding for execution for deficiency on a foreclosure decree is substantially a new one, equivalent to the legal process of scire facias. It cannot be sought against persons not properly charged in the bill, and it cannot be adjudicated except upon the occasion of a deficiency reported. Parties not properly charged have every defense open to them, and they are not called on to defend unless cited.—Vaughan v. Black, 63 Mich. 215.

¶ 714. The setting forth of a personal liability in the decree of foreclosure is always provisional, and until a deficiency arises and the defendants are called in to answer for it, they are not bound to pay it even if responsible.—Powers v. Golden Lumber Co., 43 Mich. 468.

¶ 715. Execution is not to be awarded in a decree for sale on foreclosure so long as it is not known that there will be a deficiency.—Howe v. Lemon, 37 Mich. 164.

¶ 716. Where a foreclosure decree provides for the sale of land, there is no personal liability to be enforced against defendant until after it is sold and a deficiency reported.—Mickle v. Maxfield, 42 Mich. 304.

¶ 717. How. St., § 6702, authorizing a decree for a deficiency in a foreclosure proceeding and requiring a report of the sale, showing a deficiency, before the decree can be entered, contemplates a new proceeding with notice to the mortgagor.—Prentis v. Richardson's Estate, 118 Mich. 259.

¶ 718. An attempt to take a personal decree for a deficiency in a foreclosure proceeding is substantially a new proceeding requiring personal service upon the defendant if he can be found.—Prentis v. Richardson's Estate, 118 Mich. 259.

¶ 719. Before payment of a deficiency in a mortgage foreclosure proceeding can be decreed or execution issued, the amount of the deficiency must be adjudicated, after the report of sale has been made.—Field v. Saginaw Circuit Judge, 124 Mich. 68.

¶ 720. Where a foreclosure decree provides for the sale of land, there is no personal liability to be enforced against a defendant until after it is sold and a deficiency reported, and subsequent proceedings are taken to secure a deficiency decree.—Kelly v. Gaukler, 164 Mich. 519.

§ 171. ——Necessity of jurisdiction in personam.

Appearance of defendants not personally served, see ante § 89.

¶ 721. No personal decree can be made against parties not personally served within the jurisdiction where the land lies, or not submitting voluntarily by appearance.—Outhwite v. Porter, 13 Mich. 533; Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299.

¶ 722. No personal decree can be rendered against a defendant brought in by publication but who was not served with process and has not appeared.—Innes v. Stewart, 36 Mich. 285.

¶ 723. If the bill is filed to foreclose a mortgage against a nonresident mortgagor, who does not appear, a personal decree cannot be made against him for any deficiency that may remain after sale.—Lawrence v. Fellows, W. 468.

§ 172. ——Sufficiency of averments in bill and notice.

Right to adjudicate liability of surety of mortgagor for deficiency on bill to foreclose trust mortgage, see also ante ¶ 705.

¶ 724. Where a bill to foreclose a mortgage contains the necessary facts and the requisite prayer, and personal service is had on the defendant, the question of personal liability for a deficiency may be determined

in the original decree.—Field v. Saginaw Circuit Judge, 124 Mich. 68.

¶ 725. A bill for foreclosure of a mortgage given to secure a note signed by the defendants and set out in the bill, and praying that if the amount realized upon foreclosure is insufficient, execution be had for the balance, is sufficient to support a decree finding defendants personally liable for the debt.—Simons v. McDonnell, 120 Mich. 621.

¶ 726. A purchaser of mortgaged property, who is made a defendant in foreclosure proceedings as one having or claiming to have an interest in the premises as subsequent purchaser or incumbrancer or otherwise, as provided by First Ch. Rule No. 91, against whom a personal decree is sought, and who is notified of that fact as provided by First Ch. Rule No. 122, is sufficiently advised of an intent to hold him personally liable for a deficiency after sale; it not being required that the bill should in such cases specifically allege the facts from which the personal liability is sought to be established.—Jehle v. Brooks, 112 Mich. 131.

§ 173. ——Sufficiency and requisites of decree.

Decree of foreclosure in general, see ante, III, D.

¶ 727. A decree made in advance of sale, for payment of deficiency, is no more than declaratory and fixes no rights.—Shelden v. Erskine, 78 Mich. 627.

¶ 728. A decree in mortgage foreclosure proceedings finding defendants personally liable for the debt but not directing the payment of any deficiency after the sale, is not objectionable as decreeing payment of a deficiency before any is found to exist, since such is not its effect.—Simons v. McDonnell, 120 Mich. 621.

¶ 729. A decree for a deficiency on the foreclosure of a mortgage, against one not personally liable for the payment of the mortgage debt, is erroneous.—Welbon v. Welbon, 109 Mich. 356.

¶ 730. Under How. St., § 6704, authorizing joinder and such relief, a decree for deficiency may include the mortgagee and another person who indorsed the mortgage note by way of additional security when it and the mortgage were taken by complainant's assignor in part payment for the purchase of goods.—Michigan State Bank v. Trowbridge, 92 Mich. 217.

¶ 731. Where a mortgage upon land owned by husband and wife as tenants in the entirety, was executed, as was the accompanying bond, by both, to secure a loan made to him, and therefore not binding her personally it is competent on foreclosure to enter a personal decree against him only without reforming the bond or the pleadings.—People's Building & Loan Ass'n v. Billing, 104 Mich. 186.

§ 174. Issuance and service of executions for deficiency.

See note, ante, § 170.

Objection and defenses to issuance, see post § 175.

Taking proofs, presumptions and evidence on right to execution, see post § 176.

Execution of process in general, see Process, II.

Levying executions and selling property thereunder, see Executions.

Leviability of respective interests under the mortgage and nonleviability of equity of redemption for the mortgage debt, see Execution § 24.

Statutory provision for issuance of execution for deficiency in equity foreclosure, see Jud. Act, chap. XIX, § 24; Comp. L. 1915, § 12678.

¶ 732. Complainant has ten years after decree within which to take out an execution for deficiency.—Wallace v. Field, 56 Mich. 3.

¶ 733. An execution for deficiency cannot issue without special application to the court, in writing and verified, showing the right thereto.—Mickle v. Maxfield, 42 Mich. 304; Gies v. Green, 42 Mich. 107; Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3.

¶ 734. Notice of a petition for an execution to enforce collection of a deficiency on foreclosure must be given to defendant.—Gies v. Green, 42 Mich. 107; Ransom v. Sutherland, 46 Mich. 489; McCrickett v. Wilson, 50 Mich. 513.

§ 175. ——Objections and defenses to issuance.

¶ 735. No objections can be made to the issue of execution for a deficiency unless they arose after confirmation of the foreclosure sale and recognize the decree and go to its discharge.—Haldane v. Sweet, 58 Mich. 429.

¶ 736. An application for execution can be resisted only on grounds that are consistent with the decree and such as usually operate in its discharge.—Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3; Haldane v. Sweet, 58 Mich. 429.

¶ 737. In resisting the issue of execution for deficiency defendant cannot attack the validity or regularity of the foreclosure proceedings, nor treat the order confirming the sale as void, so long as it has not been set aside.—Wallace v. Field, 56 Mich. 3.

¶ 738. A petition for an execution for deficiency cannot be resisted on grounds inconsistent with the decree.—Corning v. Burton, 102 Mich. 96.

¶ 739. A defendant in foreclosure cannot, in proceedings for the issue of an execution for a deficiency properly prayed for against him, call in question the validity of the decree.—Jehle v. Brooks, 112 Mich. 131.

¶ 740. Proceedings for execution for the deficiency on foreclosure are new and supplementary and not merely in continuation of the foreclosure; and any dealing between the creditor and the principal debtor which substantially changes their contract relations would release a guarantor of collection, if entered into before their liability was finally settled, and would also be a defense to proceedings for execution.—Johnson v. Shepard, 35 Mich. 115.

¶ 741. A subsequent purchaser of mortgaged premises, who in his deed had assumed and agreed to pay the mortgage, claimed the right on the hearing of a petition for an execution for deficiency to question the return of service of the original subpoena, he having denied in his answer to the petition that the subpoena was served upon him. Held, that said defendant might have had the question of the validity of the decree determined by a proper motion before enrollment, or upon bill of review after enrollment, in which case all persons interested should be made parties; but that such question was not open for hearing in said ancillary proceeding.—Corning v. Burton, 102 Mich. 96.

¶ 741a. A defense of discharge in bankruptcy not made to the decree which found and charged the deficiency cannot be urged against the deficiency.—Field v. Howry, 132 Mich. 687.

¶ 742. Guarantors of collection who have not objected to being joined as defendants in foreclosure are not precluded from a hearing before execution issues on a contingent decree against them.—Johnson v. Shepard, 35 Mich. 115.

¶ 743. The answer to a petition for execution for deficiency must state the grounds of objection thereto, and must be verified and filed.—Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3.

¶ 744. If an answer to an application for an execution for deficiency on foreclosure presents matter of discharge, complainant may take issue on it by replication if necessary, and in proper cases the court may order a reference to take proofs.—Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3.

¶ 745. A married woman, who with her husband was a defendant in a suit to foreclose a mortgage given to secure a note signed by her together with her husband, and suffered a default, is bound by the foreclosure and deficiency decree and cannot, upon application for execution for the deficiency, raise the defense that she was a married woman when the note was given, and as it was not given with reference to her personal estate, she was not personally liable upon it.—Christian v. Soderberg, 124 Mich. 54.

§ 176. ——Taking proofs, presumptions and evidence on right to execution.

¶ 746. References to take proofs may be had in proceedings for execution for deficiency in foreclosure.—Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3.

¶ 747. A decree of foreclosure and the commissioner's report of a deficiency on the sale establish a prima facie case for the issue of execution for such deficiency.—Wallace v. Field, 56 Mich. 3.

¶ 748. A decree in foreclosure adjudging defendant personally liable for a deficiency, taken together with the report of the deficiency, makes out a prima facie case against him, and on resisting an application for an execution against him he has the burden of showing matter in discharge of the decree. —Ransom v. Sutherland, 46 Mich. 489.

¶ 749. Where, in a proceeding to obtain a deficiency decree in a foreclosure suit in chancery, the calendar shows the report of sale of a court commissioner, the entry of an order confirming the report and following these the enrollment of the decree, all of the same date, in the absence of other proof it will not be presumed that the sale had been made and report filed before the decree and files were enrolled, and hence proceedings based upon the report of sale were void because in violation of Chancery Rule 24, subd. A., providing proceedings may not be had on final decree to enforce the same until the same is duly enrolled, as it will be presumed that an officer does his duty and that his proceedings are regular.—Olmstead v. Meyers, 172 Mich. 698.

§ 177. Assignment of deficiency decree.

Assignment of foreclosure decree, see ante § 105.

Assignment or transfer of mortgage or debt secured by it, see Mortgages, VI.

¶ 750. Where, after sale of mortgaged premises, the personal residue of the decree in foreclosure was sold and assigned as a decree for less than the amount adjudged due, and a note secured by the mortgage, but not yet due and not included in the decree, was sold also, the vendor was held not liable to refund the purchase price received by him as for a total failure of consideration, on the ground that the personal decree was invalid for failure of personal service; the assignment would transfer the note and the mortgage debt with authority to enforce it by all appropriate remedies, and if there was any failure of consideration it was only partial. —Lillibridge v. Tregent, 30 Mich. 105.

§ 178. Petitions or suits to set aside or relieve from deficiency decrees.

¶ 751. Proceedings to collect a deficiency on foreclosure are purely statutory, and a petition to set them aside for want of notice is permissible without filing a bill of review. —McCrickett v. Wilson, 50 Mich. 513.

¶ 752. The decree in a mortgage foreclosure proceeding determining the question of personal liability for a deficiency is final and can only be questioned upon rehearing or bill of review.—Field v. Saginaw Circuit Judge, 124 Mich. 68.

¶ 753. A bill to prevent the collection of deficiency on foreclosure was sustained where it appeared that the defendants had an agreement with third persons whereby the suit then pending for the foreclosure of the mortgages against this complainant and his property was to proceed, and if on the sale of the premises the price did not exceed a certain sum, these defendants were to purchase the property, and complainant was to have two and a half years to pay them certain sums upon the payment of which he was to receive a release. The premises were sold to others for an amount slightly less than the amount due, and almost enough to pay what the parties were entitled to under the agreement, and although not parties to the foreclosure suit the latter applied for and obtained an order on which there was an execution for deficiency. The attempt thus to collect the deficiency was a violation of the agreement referred to and a fraud on the complainant herein, he not having appeared in the foreclosure proceedings, and the decree being taken against him pro confesso.—Smith v. Smith, 46 Mich. 301.

¶ 754. Where an absolute personal decree for the deficiency on foreclosure has been granted in the first instance against guarantors of the collection of the mortgage debt, they are not in default in not asking a bill of review, so long as the proper proceedings to fix them finally are not yet begun.—Johnson v. Shepard, 35 Mich. 115.

§ 179. Actions at law pending or following foreclosure.

Propriety and grounds of leave to sue, see post § 180.
Petition and order of leave, see post § 181.
Statutory provisions governing actions at law pending or following equity foreclosure suits, see Jud. Act, chap. XIX, § 25; Comp. L. 1915, § 12679.

¶ 755. The pendency of a foreclosure suit in equity is not pleadable in abatement to a suit at law on the debt.—Joslin v. Millspaugh, 27 Mich. 517; Goodrich v. White, 39 Mich. 489.

¶ 756. The purpose of the statute (How. St., § 6703), in suspending the right, during the pendency of foreclosure proceedings, to bring an action at law, unless authorized by the court, to recover the debt secured by the mortgage, is not to limit the remedy of the creditor, but to avoid unnecessary litigation; and, when a suit is brought without leave in a court of law, the proceedings therein will not be restrained unless substantial rights are affected.—Steele v. Kent Circuit Judge, 109 Mich. 647.

¶ 757. Comp. L. 1871, § 5149, How. St., § 6703, declaring that legal proceedings to recover a mortgage debt for which a foreclosure suit is pending shall not be had unless authorized by the court, leaves the question of permitting such proceedings to be determined in equity by the court where the foreclosure is pending, and not at law. That court will compel an election of remedies, or permit the double action, in its discretion.—Joslin v. Millspaugh, 27 Mich. 517.

¶ 758. Proceedings at law to recover a deficiency on mortgage foreclosure can be taken only by leave of the court in which the foreclosure was decreed.—Innes v. Stewart, 36 Mich. 285.

¶ 759. It seems that where proceedings by foreclosure and for a deficiency thereon are ineffective, an action at law can be instituted for the debt without leave from the court in chancery.—Culver v. Detroit Superior Court Judge, 57 Mich. 25.

¶ 760. The rule that proceedings at law to enforce payment of a deficiency on foreclosure cannot be taken without leave of the court in which foreclosure was had (How. St., § 6703), does not apply to an action begun by leave of the probate court upon the bond of the mortgagor's residuary legatee: and the omission to obtain leave also from the court in chancery is a mere irregularity that can be waived by defendants.—Culver v. Detroit Superior Court Judge, 57 Mich. 25.

¶ 761. Land was mortgaged to one person to secure three notes payable at different times. He foreclosed to obtain payment of the first two notes, and sold and bid in the land subject to the third note not yet due. There was no redemption. Held, that the mortgagee could not sue the mortgagor on the remaining note, as the latter would then be entitled to reimbursement from the land, thus causing a multiplicity of suits.—Shermer v. Merrill, 33 Mich. 284.

§ 180. ——Propriety and grounds of leave to sue.

¶ 762. Although under How. St., §§ 6702, 6703, the right to have an action at law on a mortgage debt "after * * * bill shall be filed," and pending for foreclosure, and after decree, is subject to leave of the court of chancery, yet in view of the power to grant execution after sale of mortgaged premises on foreclosure in equity, the court can-

not authorize an action at law for the deficiency until an execution has been issued therefor under order of the court and returned unsatisfied in whole or in part.—Shields v. Riopelle, 63 Mich. 458.

¶ 763. Leave is properly granted to a creditor to bring an action at law against one of two indorsers upon a note secured by a mortgage, for a deficiency remaining after the foreclosure of the same, although no execution has issued for such deficiency where the maker of the note and the other indorser, who were alone made parties to the foreclosure proceedings, are shown to be insolvent.—Steele v. Kent Circuit Judge, 109 Mich. 647.

¶ 764. In assumpsit on the debt, to which it is pleaded that foreclosure pends and has been carried to decree and sale and leave to sue has not issued, whether a complainant in foreclosure should be permitted to proceed at the same time at law is not a question for a jury.—Goodrich v. White, 39 Mich. 489.

§ 181. ——Petition and order of leave.

Necessity for leave to maintain action at law pending or following foreclosure in equity, see Jud. Act, chap. XIX, § 25; Comp. L. 1915, § 12679.

¶ 765. Upon the foreclosure of a mortgage given to secure notes of a corporation, there was a deficiency, and the proceeds were applied to satisfy certain of the unindorsed notes. The defendant and the other directors had indorsed the other notes. Complainant, in a petition for leave to bring an action at law against the defendant to recover the deficiency, alleged that all the directors consented to the application of the proceeds of the foreclosure sale to the unindorsed notes. Held, upon demurrer, that this allegation was sufficiently definite to point out the defendant as consenting to said application.—Kalkaska County State & Savings Bank v. Kalkaska Canning Co., 154 Mich. 703.

¶ 766. Leave to proceed at law while foreclosure is pending in chancery ought not to be granted ex parte where defendant is within reach.—Goodrich v. White, 39 Mich. 489.

¶ 767. An order granting permission to sue at law for the deficiency arising upon the foreclosure of a mortgage has not expended its force, so as to preclude an action in another county, when suit is brought in one county and is afterwards discontinued, if there is in the order itself no limitation upon the right granted.—Steele v. Kent Circuit Judge, 109 Mich. 647.

¶ 768. An order granting leave to sue indorsers for deficiency, entered nunc pro tunc, is not objectionable, in that it deprives defendant of the right to plead the statute of limitations, when it appears that the suit was in fact commenced in time.—Steele v. Kent Circuit Judge, 109 Mich. 647.

§ 182. Equity suits to enforce personal liability.

¶ 769. There is no statutory authority for a chancery suit independent of foreclosure proceedings to recover against either the maker of a mortgage or against those who have assumed to pay it.—Kollen v. Sooy, 172 Mich. 214.

VII. REDEMPTION FROM SALE.

§ 183. In general.

Persons entitled to redeem, see post §§ 184-186.
Time for redemptions and extensions, see post § 187.
Procedure and method of payment, see post § 188.
Rights of redemption and effect of redemption, see post § 189.
Reimbursement for expenditures on redeemed premises, see post § 190.
Subrogation and lien for redemption money, see post § 191.
Properties salable without redemption, see post § 192.
Bills to redeem from defective foreclosure, see ante § 158.
Purchase by mortgagor or his agent as amounting to redemption, see ante § 140.
Propriety of indorsement on deed of terms of redemption, see ante ¶ 499.
Rights and title of purchaser after redemption barred, see ante § 135.
Redemption at rate of interest specified in deed, see ante ¶ 169.
Bills to redeem from mortgage after defective foreclosure, see ante V; and see also Mortgages, IX.
Common-law "equity of redemption" from the mortgage and act of redemption by paying mortgage, see Mortgages, VIII, IX.
Contracts limiting or releasing right of redemption, see Mortgages, IX.
Right of mortgagor to recover payment illegally exacted as condition to redemption, see Payment, VI.
Application to pending foreclosures of act giving right of redemption (Pub. Acts 1899, No. 200), see Statutes, VI.
Manner of redemption from statutory foreclosure, see Comp. L. 1915, § 14959.
Provision against sale on execution of equity of redemption where judgment was for mortgage debt, see Jud. Act, chap. XXIII, §§ 124-126; Comp. L. 1915, §§ 12939-12941.

¶ 770. A bill in equity is not needed to enable a mortgagor to redeem from a foreclosure sale within the period allowed for redemption.—McHugh v. Wells, 39 Mich. 175.

¶ 771. Redemption from a statutory foreclosure cannot be conditioned on the pay-

ment of any allowances in the nature of fees beyond what are authorized by statute, and an attorney fee paid under protest on redeeming was allowed to be recovered back.—Vosburgh v. Lay, 45 Mich. 455.

¶ 772. An owner of the equity of redemption omitted from a foreclosure to which the first, second and third mortgagees were made defendants, but made a defendant on a foreclosure bill by a trustee who took title for the second mortgagee, cannot complain that he is not bound by the foreclosure and at the same time insist that it extinguished all the mortgages and left him bound to pay only the first and second in order to redeem.—Walsh v. Robinson, 135 Mich. 16.

§ 184. Persons entitled to redeem.

Subsequent mortgagees, see post § 185.
Grantees of mortgagor, see post § 186.
Right of dowress to equity of redemption, see Dower § 12.
Payment of mortgage by execution purchaser or redemption purchaser under execution on the equity of redemption, see Jud. Act, chap. XXIII, § 122; Comp. L. 1915, § 12937.

¶ 773. Any one who has any interest in mortgaged premises, or in any part of them, is entitled to redeem them from foreclosure, and he must redeem completely if at all.—Powers v. Golden Lumber Co., 43 Mich. 468.

¶ 774. Where a mortgage executed prior to the statute abolishing ejectment by mortgagees was assigned for the purpose of securing the assignor's debt, the right of the assignor to redeem stands upon the same footing as that of the mortgagor of real estate; it is not a mere chose in action.—Graydon v. Church, 7 Mich. 36.

¶ 775. Where the whereabouts of a mortgagor, who had been absent for two years from his home, was unknown, and where he had been reported as dead, his brother was held entitled, under the circumstances of the case, to redeem in his own name his land from a statutory foreclosure.—Squire v. Wright, 85 Mich. 76.

¶ 776. Where the assignee of two mortgage instalments has purchased the equity of redemption, he has the right to redeem from the mortgage lien of his assignor who still holds one instalment.—Jennings v. Moore, 83 Mich. 231.

¶ 777. A tenant in common of mortgaged land from whom the foreclosure has been purposely concealed may redeem; but he must not have been guilty of laches, nor have acquiesced by accepting his share of the surplus, and to make such redemption effectual he must pay to the purchaser the whole amount bid at the sale, with the interest (How. St., § 8507).—Norton v. Tharp, 53 Mich. 146.

¶ 778. A guardian has a right to redeem the lands of his ward from mortgage sale.—Marvin v. Schilling, 12 Mich. 356.

¶ 779. Where a debtor executed a bona fide mortgage on property of the value of $3,500, used as a homestead, to a sister, for $2,500, making the principal payable to his children and the interest to the sister for life, and conveyed the equity to a son, and where the mortgage was foreclosed, the creditors of the mortgagor had no right in redeeming from the foreclosure, to disregard the titles of the children, and acquire the property by paying the amount secured to the sister; and such creditors had no right to redeem at all as the deed to the son was valid as to such creditors.—Palmer v. Bray, 136 Mich. 85.

§ 185. ——Subsequent mortgagees.

¶ 780. A subsequent mortgagee may redeem a prior mortgage which has been foreclosed by advertisement.—Carter v. Lewis, 27 Mich. 241.

¶ 781. A subsequent mortgagee could, under R. S. 1838, redeem premises sold on the statutory foreclosure of a prior mortgage.—Kimmell v. Willard's Adm'rs, 1 D. 217.

¶ 782. Where there is an existing mortgage a subsequent mortgagee can be made to redeem against it or be barred of all rights under his mortgage.—Tower v. Divine, 37 Mich. 443.

§ 186. ——Grantees of mortgagor.

¶ 783. Pending the year allowed for redemption a mortgagor quitclaimed the land by deed which was not delivered because of the grantee's failure to perform, and then he quitclaimed to another. Held, that the latter had a right to redeem.—Dodge v. Kennedy, 93 Mich. 547.

¶ 784. A subsequent purchaser from the mortgagor whose deed, by reason of his having had notice of the mortgage, is subject to the lien, is entitled to redeem, and the question of the bona fides of his purchase cannot be raised by the mortgagee.—Stone v. Welling, 14 Mich. 514.

§ 187. Time for redemption; extensions.

Extension of time for redemption by delay in filing sheriff's deed, see ante ¶ 186.
Validity of decree limiting time allowed for redemption, see ante ¶ 377.
Effect on time for redemption of erroneous indorsement on deed as to redemption period, see ante ¶¶ 174, 175.
Extension of time for redemption until foreclosure by lapse of time or in equity where statutory foreclosure notice insufficient, see ante ¶ 619.
Shortening time for redemption as impairing contract, see Constitutional Law § 182.

Application to pending foreclosures for statute changing time for redemption, see Statutes, VI.
Time for redemption from statutory foreclosure, see Comp. L. 1915, § 14959.
Statutory provision for period of redemption from equity foreclosure, see Jud. Act, chap. XIX, § 23; Comp. L. 1915, § 12677.

¶ 785. Pub. Acts, 1899, No. 200, requiring that lands should not be sold within six months after filing a bill in foreclosure and giving the mortgagor that time to redeem abrogates the earlier court decisions as to what was a reasonable time within which to redeem.—Redfield v. Reid, 148 Mich. 545.

¶ 786. The time within which to redeem a mortgage from a foreclosure sale fixed by Pub. Acts 1899, §§ 111, 118, is "six months from the time of such sale" and the time of sale does not mean "time when the sale is confirmed."—Trombley v. Klersy, 147 Mich. 370.

¶ 787. An offer to a mortgagor to give him time within which to redeem the whole or a part of the premises from statutory foreclosure cannot avail to correct illegalities or to preclude the mortgagor from taking advantage of them and demanding redemption, and a limit of ten days proposed for redemption is inequitable.—Grover v. Fox, 36 Mich. 461.

¶ 788. Where, at the time of the filing of a bill attacking a mortgage foreclosure sale by advertisement, the period of redemption has not expired, and, when later it is about to expire, it is extended by stipulation until 30 days after the decree in the trial court, the right to redeem will expire at the end of the 30-day period unless the mortgage sale is set aside as void.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

§ 188. Procedure and method of payment.

Tendering or depositing amount due to redeem on applying to court to set aside foreclosure, see ante § 153.
Notice to purchaser of payment on redemption from foreclosure by advertisement, see Comp. L. 1915, § 14967.
Procedure and method of payment on redemption from statutory foreclosure and release from mortgage, see Comp. L. 1915, §§ 14959, 14960.
Method of payment on redemption from equity redemption, see Jud. Act, chap. XIX, § 23; Comp. L. 1915, § 12677.

¶ 789. Payment of principal with interest at the rate recited in the sheriff's deed as that borne by the mortgage is sufficient to effect redemption.—Dodge v. Kennedy, 93 Mich. 547.

¶ 790. The statute of 1840 for the foreclosure of mortgages (Laws of 1840, p. 145) required redemption moneys to be paid to the register of deeds, and to no other person; and it was his duty, upon such payment, to destroy the deed, and pay over the money to the purchaser, his heirs or assigns.—Woodbury v. Lewis, W. 256.

¶ 791. The register of deeds has no right to receive anything but money in redemption of property sold. His powers are limited to receiving the money and destroying the deed. He is a special agent for these purposes only, and his acts are not binding on the purchaser when he exceeds or departs from his authority without the assent of the purchaser.—Woodbury v. Lewis, W. 256.

¶ 792. Although the register of deeds is allowed to receive nothing but money, yet it is a sufficient payment, in redemption of a foreclosed mortgage, to give him, at his request and in good faith, a check for the amount required, keeping the money to meet it in the bank until called for.—Carter v. Lewis, 27 Mich. 241.

§ 189. Rights of redemptioner and effect of redemption.

Right to redeem each parcel separately, see also ante ¶ 660.
Right of redemptioner to receive certificate of payment on payment or tender with damages for refusal, see Comp. L. 1915, § 14961.
Discharge of mortgage by certificate of mortgagee or by certificate of register in chancery that foreclosure decree satisfied, see Comp. L. 1915, § 11743.

¶ 793. A sale on statutory foreclosure satisfies the mortgage debt and releases the personal obligation to the extent of its proceeds; but a subsequent incumbrancer who redeems from it thereby obtains such an interest in the land as will protect him, and later incumbrancers who are also benefited must not only repay the redemption money, but must pay his mortgage; and as the two claims are distinct, the liens therefor are not merged, and the payment of one cannot release the other.—Powers v. Golden Lumber Co., 43 Mich. 468.

¶ 794. One who holds a mortgage under a fraudulent assignment is entitled, if he has redeemed upon the foreclosure of a prior mortgage, to receive from the owner of the land the amount of the redemption, but he cannot have interest thereon where his concealment of the fact of such assignment to himself and his refusal to give it up have delayed settlement and prevented the owner from redeeming.—Wallace v. McBride, 70 Mich. 596.

¶ 795. Under Comp. L. 1871, § 6922, providing that in case of redemption after foreclosure sale the deed given on the sale shall be void and of no effect, a holder of another mortgage, who redeems, during the

period of redemption, for his own protection, after a sale had been had upon foreclosure proceedings, instituted by advertisement, is in the position of an assignee.—Dodge v. Fuller, 48 Fed. 847.

¶ 795a. Redemption by a guardian from foreclosure of the lands of the infant with money volunteered by a stranger for the purpose is presumably in the interest of the owner, who may insist on the rights derived therefrom.—Tong v. Marvin, 26 Mich. 35.

¶ 796. When a mortgagor redeems, it should always be construed as payment, he being personally liable for the debt. But when his vendee redeems, who is not personally liable, and there is an intervening mortgage between the one redeemed by him and his equity of redemption, the same rule should prevail as in case of redemption by a subsequent mortgagee.—Johnson v. Johnson, W. 331; Webb v. Williams, W. 544.

§ 190. Reimbursement for expenditures on redeemed premises.

Right of purchaser to reimbursement for taxes and insurance paid during period of redemption, see also ante ¶ 564.

¶ 797. A mortgagor in redeeming from foreclosure must reimburse the mortgagee for money paid out by the latter for taxes, repairs, and insurance, where the mortgage contract so provides.—Prybeski v. Piechoviak, 170 Mich. 572.

¶ 798. The purchaser of property sold on foreclosure of mortgage will be allowed a reasonable expenditure upon redemption thereof for such repairs made by him as were in good faith and necessary.—Cusick v. Spencer, 149 Mich. 434.

§ 191. Subrogation and lien for redemption money.

¶ 799. A lien of a junior mortgagee for redemption money paid on foreclosure of the first mortgage is an independent equity, and not merely appurtenant to the mortgage held by the mortgagee who has redeemed; so that proceedings to enforce the lien may be taken before such mortgage matures, and the discharge of the junior mortgage does not cut off the lien.—Powers v. Golden Lumber Co., 43 Mich. 468.

¶ 800. Before the period of redemption from a statutory foreclosure expired, A., the mortgagor, died. His widow sold the land to B. by warranty deed, in consideration of B.'s paying her $25 and what was due on the mortgage. B. redeemed, and A.'s heirs afterwards brought ejectment against him. Held, that B. had a lien on the land for the redemption money paid by him, with interest, less the use and occupation of the premises over and above improvements.—Webb v. Williams, W. 544.

§ 192. Properties salable without redemption.

¶ 801. Where a public electric lighting plant is being operated at a loss by a receiver appointed in a foreclosure proceeding, the court may order a sale of the entire property and franchise without the right to make redemption.—Webber v. Genesee Circuit Judge, 184 Mich. 112.

FOREIGN to FOREIGN CAUSES OF ACTION.

Cross-References.

Foreign—
See generally specific topics treating of subjects with which the adjective "foreign" is applied, e. g., Estates of Decedents (foreign administration); Foreign Corporations; Foreign Judgments; Receivers; Wills, V, E.
Foreign Causes of Action—
Jurisdiction over, see Courts §§ 43-46.

FOREIGN CORPORATIONS.

TREATS of corporations in respect of their acts and doings in a state other than that of their creation and existence.

Analysis.

I. Status and recognition, regulation and privileges.

§ 1. In general; status.
§ 2. Regulation and terms of admission.
§ 3. ——Public service corporations.
§ 4. ——Permissive or enabling acts.
§ 5. ——Conditions obnoxious to Federal Constitution and laws.
§ 6. Comity of states toward corporations.
§ 7. Submission and subjection to laws of state.
§ 8. Designation of agents for service.

§ 9. License and franchise fees.
§ 10. Effect of noncompliance with regulations.
§ 11. ——On collateral and related contracts.
§ 12. ——On foreign contracts.
§ 13. ——Contracts of de facto or defective corporation.
§ 14. ——Validation of contracts by subsequent repeal or compliance.
§ 15. Interstate commerce contracts and doings.
§ 16. What constitutes doing business or contracting within state.
§ 17. ——Single and discontinuous acts and contracts.
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II. Powers, duties, rights and liabilities.

§ 20. In general; charter limitations.
§ 21. Acquiring, holding and selling realty.
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III. Actions by and against.

§ 25. Jurisdiction, process and appearance.
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§ 28. ——Of compliance with statutes or exception therefrom.

IV. Stock and stockholders, agents and officers.

§ 29. In general.

I. STATUS AND RECOGNITION, REGULATION AND PRIVILEGES.

§ 1. In general; status.

Regulation and admission to do business in state, see post §§ 2-9.
Effect of noncompliance with regulations for admission to do business, see post §§ 10-14.
Immunity from regulations as to interstate business, see post § 15.
What constitutes doing business in state, see post §§ 16-18.
Estoppel to question admission, see post § 19.
General law of corporations, including all matters relating to either domestic or foreign corporations but not dependent on their foreign existence and character, see Corporations.
Creation of corporations by joint act of several states, see Corporations ¶ 9.
Consolidation with domestic corporation, see Corporations § 206.
Organization of corporation to take assets of foreign one, effect as "reorganization," see Corporations ¶ 774.
Citizenship within the constitution and for purposes of Federal jurisdiction, see Constitutional Law, X; Courts, V.

¶ 1. A foreign corporation is not a citizen of a state creating it except in a qualified sense; and it can do no business in any other state except on such conditions as the latter sees fit to impose.—Home Ins. Co. v. Davis, 29 Mich. 238.

¶ 2. Foreign corporations organized to do business not open to citizens generally cannot carry on business in Michigan unless express or implied permission is given them to do so.—People v. Howard, 50 Mich. 239.

¶ 3. A corporation is a creature of the sovereign will, and when created by one sovereignty it can operate within another's limits only by the latter's express permission, or by permission implied from principles of comity, but such permission does not make it any the less a foreign corporation.—State Treasurer v. Auditor General, 46 Mich. 224.

¶ 4. A foreign corporation doing business in Michigan in conformity to the laws of the state is not an organization of this state, within the meaning of How. St., § 8960d3, forbidding corporations organized in this state from taking any name so closely resembling the name used by "any other organization of this state" as to mislead the

public as to its identity.—People ex rel. Home Life Ins. Co. v. Home Life Assur. Co., 111 Mich. 405.

§ 2. Regulation and terms of admission.

Permissive or enabling acts, see post § 4.
Conditions obnoxious to constitutional principles, see post § 5.
Conditions affecting foreign public service corporations, see post § 3.
Denial of comity toward corporation repugnant to public policy of the state, see post § 6.
Duty to designate agent for service, see post § 8.
Payment of license or franchise fees, see post § 9.
Effect of doing business without complying with regulations, see post §§ 10-14.
Right to do interstate commerce business without compliance, see post § 15.
What constitutes doing business so as to require certificate, see post §§ 16-18.
Presumptions and proof as to compliance, see post § 28.
Regulation of corporations as such and not as foreign corporations, see Corporations.
Railroad and carrier regulations, see Carriers, I; Railroads; Public Service.
Regulation and admission of foreign insurance corporations to do insurance business, see Insurance, I, II.
Admission of foreign corporation to do investment or banking business, see Banking § 2.
Factors for consideration on application of foreign investment corporation to do business, see Banking ¶ 4.
Mandamus to compel issuance of certificate of admission, see Mandamus, III.
Revocation or other remedy for combining in trade, see Combinations § 9.
Statutory requirements for obtaining certificate of authority, see Comp. L. 1915, §§ 9063 et seq.
Regulations respecting foreign mining, etc., corporations, see Comp. L. 1915, §§ 9073-9076.

¶ 5. Corporations of one state have no right to exercise their franchises in another state except upon the assent of such other state given on such terms as the legislature thereof may impose.—People ex rel. Glens Falls Ins. Co. v. Jackson Circuit Judge, 21 Mich. 577; Thompson v. Waters, 25 Mich. 214; Home Ins. Co. v. Davis, 29 Mich. 238; American Ins. Co. of Chicago v. Stoy, 41 Mich. 385; People v. Howard, 50 Mich. 239; Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485.

¶ 6. Corporations of one state have no right to exercise their franchises in another state except upon the assent of such other state, and upon such terms as may be imposed by its legislature.—Rensenhouse v. Seeley, 72 Mich. 603; First Nat. Bank v. Burch, 80 Mich. 242; Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464.

¶ 7. Corporations can be admitted to do business in states other than those where created, only upon such terms as such other states may see fit to impose.—Pollock v. German Fire Ins. Co., 132 Mich. 225.

¶ 8. States may impose conditions upon the right of foreign corporations to do business within their limits, so long as their effect is not to obstruct or restrain commerce among the states.—Coit & Co. v. Sutton, 102 Mich. 324.

¶ 9. It is competent for a state to prescribe the terms upon which a foreign corporation may enter and transact business within the state.—Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239.

¶ 10. A state may prohibit foreign insurance companies from doing business within its limits, or, in allowing them to do so, may impose such conditions as it pleases.—Swing v. Weston Lumber Co., 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. Rep. 497.

§ 3. ——Public service corporations.

¶ 11. A Wisconsin corporation furnishing heat, light, etc., which has secured permission from the Railroad Commission of Wisconsin to issue stock, is not entitled to receive from the Secretary of State of Michigan a certificate of authority to carry on business at Michigan until it has obtained from the Michigan Railroad Commission an order authorizing the issue of stock as required by Act No. 144, Public Acts of 1911, § 1, as amended by Act No. 177, Public Acts of 1911.—Peninsular Power Co. v. Secretary of State, 169 Mich. 595.

§ 4. ——Permissive or enabling acts.

¶ 12. How. St., § 4161d6, being section 37 of the act relating to the incorporation of domestic manufacturing and mercantile corporations, which provides that foreign corporations organized for any of the purposes contemplated by said act, upon recording copies of their articles of association and appointing a resident agent for service of process, may carry on business in this state, and shall enjoy all the rights and privileges, and be subject to all the restrictions and liabilities, of corporations existing under said act, does not exclude foreign corporations from doing business within this state until they have complied with such conditions, or invalidate contracts made by them, but, rather, prescribes the terms upon which such corporations, if they so desire, may become entitled to the benefits conferred by the act upon domestic corporations of similar character.—People v. Hawkins, 106 Mich. 479.

§ 5. ——Conditions obnoxious to Federal Constitution and laws.

Equal protection of the laws, see Constitutional Law § 224.

Privileges and immunities of citizens, effect of laws to abridge, see Constitutional Law § 230.

¶ 13. A condition that a foreign corporation doing business in the state shall submit itself to the jurisdiction of the state courts is lawful, and precludes the right of transferring causes from a state to a federal court. People ex rel. Glens Falls Ins. Co. v. Jackson Circuit Judge, 21 Mich. 577; Home Ins. Co. v. Davis, 29 Mich. 238; Contra, Home Ins. Co. of New York v. Morse, 20 Wall. (87 U. S.) 445, 22 L. ed. 365.

§ 6. Comity of states toward corporations.

Effect of exercise of comity on status of the corporation, see ante ¶ 3.
Terms on which admissible to do business in state, see ante § 2.
Powers of the corporation as limited by its charter, see post § 20.
Restriction of powers to like powers of domestic corporations, see post § 20.
Comity as to holding realty, see post § 21.
Comity as to contracts, see post § 22.
General doctrine of comity, see Conflict of Laws, I.
Law governing foreign corporations, see Conflict of Laws § 35.

¶ 14. The recognition of the existence of a corporation by states other than the state creating it, and enforcement of its contract made therein, depend upon the comity of those states, which comity is never extended where the existence of the corporation, or the exercise of its powers, is prejudicial to their interests or repugnant to their policy. —First Nat. Bank v. Burch, 80 Mich. 242.

§ 7. Submission and subjection to laws of state.

Submission to jurisdiction by voluntary appearance, see post § 25.

¶ 15. An insurance corporation which voluntarily does business in a foreign state voluntarily submits itself to become amenable to the laws of such state, although it neglects or refuses to domesticate there with authority to openly do business on a par with home insurance companies.—Cox v. Railway Conductors' Co-operative Protective Ass'n, 194 Mich. 213.

¶ 16. Where a foreign corporation is doing business in a state with the consent of the state, it is subject to such changes as may from time to time be made in the law of the state touching the service of process upon it.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

¶ 17. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process.—St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354.

§ 8. Designation of agents for service.

Effect of requirement on jurisdiction of the courts, see post § 25.
Requirements of the statute as to designation, see Comp. L. 1915, §§ 9063, 9072.

¶ 18. Act No. 321, Pub. Acts 1907, relates only to liquor dealers' bonds, and does not repeal section 5198, 2 Comp. Laws 1897, which requires foreign corporations to appoint an attorney in Michigan for the service of process.—People ex rel. Wipfler v. Fidelity & Deposit Co. of Maryland, 163 Mich. 94.

§ 9. License and franchise fees.

Conditions for admission to state, see ante §§ 2-5.
Invalidity of contracts made without paying fee, see post § 10.
Immunity of corporations confined to interstate business, see post § 15.
General law of licenses, see Licenses.
Taxation of foreign corporations and stocks or shares in them, see Taxes.
Right to question constitutionality of licensing law after paying license, see Constitutional Law § 29.
Franchise fee for admission, see Comp. L. 1915, § 9065.
Fee on increase of capital stock or increase in proportion of capital employed in Michigan, see Comp. L. 1915, § 9067.

¶ 19. Where a foreign corporation not only sells its products here through itinerant agents, but comes within the state and asks to have its articles filed here and to be put on the same footing with home corporations, it must pay the franchise fee that a domestic corporation must pay.—Moline Plow Co. v. Wilkinson, 105 Mich. 57.

¶ 20. Pub. Acts 1893, No. 79, subjecting foreign corporations theretofore authorized to do business in this state that had not filed or recorded their articles under the laws of this state prior to the passage of the act of 1893, to the payment of a specified franchise fee upon every increase of their capital stock, does not apply to an increase of stock made prior to the passage of the act, although the certificate thereof was not filed with the secretary of state until after the act took effect; and although in case of a domestic corporation the increase would not take effect until the certificate thereof was received by the secretary of state (How. St., § 4161a1, subd. 4).—Warren-Scharf Co. v. Secretary of State, 115 Mich. 234.

¶ 21. Comp. L. 1897, § 8754; How. St., 2nd Ed., § 9617, providing that every corpo-

ration which is required by law to file articles of association with the secretary of state and every foreign corporation which shall be permitted to transact business in the state which shall not, prior to the passage of the act, have filed or recorded its articles of association under the laws of the state, and been thereby authorized to do business therein, shall pay to the secretary of state a certain franchise fee, and that all contracts made in the state after a certain date by any corporation which has not first complied with the act, shall be wholly void, applies not only to such foreign corporations as actually file and record their charters but to all foreign corporations carrying on or transacting business in the state, whether they choose to avail themselves of the right of registration or not.—Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239.

§ 10. Effect of noncompliance with regulations.

See also post ¶ 44.

Validity of contracts collateral to corporate contract which is invalid, see post § 11.

Validity of contracts made in other states, see post § 12.

Treating contract as individual because corporation was defective, see post § 13.

Validation of the contract by complying with statute or by its repeal, see post § 14.

Failure to comply with enabling acts, see ante ¶ 12.

Submission to laws of state by doing business therein without permit, see also ante ¶ 15.

Estoppel to question admission, see post § 19.

Pleading and proof as to compliance and presumptions thereabout, see post § 28.

Proper remedy to compel compliance with statutes, see Mandamus; Quo Warranto.

Embezzlement from corporation doing business without license, see Crimes § 72.

Liability for costs in action for penalty for not filing copy of charter, see Costs ¶ 19.

Statutory disability to contract until compliance and without certificate unrevoked, see Comp. L. 1915, § 9068.

¶ 22. The failure of a foreign corporation to comply with Comp. Laws 1915, § 9068, providing that no foreign corporation, subject to the provisions of the act, shall be capable of making a valid contract in the state until it shall have fully complied with the requirements of the act and at the same time holds an unrevoked certificate to that effect from the secretary of state, invalidates all contracts.—Flint v. Le Heup, 199 Mich. 41.

¶ 23. Where a foreign corporation does business in Michigan of a purely local nature, without complying with Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903, it cannot recover on a contract relating to that business.—Imperial Curtain Co. v. Jacob, 163 Mich. 72.

¶ 24. The contracts of a foreign corporation failing to comply with the Michigan statute governing its admission to do business cannot be enforced by it until it has satisfied the statute; but such contracts are not void.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122.

¶ 25. A contract made in this state by a foreign corporation doing business here which corporation has not paid a franchise fee as required by Pub. Acts 1893, No. 79, is void.—Rough v. Breitung, 117 Mich. 48.

§ 11. ——On collateral and related contracts.

¶ 26. A foreign corporation not admitted to do business in Michigan contracted to build a public work with a Michigan municipality. Defendant surety company went on its statutory bond given to protect material men. Held, the defendant was liable to a material man despite the failure of the contracting corporation to be admitted.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122.

§ 12. ——On foreign contracts.

What contracts are foreign, see post § 18.

¶ 27. Act No. 34, Pub. Acts 1903, providing that no foreign corporation shall, without compliance with its provisions, maintain an action in Michigan upon any contract made in Michigan does not prevent such corporation from enforcing in the Michigan courts a contract made in Pennsylvania.—Pittsburgh Coal Co. v. Northy, 158 Mich. 530.

¶ 28. A contract made by a foreign corporation elsewhere than in the state of Michigan is valid although it is to be performed in the state, within the provisions of Pub. Acts 1891, chap. 182, § 1, as amended by Pub. Acts 1893, chap. 79, § 1, How. St., 2nd ed., § 9617, requiring every foreign corporation, permitted to transact business within the state, and not having filed articles of association under its laws, to pay a certain franchise fee on its capital stock and providing that all contracts made in the state after Jan. 1, 1894, by any corporation that has not first complied with the provisions of the act, shall be wholly void.—Holder v. Aultman, Miller & Co., 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269, aff'g 68 Fed. 467.

§ 13. ——Contracts of de facto or defective corporation.

¶ 29. There can be no recovery on a contract of sale of property by individuals on the theory that a nominal corporate party was not legally organized, where it was duly incorporated in another state and had its officers and carried on its business as a corporation, but had not paid the franchise fee to entitle it to enforce its contracts or do business within the state; such an omission makes the contract void but does not affect

the validity of the incorporation.—Rough v. Breitung, 117 Mich. 48.

§ 14. ——Validation of contracts by subsequent repeal or compliance.

¶ 30. An Illinois corporation sold goods in Michigan without complying with Act No. 34, Pub. Acts 1903, which provided that a foreign corporation should have no remedy to enforce contracts made without compliance with its provision requiring the filing of articles in Michigan. The goods were sold before this statute was repealed. Held, that after its repeal said corporation could not recover for the sale of said goods.—Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399. (Bird, C. J., and Hooker and Brooks, JJ., dissenting.)

¶ 30a. A contract made by a foreign corporation which has not been authorized to do business in this state is not void under Pub. Acts 1901, No. 206 and such a contract may be enforced by suit after the corporation has filed or recorded a certified copy of its charter or articles of association.—Hastings Industrial Co. v. Moran, 143 Mich. 679.

§ 15. Interstate commerce contracts and doings.

See also post ¶¶ 42, 47.

What constitutes interstate commerce within statutory exceptions, see Commerce §§ 4, 12.

Interstate sale as barring defense of want of admission and license, see Commerce § 4.

¶ 31. As long as the business of a foreign corporation is limited to acts of interstate commerce and it does not establish a local agency within the state to represent it in the sale of its goods, wares, and merchandise, it is not amenable to the laws of this state requiring foreign corporations, as a condition of transacting business in the state, to file a copy of its charter or articles of incorporation within the state.—Standard Fashion Co. v. Cummings, 187 Mich. 196.

¶ 32. In an action by a foreign corporation not licensed to do business within the state to recover for the purchase price of a ventilating system, which, according to the contract, was to be installed by the seller, evidence held insufficient to show that the apparatus had such intrinsic or peculiar quality or inherent complexity as made it necessary for the manufacturer to agree to install it in order to effect sales generally, so that the contract was not within the exception in § 8 of Act 310, Pub. Acts, 1907, as amended, How. 2nd Ed., § 9654, that the provisions of the act providing as to licensing of foreign corporations as a prerequisite to doing business within the state should not be construed as prohibiting any sale of goods or merchandise which would be protected by interstate commerce.—B. F. Sturtevant Co. v. Adolph Leitelt Ironworks, 196 Mich. 552.

¶ 33. An order not subject to countermand or cancellation, sent from this state to another state for books to be delivered in this state, which was subsequently done, payment to be made in this state, is within section 6, Act No. 206, Pub. Acts 1901, providing that section 1 of the same Act, requiring foreign corporations to file their charter, appoint an agent, etc., shall not be applicable to contracts protected by the rights of interstate commerce.—Fifth Ave. Library Society v. Hastie, 155 Mich. 56.

¶ 34. Because of the operation of the interstate commerce law, Laws 1893, Act No. 79, requiring payment of a franchise fee, must be held not to apply to a foreign corporation the business of which in Michigan consists merely of selling through itinerant agents and delivering commodities manufactured outside of the state.—Coit & Co. v. Sutton, 102 Mich. 324; Moline Plow Co. v. Wilkinson, 105 Mich. 57; M. I. Wilcox Cordage & Supply Co. v. Mosher, 114 Mich. 64.

¶ 35. Although a foreign corporation may not have complied with Act No. 34, Pub. Acts 1903, or Act No. 310, Pub. Acts 1907, requiring it to file articles before doing business in Michigan, it may recover for goods ordered by mail and shipped from Chicago into Michigan.—Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399.

¶ 36. Comp. L. 1897, § 8754; How. St., 2nd Ed., § 9617, requiring the payment of a franchise tax by all corporations, including foreign corporations, as a condition to the lawful transaction of business in the state, and making contracts void if the statute is not complied with, does not apply to foreign corporations engaged in purely interstate commerce.—Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239.

¶ 37. A contract made in the state between a Michigan corporation and a foreign corporation for the sale of automobile wheels throughout the United States on commission, upon the making of which the foreign corporation establishes an office in the state, from which it carries on its business of securing orders from the entire country for the sale of wheels, without procuring a certificate of authority to do business in the state, constitutes interstate commerce and hence is not within the prohibition of Comp. L. 1915, § 9063, providing that it shall be unlawful for any corporation organized under the laws of another state to carry on its business in the state until it shall have procured from the secretary of state a certificate of authority, and requiring certain prerequisites to the issuance of such certificate and Comp. L. 1915, § 9068, providing that no foreign corporation, subject to the provisions of the Act, shall be capable of making a valid con-

tract in the state until it shall have complied with the requirements of the Act and Comp. L. 1915, § 9070, providing that the Act shall not be construed "to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce."—American Distributing Co. v. Hayes Wheel Co., 250 Fed. 109.

§ 16. What constitutes doing business or contracting within state.

See also ante ¶ 19.
Business requiring payment of franchise fees, see ante § 9.
Interstate commerce contracts and doings, see ante § 15.
Single contracts and dealings, see post § 17.
Place of the contract, see post § 18.
Pleading to take the contract out of the category of "doing business," see also post ¶ 95.
Sales in other states by agents, see also Commerce §§ 4, 5.

¶ 38. A foreign corporation organized for the purpose of establishing and maintaining a summer resort in a foreign country is engaged in business in the state where it has established an office and agency in a city in the state, with its fiscal agent and secretary transacting its business in such city, where its executive officers and nearly all of its resident directors reside and meetings of its stockholders and directors are held, and its stock book is kept and certificates are issued by its secretary.—Flint v. Le Heup, 199 Mich. 41.

¶ 39. Where a foreign corporation which had not filed its articles of association with the secretary of state until after the contract was made, had entered into a contract to construct and equip a canning factory in this state according to certain plans, specifications, terms, and conditions set out and began the construction thereof immediately thereafter, and all of the machinery and equipment was shipped into this state from other states, and no part of the contract values were furnished within the state, except the construction of the foundation and building and the placing of machinery amounting to about 30 per cent of the contract price, and at no time prior to the completion of the building did the corporation have an office, warehouse or general agent in this state, such contract is not one relating to matters of interstate commerce and is not therefore exempt from the operation of the various statutes in this state relating to the requirements of a franchise tax from foreign corporations, and the statute providing terms upon which a foreign corporation may maintain suits in our courts.—Hastings Industrial Co. v. Moran, 143 Mich. 679.

¶ 40. Where a foreign corporation agrees to install a new elevator within the state, and to repair an existing elevator for a lump price, such agreement constitutes doing business within the state within the provisions of Pub. Acts 1903, Act No. 34, forbidding any foreign corporation to do business in the state unless it shall first have filed and recorded with the secretary of state a certified copy of its charter.—Haughton Elevator & Machine Co. v. Detroit Candy Co., 156 Mich. 25.

¶ 41. An Illinois corporation sent its salesmen into Michigan, who carried goods with them and sold them to buyers. Held, such sales were in violation of Act No. 34, Pub. Acts 1903, requiring foreign corporations to file articles, and said corporation could not recover for them.—Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399.

¶ 42. A contract by which a foreign corporation does business through a local agent, is not an agreement relative to interstate commerce where it does not amount to a sale of manufactured articles, nor does it constitute merely an agreement to sell.—Neyens v. Worthington, 150 Mich. 580.

¶ 43. A contract by a foreign corporation with a resident, by which the resident is given exclusive rights as to agency for the foreign corporation, and is given authority to make contracts for other agencies, the relation to continue over a term of fifteen years, constitutes a carrying on of business within the state.—Neyens v. Worthington, 150 Mich. 580.

¶ 44. Plaintiff, a foreign corporation, contracted to ship electric lamps from Pennsylvania to defendant in Michigan. The contract provided for the maintenance for an indefinite time in Michigan of an agency of the plaintiff, for the purpose of examining, repairing, and replacing the goods sold to defendant. Defendant further agreed to furnish certain solicitors to plaintiff to aid in introducing the lamps. Held, the business involved in the contract was not interstate commerce so as to relieve plaintiff from the necessity of complying with Act No. 310, Pub. Acts 1907, governing the admission of foreign corporations to do business, and having failed so to comply plaintiff could not recover on the contract for goods sold.—Nernst Lamp Co. v. Conrad, 165 Mich. 604.

¶ 45. A foreign corporation which ships goods to an agent within the state to be stored by him until sold, is engaged in doing business within the state within the meaning of Act No. 310, Pub. Acts 1907, § 9647 et seq., How. St., 2nd ed., requiring a certificate of authority from the state in order to permit a foreign corporation to do business therein.—E. A. Lange Medical Co. v. Brace, 186 Mich. 453.

¶ 46. A contract guarantying payment for goods shipped by a foreign corporation to an agent within the state to be stored by him until sold, is void under § 6 of Act No. 310,

Pub. Acts 1907, § 9652, How. St., 2nd ed., where the corporation failed to obtain a certificate of authority from the state to do business therein.—E. A. Lange Medical Co. v. Brace, 186 Mich. 453.

§ 17. ——Single and discontinuous acts and contracts.

Burden of proof as to character of the contract, see post ¶ 96.

¶ 47. A foreign corporation is not engaged in doing business within the state, so as to require the filing of the certificate of authority to do business in the state specified by Pub. Acts 1907, No. 310, How. St., 2nd ed., § 9647 et seq., where, as an act of interstate commerce, it leased a steam shovel to a person living within the state, and, upon his default, sold it to another person under a contract completed without the state by which the seller agreed to immediately ship the shovel to another point within the state, give it a working test for 10 days under supervision of the seller's representatives and repair any defects disclosed in the shovel by the test and furnish any necessary new parts to put the shovel in first class working order, which was done, especially as the transaction was a single one, and evidenced no intention of carrying on business within the state.—Vulcan Steam Shovel Co. v. Flanders, 205 Fed. 102.

¶ 48. A solitary act of business by a foreign corporation does not constitute doing business within the state within Comp. L. 1897, § 8754, How. St., 2nd ed., § 9617, requiring the payment of a franchise fee of all corporations doing business in the state and making all contracts void if the act is not complied with.—Oakland Sugar Mill Co. v. Fred W. Wolf Co., 18 Fed. 239.

§ 18. ——Place of contract; local or foreign character.

Validity of contracts made in other states with foreign corporation, see ante § 12.

What contracts are local and what foreign for purpose of conflict of laws, see Conflict of Laws § 13 et seq.

Interstate commerce, see ante § 15.

Presumption as to place of contract, see also Contracts § 304.

Contract in other state as one of agency or sale, see also Agency ¶ 8.

¶ 49. Comp. L. 1897, § 8574, invalidating "all contracts made in this state" by any foreign corporation that has not filed articles and paid a franchise tax, does not avoid a contract which, though signed by a general agent in this state, where it is to be performed, stipulates that it is not to be valid until approved at a certain city in another state, where, later, it is approved.—Holder v. Aultman, Miller & Co., 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269, aff'g 68 Fed. 467.

¶ 50. The selling agent of a New Jersey corporation signed in Michigan a contract to sell coal, but had no authority to make a binding contract of that kind. The contract was approved by the proper officer of the corporation in Pennsylvania. Held, the contract was made in Pennsylvania and not in Michigan.—Pittsburgh Coal Co. v. Northy, 158 Mich. 530.

¶ 51. A foreign insurance company which had not been authorized to do business in this state as provided for in Comp. L. 1897, § 5157, could not maintain an action in this state to recover an assessment levied under a policy issued by one of its agents in another state upon the request of an insurance broker in this state who was unable to place all the insurance applied for with the companies he represented. (Comp. L. 1897, § 10467.)—Swing v. Weston Lumber Co., 140 Mich. 344. Writ of error dismissed in 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. Rep. 497.

¶ 52. A foreign insurance company cannot enforce the liability of an insured for assessments under the policy on property in the state, though the policy was issued in Ohio on application mailed to Illinois, where the insurer has never complied with the provisions of Comp. L. 1897, §§ 5157, 5162, on which it could be admitted to do insurance business within this state; since by section 10467, it is provided that "when by the laws of this state any act is forbidden to be done by any corporation * * * without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded on such act, or upon any liability or obligation * * * in consideration of such act," and since sections 5157, 5162 apply alike to domestic and foreign insurers.—Swing v. Cameron, 145 Mich. 175.

¶ 53. A contract between a foreign corporation and a commission agent located in the state for the sale of machinery, which is signed at the place of residence of the agent by such agent and the local agent of the company and which is subsequently signed by the company's manager in the state and approved at the head office in another state pursuant to a stipulation in the contract requiring the countersignature of such manager and the approval of the contract at the head office, as a condition to its validity, is a foreign contract and is not within the provisions of Pub. Acts 1891, chap. 182, § 1, as amended by Pub. Acts 1893, chap. 79, § 1, How. St., 2nd ed., § 9617, making contracts, made within the state by a foreign corporation which has not complied with its provisions as to payment of a franchise fee on its capital stock, void.—Holder v. Aultman, Miller & Co., 169 U. S. 81, 42 L. ed. 69, 18 Sup. Ct. Rep. 269, aff'g 68 Fed. 467.

§ 19. Estoppel to question admission to state.

General law of estoppels, see Estoppel, III.

¶ 54. A foreign insurance company is estopped from defending against its contract

on the ground of want of authority to do business here.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 55. A foreign corporation failing to comply with the Michigan statute governing its admission to do business in Michigan, may not set up the invalidity of its contracts on such ground.—Kuennan v. United States Fidelity & Guaranty Co., 159 Mich. 122.

¶ 56. A foreign corporation which does a local business in the State of Michigan without complying with Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903, Act No. 310, Pub. Acts 1907, and Act No. 3, Ex. Sess. 1907, is estopped to set up the unlawfulness of its transactions, and is held to assent to the legal remedies prescribed for service on its resident agents.—Showen v. J. L. Owens Co., 158 Mich. 321.

II. POWERS, DUTIES, RIGHTS AND LIABILITIES.

§ 20. In general; charter limitations.

Powers as to conveyances and transfers of land, see post § 21.
Power to contract, see post § 22.
Power to sue or defend, see post § 23.
Defenses denied by laws of domicile, see also post ¶ 77.
Corporate powers and disabilities and the ultra vires doctrine, see Corporations.
Foreign corporations as guardians of minors, see also Conflict of Laws ¶ 97.
Engaging in Monopolistic combinations, see Combinations § 3.
Rights and liabilities of foreign carriers, see Carriers § 9.

¶ 57. Foreign corporations having proper powers may be admitted to do in Michigan what domestic corporations may do. Attorney General ex rel. Union Trust Co. v. First Nat. Bank of Bay City, 192 Mich. 640. Reversed in 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734.

¶ 58. The principle that a court will never carry into effect a contract made in violation of a positive law applies to a contract made by a foreign corporation in violation of its charter.—Orr v. Lacey, 2 D. 230.

¶ 59. Comity to a foreign corporation cannot extend to the point of granting it privileges which its charter does not permit it to exercise; and in applying for privileges it must show that it has power to exercise them.—Diamond Match Co. v. Powers, 51 Mich. 145.

¶ 60. A railroad corporation owing its existence and authority only to the laws of an individual state has no power or capacities which are not, expressly or by implication, given by the laws of that state, and none which would not be recognized and sustained by its courts.—Thompson v. Waters, 25 Mich. 214.

¶ 61. A foreign private corporation cannot establish a liability upon any act done by it as a consideration for a benefit to it, if it is an act which domestic corporations cannot do without authority of law (Comp. L. 1871, § 6543, How. St., § 8136), such as its removal from place to place, or the establishment of branches, or the acquisition of real estate, or going into business outside of the scope of its granted powers.—Chapman v. Colby, 47 Mich. 46.

¶ 62. Section 8587, 3 Comp. Laws 1897; Pub. Acts 1895, No. 270, places foreign corporations complying with its provisions, and thereby acquiring authority to transact business within the state, upon the same footing as domestic corporations, with the same rights to prosecute and defend actions in the courts of the state, to enforce their contracts, and to use the remedies authorized by law, as are possessed by domestic corporations.—Stack v. Detour Lumber & Cedar Co., 151 Mich. 21.

§ 21. Acquiring, holding and selling realty.

Powers of corporations in general, see Corporations, XIII.

¶ 63. The strictly legal existence by force of obligatory law of a corporation is confined to the state which created it and endowed it with its powers, capacities and rights, which it can only exercise in another state by the permission, express or implied, of the legislative power thereof; but the mere right of the corporation to purchase and sell property, not being in its nature strictly a franchise, will be recognized and protected in another state, subject only to the qualification that the enjoyment and exercise of such right shall not be contrary to the laws or settled policy of the latter state, or prejudicial to its interests or those of its citizens.—Thompson v. Waters, 25 Mich. 214.

¶ 64. The courts of any state are bound, unless the constitution or the legislature has, either expressly or by implication, declared a contrary rule, to recognize the right of corporations of another state to realize and collect debts due to them, by receiving a conveyance of lands in the former state.—Thompson v. Waters, 25 Mich. 214.

¶ 65. In regard to the taking, holding or conveying of lands in this state by a corporation created in another state, the legislature has adopted no policy and enacted no statute modifying the generally received doctrines of comity. The several separate acts of incorporation in Michigan are too various and dissimilar in this regard to throw any light upon the question of the state or legislative policy.—Thompson v. Waters, 25 Mich. 214.

¶ 66. Where a corporation is created in one state with powers, so far as that state can give them, of taking, holding and conveying lands in another state where the legislature have not expressly or by implication forbidden it, an affirmative enabling act is not necessary to give them the capacity to take, hold and convey lands in the latter state; this capacity rests upon the same principles of comity as their capacity to make or enforce contracts, or to acquire, hold and convey personal property.—Thompson v. Waters, 25 Mich. 214.

¶ 67. Comp. L. 1857, § 4834 (How. St., § 8136), applies only to acts forbidden to any corporation, and puts foreign corporations upon the footing on which domestic corporations are put by those state laws only which apply generally to all the corporations in the state; and section 2149 (How. St., § 4866) only confirms such powers as any corporation then had or might thereafter have "by law"; it is merely declaratory of the corporation's common-law right to hold and convey lands wherever that right was not restrained by the legislature.—Thompson v. Waters, 25 Mich. 214.

¶ 68. The question whether a railroad company, organized under the laws of Indiana, is competent to take title to lands in Michigan, depends (1) upon the laws of Indiana, and (2) upon the laws of Michigan and the public policy indicated by its legislation. The statutes and judicial decisions of Indiana considered, and the conclusions reached that, so far as depends upon the laws of Indiana, such lands may be taken in payment of, or security for, debts due the corporation in Michigan.—Thompson v. Waters, 25 Mich. 214.

¶ 69. So far as state policy or comity is concerned there is no difference between the recognition of the equitable interest of a foreign corporation as cestui que trust, the legal title being vested in a trustee, and the recognition of its right to the legal estate, since it would ordinarily control the property in both cases. There is no distinction in this matter between railroad and other corporations, as those for insurance, banking, etc.—Thompson v. Waters, 25 Mich. 214.

§ 22. Contracts.

Invalidity by reason of doing business without compliance with regulative and admissive laws, see ante §§ 10-14.
Right of unlicensed corporation to enforce in Michigan contracts made in other states, see ante § 12.
Interstate commerce contracts, see ante § 15.
Estoppel to deny validity for want of admission to do business in state, see ante § 19.
Conveyances and transfers of real property, see ante § 21.
Powers of corporations in general, see Corporations, XII.
Liens for labor, see Corporations §§ 227, 331 et seq.; Liens.
Presumption as to consideration for deed to foreign corporation, see Contracts § 139, ¶ 604.

¶ 70. The doctrine of state comity will not be applied in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state.—Seamans v. Temple Co., 105 Mich. 400.

¶ 71. A corporation organized under the laws of another state can make no contracts forbidden by the laws of that state to such corporations.—Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44.

¶ 72. A foreign corporation will not have the aid of our courts in enforcing a contract entered into in violation of its charter.—Orr v. Lacey, 2 D. 230.

§ 23. Right to sue or defend.

See also ante ¶ 62.
Foreign receivership as working abatement of later state suit on contract of corporation, see Abatement ¶ 51.
Exemption of corporation from garnishment, inapplicability in other states, see Conflict of Laws ¶ 14.
Jurisdiction over foreign causes of action in suits between foreign corporation and nonresident, see Courts § 46.
Powers of corporations generally, see Corporations, XIX.
Capacity to sue and be sued, see Jud. Act, chap. XII, §§ 18, 19; Comp. L. 1915, §§ 12369, 12370.
Disability to sue on or by reason of act forbidden without express authority of law, see Jud. Act, chap. XII, § 19; Comp. L. 1915, § 12370.

¶ 73. Foreign corporations may sue each other in Michigan if both are doing business within the state and the cause of action accrued there. (Comp. L. 1881, Act. No. 256.)—Emerson, Talcott & Co. v. McCormick Harvesting Mach. Co., 51 Mich. 5.

¶ 74. The limitations upon the right of a foreign corporation to sue in the courts of this state are found in the limitations of the doctrine of comity and in the statutes regulative of the matter.—Seamans v. Temple Co., 105 Mich. 400.

¶ 75. A foreign corporation which sells goods here only through itinerant salesmen, and which, therefore, has not been compelled to file articles or to pay a franchise fee, is entitled to enforce against directors of a domestic corporation to which it has sold goods, the statutory liability for their wilful neglect to file an annual report.—Wilcox Cordage & Supply Co. v. Mosher, 114 Mich. 64.

¶ 76. The effect of the statutes regulating the transaction of local business in this state by foreign corporations is to make such corporations, as to such business, domestic corporations, organized under the act specified in the certificate of the secretary of state, and entitled to and subject to the same remedies as such corporations in the courts of this state.—Showen v. J. L. Owens Co., 158 Mich. 321.

¶ 77. An Illinois corporation admitted to do business in Michigan, is not deprived of the right to plead usury on foreclosure of a mortgage executed in Michigan, payable here, and covering lands here, because the interest statute of Illinois contains a provision that "No corporation shall hereafter interpose the defense of usury in any action."—Stack v. Detour Lumber & Cedar Co., 151 Mich. 21.

§ 24. Insolvency and winding up.

Of corporations in general, see Corporations, XXIII.

Rights of trustee in bankruptcy of foreign corporation, see Bankruptcy.

¶¶ 78, 79. Officers of a local branch, situated in Detroit, of a mutual benefit order the supreme "sitting" of which was an insolvent Indiana corporation, for which a receiver had been appointed in Indiana with an ancillary receiver appointed by the court here, held funds in their hands belonging to the supreme body, and were garnished in respect to such funds in a suit against the corporation. Upon an application for a mandamus to compel the circuit judge to punish such officers as for contempt in refusing to turn the funds over to such ancillary receiver, it was held that proceedings for contempt were not appropriate for the trial of the issues involving the title to the fund, or to determine the validity of the lien claimed by the garnishee.—Baldwin v. Wayne Circuit Judge, 101 Mich. 119.

III. ACTIONS BY AND AGAINST.

Power to sue and defend actions, see ante § 23.

Actions by and against corporations in general, see Corporations, XIX.

[Note. Since the laws of procedure are ordinarily general and the peculiarities respecting corporations are minor to the general law, it is advisable in all cases to consult the specific topics treating of procedure although the desired action involves a corporation.]

Remedies for noncompliance with state regulations, see Quo Warranto; Mandamus; Penalties.

Right to costs in circuit on recovery below statutory amount, see Costs § 19.

Provisions of statutes, see Jud. Act, chap. X, § 1; chap. XII, §§ 18, 19; Comp. L. 1915, §§ 12340, 12369, 12370.

Statutes relating to default judgments against corporation, see Jud. Act, chap. XX, § 1; Comp. L. 1915, § 12737.

§ 25. Jurisdiction, process and appearance.

Subjection of the corporation to changes in mode of service, see ante ¶ 15.

Jurisdiction in personam in attachment cases, see post ¶ 87.

General law of process, service and appearance, see Process; Appearance.

Appearance by superior foreign corporation to action against local subordinate corporation, see Appearance ¶ 25.

Agents for service and mode of service, see Process, II.

Mode of gaining jurisdiction of action against, see also Courts ¶ 200.

Sufficiency of record to show that corporation was engaged in business in the state and therefore subject to its jurisdiction, see also Courts § 79.

Mode of trying jurisdictional fact of doing business in state, see also Courts ¶ 283.

Sufficiency of proof of service of foreign corporation to sustain foreign judgment against it, see Foreign Judgments § 15.

Presumption on foreign or domestic character of corporation in support of jurisdiction of foreign judgment, see Foreign Judgments ¶ 28.

Jurisdiction of justices of the peace, see Justices of the Peace, III.

Place or county for bringing actions, see Venue.

Mode of questioning sufficiency of service, see Pleading, III; Process, III.

Capacity of foreign corporation to sue, see Jud. Act, chap. XII, §§ 18, 19; Comp. L. 1915, §§ 12369, 12370.

¶ 80. Under 2 Comp. Laws 1897, § 5198, requiring foreign corporations to appoint an attorney in Michigan for the service of process, the jurisdiction of the courts is not affected.—People ex rel. Wipfler v. Fidelity & Deposit Co. of Maryland, 163 Mich. 94.

¶ 81. The words "agent of such corporation within this State" in Comp. Laws 1871, §§ 6544, 6550, providing that in "suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State, government, or country, if a copy of such attachment, and of the inventory of the property attached, shall have been personally served on any officer, member, clerk or agent of such corporation within this State, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant," do not authorize the service of a copy of the writ, as a summons, upon an agent of a foreign corporation unless the corporation be engaged in business in the State, and the agent be appointed to act there.—St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354.

¶ 82. Where a plaintiff is injured in Canada by a foreign corporation having an office in Michigan, he may secure service upon such corporation and bring his case in Michigan, under Act No. 3, Pub. Acts 1909.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

¶ 83. The record must show that the corporation is doing business in the state and that the agent served was appointed to act there, or service of summons on an agent of a foreign corporation is insufficient to give a state court jurisdiction of the corporation.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 84. Where a nonresident corporation appears voluntarily and consents to a stipulation extending the time within which it may plead, such extension is consistent only with a general appearance.—National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co., 168 Mich. 195.

¶ 85. In a suit in assumpsit by one nonresident corporation against another, defendant, by making a voluntary appearance and consenting to a stipulation extending the time within which it may plead, submits itself to the jurisdiction of the court, and this, although there has been and could be no valid service upon defendant compelling it to submit to such jurisdiction.—National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co., 168 Mich. 195.

§ 26. ——Attachment and garnishment process.

General law of attachment, including grounds for attachment against corporations, see Attachment.

General law of garnishment, see Garnishment.

Liability of corporations to be garnisheed, see Garnishment § 12.

Form of affidavit for garnishment of corporation, see Garnishment § 42.

Service of garnishment on corporation, see Garnishment § 51.

Examination of foreign corporate garnishee, see Garnishment § 70.

Attachment statutes, see Jud. Act, chap. XXVI, §§ 2, 43, chap. LXXV, § 1; Comp. L. 1915, §§ 13029, 13070, 14337.

Garnishment statutes, see Jud. Act, chap. XXVIII, §§ 4, 29, 30, 46, chap. LXXV, § 19, chap. LXXVI, §§ 30-35; Comp. L. 1915, §§ 13125, 13150, 13151, 13167, 14355, 14390-14395.

¶ 86. The language used in Milwaukee Bridge & Iron Works v. Wayne Circuit Judge, 73 Mich. 155, "our statutes nowhere provide for any service of a writ of garnishment upon a foreign corporation," is not applicable to a particular class of foreign corporations—e. g., foreign insurance companies—respecting which ample provisions for service are made.—German-American Ins. Co. v. Chippewa Circuit Judge, 105 Mich. 568.

¶ 87. Under the attachment statutes, 3 Comp. Laws 1897, § 10474 et seq., service of a writ upon the local agent of a foreign corporation doing business in Michigan gives jurisdiction in personam.—Showen v. J. L. Owens Co., 158 Mich. 321.

§ 27. Pleading and proof of corporate existence.

Of existence of domestic corporations, see Corporations §§ 15, 193.

Statutory requisites of proof of corporate existence, see Jud. Act, chap. XVII, § 47; Comp. L. 1915, § 12535.

¶ 88. A plaintiff foreign corporation need not allege its incorporation under any particular statute.—Imperial Curtain Co. v. Jacob, 163 Mich. 72.

¶ 89. The defense that the plaintiff is not authorized to prosecute in the courts of the state because of its noncompliance with the laws of the state may be made under a plea of the general issue and without special notice, in an action brought by the trustee of a foreign insurance company to recover an assessment on a policy of insurance covering property situate in the state.—Swing v. Cameron, 145 Mich. 175.

¶ 90. Testimony from information derived by the witness from plaintiffs in doing business for them, and from an examination of what purported to be their articles of association, that they are an incorporated company under the laws of another state, warrants a finding of corporate existence.—Locke v. Leonard Silk Co., 37 Mich. 479.

¶ 91. Proof of the law under which a foreign corporation exists is dispensed with by proof of dealings of the other party recognizing it as a corporation, unless the power of the corporation under its charter is involved in which case the charter or the statutes of the foreign state under which incorporation was had are essential.—Chapman v. Colby Brothers & Co., 47 Mich. 46.

¶ 92. Under section 10194, 3 Comp. Laws 1897, the fact that a plaintiff is doing business under a certain corporate name is prima facie evidence of its due incorporation.—Imperial Curtain Co. v. Jacob, 163 Mich. 72.

¶ 93. Section 10194, 3 Comp. Laws 1897, relating to mode of proof of incorporation by proof of doing business under certain name applies equally to foreign and domestic corporations.—Imperial Curtain Co. v. Jacob, 163 Mich. 72.

§ 28. ——Of compliance with statutes or exception therefrom.

Necessity of proof of charter, inability to take judicial notice, see also Evidence ¶ 171.

Necessity of notice of invalidity of contract with plea to action by foreign corporation, see Pleading, IX.

¶ 94. A foreign corporation suing in Michigan is not required to allege that it has complied with Act No. 34, Pub. Acts 1903, relating to admission of foreign corporation, but such compliance is presumed.—Pittsburgh Coal Co. v. Northy, 158 Mich. 530.

¶ 95. A foreign corporation which is not licensed to do business within the state and which contracts to sell and install superheaters need not allege in its declaration in an action for breach of a written contract of sale that the machinery was of such a complex character that the installation thereof by the seller is a necessary part of the contract.—Power Specialty Co. v. Michigan Power Co., 190 Mich. 699.

¶ 96. The burden of proof is upon a foreign corporation not licensed to do business in the state, which claims in an action for damages for breach of a written contract of sale that superheaters are of such a complex character that the installation thereof by the seller is a necessary part of the contract of sale, to establish such fact. —Power Specialty Co. v. Michigan Power Co., 190 Mich. 699.

¶ 97. Whether a corporation, which is suing on a contract, is a foreign corporation engaged in carrying on business in the state without complying with Comp. L. 1897, § 8754; How. St., 2nd ed., § 9617, requiring the payment of a franchise tax by all corporations, including foreign corporations, as a condition to the lawful transaction of business in the state, is a question of fact for the jury, under proper directions by the court, unless the facts bearing on the question are undisputed, and the inference from them so obvious as to leave no issue for the submission of the jury.—Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239.

IV. STOCK AND STOCKHOLDERS, AGENTS AND OFFICERS.

§ 29. In general.

Duty to designate agent for service, see ante § 8.

[Note. The internal rights and liabilities of corporate officers, agents, stockholders and members are usually not dependent on any foreign corporation law. The matter is therefore mainly found in Corporations, XVII, XXIV. For similar reasons the cases on agency for the corporation towards third persons are treated in Corporations, XVII.]

Power of domestic corporation to acquire stock and properties of foreign corporation, see Corporations §§ 82, 84, 85.

Remedy of withdrawing member in foreign summer resort association for illegal acts, see also Corporations § 351.

Validity of subscription by Michigan corporation to stock of foreign corporation, see Corporations ¶ 297.

Estoppel to question authority of acts done by nonresident managing directors, see Corporations § 553.

Officers and agents qualified to receive service of process, see Process, II.

Taxation of stocks and shares, see Taxes.

Taxation of nontaxable stock as denial of full faith and credit under constitution, see Foreign Judgments ¶ 4.

Statutory duty to keep stockholders list and transfer books within state, see Comp. L. 1915, §§ 11345, 11346.

Liability for acting as agent of corporation not admitted to do business, see Comp. L. 1915, § 9069.

¶ 98. Act No. 310, Pub. Acts 1907, provides that with reference to foreign corporations the "secretary of state shall, in the certificate which he issues, state under what act such corporation is to carry on business in this state and such corporations shall * * * be subject to all the restrictions, requirements, and duties * * * imposed upon corporations organized under such act." Held, that where the secretary of state designates that a foreign corporation is organized under Act No. 232, Pub. Acts 1903, imposing personal liability on directors for failure to file the annual report, the statute must be construed strictly, being penal in nature, and impose liability on the corporation only and not the officers; hence the directors of such foreign corporation are not liable to such penalty.—Young v. Moore, 162 Mich. 60.

FOREIGN DEEDS to FOREIGN DIVORCE.

Cross-References.

Foreign Deeds—
As self-proving documents, see Evidence § 514.

Foreign Divorce—
See Divorce, XI.

FOREIGN JUDGMENTS.

TREATS of judgments of other states and nations with respect to proving them, their force and effect, and enforcement of them by action. It excludes matters common to all judgments (see Judgments; Former Adjudication).

Analysis.

I. In general; how proved.

§ 1. In general.
§ 2. Transcripts and exemplification.

II. Faith and credit; effect and conclusiveness.

§ 3. Full faith and credit clause.
§ 4. Effect and conclusiveness of sister state judgments.
§ 5. ——Jurisdictional facts and procedure.
§ 6. ——Sufficiency of record and presumptions thereon.
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I. IN GENERAL; HOW PROVED.

§ 1. In general.

Sufficiency of record of the judgment, see post § 6.
Burden of proving the judgment in action upon it, see post § 15.
General law of judgments, see Judgments.
Jurisdiction of courts as affected by foreignness of parties, or by situs of the subject-matter of the action or cause of action, see Courts §§ 43-46.
Concurrent and conflicting jurisdiction of courts of several states or countries, and priority in jurisdiction, see Courts, V, C.
Sufficiency of the process and service to attach jurisdiction, see Courts, V, A; Process; Appearance; and see Judgments, VII.
Immunity of judgments in general from collateral attack, see Judgments, VII.

§ 2. Transcripts and exemplification.

Full faith and credit ascribable, see post II.
Certification of transcripts for evidence, see Evidence, §§ 560, 561.
Certification of foreign inferior judgments, see Evidence § 563.

¶ 1. A record from the registry of deeds of a county in this state containing a certified copy of a will executed and probated in another state is admissible in evidence where it recites that a copy of the will and of the probate thereof duly authenticated were presented to the probate court here; that due notice of hearing was given by publication, and that said copy was duly admitted to record upon full proof.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

¶ 2. The transcript of a foreign action, in which the verified petition on file states that "plaintiff is a minor, nineteen years of age December 5, 1901," was not admissible in evidence in a suit in this state, in which the plaintiff is described as a minor, and filed January 30, 1904, at which the plaintiff named in the foreign suit would be over twenty-one years of age, even though the name of the plaintiff is the same in both suits; since there is a failure to identify the plaintiff described in the transcript as the plaintiff in the present suit.—Spiker v. American Relief Soc., 140 Mich. 225.

II. FAITH AND CREDIT; EFFECT AND CONCLUSIVENESS.

§ 3. Full faith and credit clause.

Effect and conclusiveness of the judgment, see post §§ 4-10.

Conflict of foreign and domestic judgments, see post § 11.

Terms of the constitutional provision, see U. S. Const. art. IV, § 1, in Comp. L. 1915, page 43.

¶ 3. But for the Federal Constitution, judgments of sister states would stand on the footing of foreign judgments.—Bonesteel v. Todd, 9 Mich. 371.

¶ 4. Taxation of stock in foreign corporations owned by residents of Michigan, under Comp. Laws 1897, § 3831, is not in violation of U. S. Const. art. 4, § 1, providing for full faith and credit, etc., though such stock is nontaxable in the corporate domicile.—Bacon v. Board of State Tax Commissioners, 126 Mich. 22.

§ 4. Effect and conclusiveness of sister state judgments.

Effect of the constitutional provision, see ante § 3.

Jurisdictional facts and procedure, see post § 5.

Sufficiency of the record and anterior proceedings to support the judgment, see post §§ 6, 7.

Matters, rights and persons affected and concluded, see post §§ 8-10.

Conflict with domestic judgment, see post § 11.

Necessity and burden of establishing the judgment in action thereon, see post § 15.

Pleading want of jurisdiction, see post ¶ 63.

¶ 5. The Act of Congress of May 26, 1790 (1st Stat. 122), requires that general faith, validity and credit shall be given to judgments of courts of a foreign jurisdiction as evidence.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 6. In an action in one state upon a judgment of a court of general jurisdiction of another state, no plea or proof can be received in contradiction of any material fact appearing by the record, unless such plea or proof would be received in an action on the judgment in the state in which it was rendered.—Wilcox v. Kassick, 2 Mich. 165.

¶ 7. If the state court has jurisdiction of a corporation and process is served in accordance with state laws, the judgment is generally held to be binding on the courts of foreign states.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 8. A judgment of a court of one state, having jurisdiction of the parties and of the subject-matter, is conclusive in the courts of a sister state, the only remedy being by direct proceedings in the original cause.—Mutual Fire Ins. Co. v. Phœnix Furniture Co., 108 Mich. 170.

¶ 9. A judgment of a court of competent jurisdiction in one state is conclusive upon the parties to the action and their privies, in the courts of another state, and cannot be attacked, even upon the ground of fraud, except by a direct proceeding in the court in which it was rendered.—Dunlap v. Byers, 110 Mich. 109.

¶ 10. The supreme court cannot sit in review upon the decrees of the courts of a sister state having exclusive jurisdiction over the person and the subject-matter of a suit.—Stevens v. Ottawa Probate Judge, 156 Mich. 526.

¶ 11. While the constitution and laws of the United States require that the judgment of one state shall have the same credit in another state as it has by law or usage in the courts of the state where it was rendered, such judgment is not to be given in another state more than its domestic force.—Bonesteel v. Todd, 9 Mich. 371.

§ 5. ——Jurisdictional facts and procedure.

Effect of jurisdictional recitals in foreign divorce, see also Divorce § 191.

Collateral attack for falsity of affidavit where foreign jurisdiction is based on the affidavit rather than on the truth of the facts deposed to, see also Divorce ¶ 692.

General appearance in foreign action as precluding party to question jurisdiction, see also Courts ¶ 216.

¶ 12. U. S. Const. art. 4, § 1, providing that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, does not preclude an inquiry into the jurisdiction of courts; and if, in fact, the subject-matter of a suit was not within the jurisdiction of the state from which the court derives its authority, its judgment is a nullity, and may be so treated everywhere.—People v. Dawell, 25 Mich. 247.

¶ 13. The judicial proceedings to which full faith and credit must be given in every state besides that in which they are taken are those only in which the court was competent to act; and a prima facie showing of their regularity does not save them from impeachment by proper evidence.—Reed v. Reed, 52 Mich. 117.

¶ 14. The provision of the Federal Constitution requiring that full faith and credit shall be given in each state to the Public Acts, records and judicial proceedings of every other state, does not prevent inquiry into the jurisdiction of the court in which the original judgment was rendered to pronounce the judgment.—Farrow v. Railway

Conductors' Co-operative Ass'n, 178 Mich. 639.

¶ 15. The jurisdiction of a foreign court to render a judgment can be impeached when the judgment is sued on in this state, and the recital of jurisdiction in the record of the judgment is immaterial.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 16. A certificate of service by a proper officer, or an agent in the state of a foreign corporation doing business in the state, is prima facie evidence that such agent represented the corporation in the business, but when the record is offered in evidence in a suit on the judgment in a foreign state, the corporation may show that the agent could not represent it by accepting service.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 17. In an action in this state on a default judgment entered in Illinois against a corporation, it appearing from the record of the judgment that proper service was had, it was error for the trial court to refuse to admit evidence of defendant that the person served in Illinois as an agent of the defendant never was such agent, unless these facts were conclusively determined against the defendant by the Illinois court on the motion to vacate the judgment.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 18. Record recitals of jurisdictional facts do not preclude oral testimony as to the existence of such facts.—Farrow v. Railway Conductors' Co-operative Ass'n, 178 Mich. 639.

¶ 19. The finding of a court of a foreign state, in granting letters of administration, that an intestate was domiciled in that state, is not conclusive so as to bind the courts of Michigan, and they have an equal right to determine the question of domicile for a similar purpose.—Colvin v. Jones, 194 Mich. 670.

¶ 20. The foreign record cannot be impeached when sued upon here by showing, in opposition to its recitals, that process was not served upon defendant.—Wilcox v. Kassick, 2 Mich. 165.

¶ 21. Where a court in a foreign state having jurisdiction of the parties and subject-matter, on appeal by the plaintiff from justice court, entered an order on plaintiff for security for costs and a more definite petition, and subsequently without notice to the defendant dismissed the suit without prejudice, and thereafter set aside the dismissal, and where at a later date a motion was made to dismiss for failure to comply with the order first entered and after argument a like finding in favor of the defendants was entered as had been entered before the justice; such finding, whether right or wrong, was res adjudicata and a court of this state could not inquire as to whether or not the foreign court had jurisdiction to enter the judgment, the decision of that court upon a question of law being just as conclusive as upon a question of fact.—Stearns v. Wiborg, 123 Mich. 584.

¶ 22. A foreign judgment can be attacked for want of jurisdiction unless the transcript affirmatively shows that the court rendering such judgment had jurisdiction.—Spiker v. American Relief Soc., 140 Mich. 225.

§ 6. ——Sufficiency of record and presumptions thereon.

Requisites of judgment entry and record in general, see Judgments, III.

Effect of appearances to confer jurisdiction or waive objections, see Appearance § 10 et seq.; Courts, V.

General presumptions as to regularity, normality and legality, see Evidence, II.

Presumption as to authority to appear, see Appearance § 4.

Presumption as to jurisdiction in foreign divorce suit, see Divorce § 191.

The judgment of a court of general jurisdiction of another state is a nullity if the record shows a want of jurisdiction.—Wilcox v. Kassick, 2 Mich. 165.

¶ 22a. The judgment of a court of general jurisdiction of another state does not show either that the court had, or that it had not, jurisdiction, jurisdiction will be presumed.—Wilcox v. Kassick, 2 Mich. 165.

¶ 24. When the record shows that the process was not personally served, and that the defendant did not appear personally in the suit, but that an attorney appeared for him and made defense, the authority of such attorney to appear for him will be presumed. But whether the authority may be disproved, quære.—Wilcox v. Kassick, 2 Mich. 165.

¶ 25. In purely collateral civil proceedings depending upon a divorce procured in another state, the court granting divorce must be presumed to have had jurisdiction, and to have proceeded on the merits in accordance with the local laws, and the divorce cannot be impeached by showing that complainant's residence was not such as to give that court jurisdiction.—Waldo v. Waldo, 52 Mich. 94.

¶ 26. In construing a judgment of a foreign state the court may indulge in certain presumptions in favor of its regularity.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 27. The court should indulge in no presumptions of fact on the unproved allegations in the plaintiff's declaration which were not admitted to be true at the trial, either to aid or rebut the record of the foreign judgment which is sued on in this

state.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 28. If the face of the record of a foreign judgment recites that the defendant corporation was lawfully served, and there is a strong inference that the defendant was a domestic corporation, and it appears that a proper agent was served, it was not error for the trial court to admit the record of the judgment in evidence.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 29. A., who had agreed to indemnify B. for signing C.'s replevin bond, was sued by B., who introduced in evidence an Indiana record which showed a copy of the bond set out at length in the complaint as the only cause of action relied on. Held, that it would be presumed in support of the judgment that it was rendered after due proof of the execution of the bond declared upon. —Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 30. The courts of a sister state, in a cause within and between parties subject to their jurisdiction, are entitled to so much respect, at least, that they should not, without proof, be presumed guilty of wrong and oppression.—Graydon v. Church, 7 Mich. 36.

§ 7. ——Sufficiency of warrant and confession.

Extraterritorial force and sufficiency of warrant to confess judgment, see Conflict of Laws § 43.

¶ 31. A warrant of attorney, purporting to authorize "any attorney at law" to confess judgment on a note in "any court of record," is sufficient to sustain a judgment entered in a court of the state in which the warrant was executed, on confession of an attorney of such court, even though the warrant could be given no extraterritorial effect. —First Nat. Bank v. Garland, 109 Mich. 515.

¶ 32. A judgment of Ohio entered on a warrant of attorney which expressly permits it without process is not within the provisions of the Ohio statute requiring the issue of summons as a condition precedent to the taking of judgment.—First Nat. Bank v. Garland, 109 Mich. 515.

¶ 32a. Under Comp. Laws 1897, § 10299, providing that the authority for confessing judgment shall be in some instrument distinct from that containing the evidence of indebtedness, a judgment without service rendered in Illinois on a note made in Michigan, containing a power of attorney to confess, is void as being founded on a void warrant of attorney.—Acme Food Co. v. Kirsch, 166 Mich. 433.

¶ 33a. In an action in one state upon a judgment of a court of general jurisdiction of another state, no plea or proof can be received in contradiction of any material fact appearing by the record, unless such plea or proof would be received in an action on the judgment in the state in which it was rendered.—Wilcox v. Kassick, 2 Mich. 165.

§ 8. ——Matters and rights concluded or merged.

Matters beyond the jurisdiction, see post § 9.
Matters barred or merged by judgments of foreign nations, see post § 13.
General law of res judicata, see Former Adjudication, IV, VI.
Decisions from other states or countries as precedents of law, force and effect as authority, see Courts §§ 25, 26.
Validity and effect of foreign divorces, see Divorce § 191.
Construction of will in domicile as precedent for construction in Michigan, see Courts ¶ 75.
Jurisdiction to annul or revise foreign judicial sale, see also Courts § 45.
Foreign judgment as evidence of account stated, see Account Stated ¶ 41.

¶ 33. The consequences of a judgment in respect to its effect as a merger or extinguishment of the original demand are a part of the law under which the judgment itself is rendered, and are to be regarded when the judgment is used in another state.—Bonesteel v. Todd, 9 Mich. 371.

¶ 34. Where a court of one state has acquired jurisdiction of a proceeding for the dissolution of a partnership and for a settlement of its affairs, it has authority to determine all of the equities of the case, and may, therefore, adjudicate the rights of the parties as to real estate located in another state.—Dunlap v. Byers, 110 Mich. 109.

¶ 35. The fact that a member of an insolvent mutual benefit society incorporated in another state was allowed to prosecute to judgment in such state his claim upon his certificate does not render res adjudicata the question of his right to satisfy his judgment out of the society's local assets in this state. —Wheeler v. Dime Sav. Bank, 116 Mich. 271.

¶ 36. Complainant filed a bill in South Dakota alleging that defendant and himself were partners and that defendant procured from him by fraud an assignment of his interest in certain property, and asked that he be restored to his rights therein. Defendant denied said allegations. The court found that there was no partnership; that no fraudulent representations were made; and that the conveyance was a good faith transfer of complainant's interest. Complainant failed to appeal, and afterwards filed a bill in Michigan repeating the allegations of fraud and asking for a reconveyance, but not alleging a partnership. Held, a plea of former adjudication setting out said facts was a valid bar to complainant's second suit.—Niles v. Lee, 169 Mich. 474.

¶ 37. A judgment of another state on a claim covered by a guaranty when offered in a suit on the guaranty is conclusive upon the matters covered by the foreign action.—Clark v. Clune, 172 Mich. 323.

¶ 37a. The decision of an Oklahoma court as to the validity of a note for the price of land is conclusive of that matter in another controversy on the same matter.—Bishop v. Dodge, 196 Mich. 231.

¶ 38. Upon the appointment of a receiver for an Illinois mutual fire insurance company in a court of that state, there were turned over to him certain notes given by Michigan policy holders, payable at such times as the directors of the company might order and assess for the losses and expenses of the company. A decree was entered, upon evidence placed before the court, determining the amount of assets and debts of the company, and the assessment necessary to liquidate said indebtedness, which, as shown upon the face of the decree, included certain unearned or return premiums, for the payment of which said policy holders had by a decision of the supreme court of Michigan been held not liable. Held, that said decree was conclusive upon the policy holders in a suit brought in this state to enforce assessments made by the receiver against them upon said notes.—Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170.

¶ 39. Query, to what extent a judgment of a court of one state, providing for an assessment against the stockholders of an insolvent corporation, is conclusive upon the courts of another state, in view of the limitations of doctrine found in Great Western Tel. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. 810; Warner v. Delbridge & Cameron Co., 110 Mich. 590.

¶ 40. Where suit was brought in the state of New York against two joint debtors, one of whom was not served with process, and did not appear in the action, and judgment in form was rendered against both under the joint debtor act, it was held that this judgment was not an extinguishment of the demand sued upon, and that an action brought subsequently in this state against the two was properly brought on the original demand instead of upon the judgment.—Bonesteel v. Todd, 9 Mich. 371.

§ 9. ——Matters beyond jurisdiction of place or subject.

Jurisdiction respecting causes or subjects beyond territorial bounds of court, see Courts, V, A.

Nature of administration proceedings as entitling foreign probate of will to recognition, see Estates of Decedents ¶ 32.

Foreclosure of mortgage on chattels brought into state and sold, see also Chattel Mortgages ¶ 362.

¶ 41. Where a decree entered in one state enjoins a party from interfering with the other party's rights to certain property located in another state, said injunction is valid as a decree in personam and should be respected by the courts of other states.—Niles v. Lee, 169 Mich. 474.

¶ 42. A circuit court in chancery of one county cannot decide what the probate court of another county shall do about requiring executors or administrators who are administrating estates before that court to give new bonds or more ample bonds.—Eames v. Manley, 121 Mich. 300.

¶ 43. The probate court of the domicile of a testator has exclusive jurisdiction to determine the validity of a will and a decree of a court not having jurisdiction is not conclusive upon courts of other jurisdictions either under the rule of state comity or under the United States Constitution.—Scripps v. Wayne Probate Judge, 131 Mich. 265.

¶ 44. Proceedings under the boat and vessel law of another state, which allows nonresident creditors no opportunity of appearing and asserting their claims, can have no extraterritorial force, and will not displace a prior lien existing upon a vessel under the laws of this state.—Wight v. Maxwell, 4 Mich. 45. Writ of error dismissed, Maxwell v. Newbold, 18 How. (59 U. S.) 511, 15 L. ed. 506.

§ 10. ——Persons affected or bound.

Corporation and members or stockholders, see also ante ¶¶ 38, 39.

General law as to persons bound by judgments, see Former Adjudication, V.

¶ 45. Where a Michigan resident died here pending a suit against him in Massachusetts in which an administrator was appointed for his estate to represent him in the suit and a decree rendered against the administrator, this decree had no force or effect to bind any one except the administrator there and was satisfied when the estate in Massachusetts had been applied thereon.—Brown v. Fletcher's Estate, 146 Mich. 401, aff'd in 210 U. S. 82, 52 L. ed. 964, 28 Sup. Ct. Rep. 702.

¶ 46. Where a resident of Michigan dies here testate and there was pending a suit against him in Massachusetts and he had stipulated to arbitrate the issues, the result of the suit and the award of the arbitrators being a judgment against an administrator of the deceased duly appointed over his Massachusetts property, even though the stipulation purported to bind his heirs, administrators, and executors, only the administrator in Massachusetts was bound thereby and the property coming into his hands; and the courts there could not legally bind the Michigan executors, because jurisdiction of the person of the defendant ceased when he died, and there was no person within the

territorial jurisdiction of the court upon whom the determination of the court could be made binding.—Brown v. Fletcher's Estate, 146 Mich. 401, aff'd in 210 U. S. 82, 52 L. ed. 964, 28 Sup. Ct. Rep. 702.

¶ 47. Where a Michigan resident died here leaving property both here and in Massachusetts, and against whom a suit was pending in Massachusetts, which suit was revived by the appointment of an administrator over his property there and a decree against his administrator, there is no privity of the foreign administrator with the domiciliary executors, and the latter are not bound by any judgment rendered against the former.—Brown v. Fletcher's Estate, 146 Mich. 401, aff'd in 210 U. S. 82, 52 L. ed. 964, 28 Sup. Ct. Rep. 702.

¶ 48. Under Comp. Laws 1857, ch. 133, p. 1219, an exemplification of the record of a judgment on a partnership note against all the members of a partnership note in the state of Michigan, only one of which partners was served with process, is inadmissible in evidence in an action on the note in a foreign state, to bar and to defeat a recovery against a partner not served with process in the first action.—Mason v. Eldred, 6 Wall. (73 U. S.) 231, 18 L. ed. 783.

¶ 49. In an action upon a foreign judgment on an insurance policy against defendant's predecessor, a voluntary association, defendant not having been sued as the successor of, or as having assumed the liabilities of the association, and not having appeared in the action on which the judgment was rendered, it was held that the judgment was entered without jurisdiction.—Farrow v. Railway Conductors' Co-operative Ass'n, 178 Mich. 639.

¶ 50. Where a creditor of a partnership commenced proceedings in a foreign state against firm property prior to the appointment of a receiver on a bill to dissolve the partnership, the judgment of the foreign court in the proceeding instituted by the creditor is conclusive as against the receiver.—Rickman v. Rickman, 180 Mich. 224.

§ 11. Conflicting foreign and domestic judgments.

¶ 51. In assumpsit upon a promissory note, the bar of a judgment in another state upon the same note is not avoided by the record of an action upon that judgment to which the defendant pleaded nul tiel record, and in which action plaintiff took a nonsuit. The plea of the judgment is good, there is no estoppel, and the second record is not admissible in evidence.—Michigan Ins. Bank v. Eldred, 6 Biss. 370, Fed. Cas. No. 9528.

§ 12. Judgments of foreign nations.

Judgment of foreign court on service made in Michigan, see also Courts ¶ 205.

¶ 52. A foreign judgment may be collaterally attacked in an action on such judgment for want of jurisdiction in the foreign court due to the failure to obtain proper service of process.—Cox v. Railway Conductors' Co-operative Protective Ass'n, 194 Mich. 213.

¶ 53. The judgment of a foreign court having jurisdiction of the matter in issue is not subject to collateral attack.—Coveney v. Phiscator, 132 Mich. 258.

¶ 54. It seems that wherever it is held that a judgment of a foreign country may be impeached for fraud, it refers to fraud practiced in obtaining the judgment.—Coveney v. Phiscator, 132 Mich. 258.

¶ 55. Criminal proceedings in the courts of a foreign country are presumed to have been regular and within the jurisdiction of the court.—Coveney v. Phiscator, 132 Mich. 258.

¶ 56. A recitation in judgment of a Canadian court of an order by the master in chambers that the statement of defense to the action filed by defendant should be stricken out, and that plaintiff should be at liberty to proceed in the action as in case of default of a statement of defense, will not deprive the court of jurisdiction, it not appearing but that the action taken was consistent with the rules of practice obtaining in that court, and based wholly upon the insufficiency of the pleading itself.—Ferguson v. Oliver, 99 Mich. 161.

¶ 57. The judgment of a Canadian or any foreign court upon service of its process made in Michigan is not binding on a defendant who refused to recognize its jurisdiction; and it will not support an action in our courts.—McEwan v. Zimmer, 38 Mich. 765.

§ 13. ——Merger, bar and conclusiveness.

By sister state judgments, see ante §§ 8, 9.

¶ 58. The common holding is that a foreign judgment unsatisfied does not merge the original cause of action.—Canadian Typograph Co. v. Macgurn, 119 Mich. 533.

¶ 59. The decree of a Canadian court in a proceeding involving lands in Michigan and Canada, in which Michigan parties submitted to the jurisdiction of such foreign court, would appear to have been conclusive upon the same parties who again litigated the matter in Michigan.—Sheehan v. Farwell, 135 Mich. 196.

¶ 59a. One who, in a foreign country, pleads guilty to a charge of obtaining money by threats and menaces and returns the money upon the obtaining of which the prosecution was based, cannot, in an action to recover the money as paid under duress, in the absence of fraud, set up that he was not in fact guilty.—Coveney v. Phiscator, 132 Mich. 258.

¶ 60. The judgment of a court of Canada in favor of a corporation sued for rescission of a contract for sale of land on the ground that it was procured by fraud of the corporate agents and officers, and, if rescission could not be granted, for damages for the fraud, is a bar to a subsequent suit in Michigan against the corporate officers for the same fraud; where the Canadian court under its practice had full jurisdiction to adjudicate all the issues.—Krolik v. Curry, 148 Mich. 214.

III. ACTIONS UPON, OR IN RESPECT OF.

§ 14. In general; pleading.

Burden of proof and evidence, see post § 15.
Judgment and relief, see post § 16.
Actions on judgments in general, see Judgments, XII.
Use of belated amended declarations to aid bill of particulars, see Pleading, V.
Contempt proceedings to enforce judgment on foreign alimony decree, see Contempt § 23, ¶ 80.
Amendment of bill to add averment that judgment was on personal service, see Equity ¶ 510.
Foreign judgment as garnishable debt, see Garnishment ¶ 113.

¶ 61. While a decree in a partnership accounting in another state and determining equities in the land will not directly effect the transfer of title, it will bind the consciences of the parties, and can be enforced in the courts of the state where the property is located.—Dunlap v. Byers, 110 Mich. 109.

¶ 62. A finding of a court of another state, in a proceeding for an accounting between partners, that certain lands in this state were partnership lands, which had been sold with the consent of the parties, and the proceeds credited to the partnership, is sufficient to authorize a decree as to such lands in an action to enforce in this state the decree of the foreign court.—Dunlap v. Byers, 110 Mich. 109.

¶ 63. If the judgment does not show either that the court had, or that it had not, jurisdiction, the jurisdiction will be presumed; but in such case facts showing a want of jurisdiction may be alleged by plea, and if established a recovery may be defeated.—Wilcox v. Kassick, 2 Mich. 165.

¶ 63a. In an action to recover the balance due upon a foreign judgment, the declaration averred the recovery of judgment for a certain sum "and also the sum of $42.60 adjudged to said plaintiff," etc. The judgment record introduced in evidence showed a judgment for the sum named, "besides his costs and charges herein expended," and elsewhere showed that they had been fixed at the sum stated in the declaration. Held, that there was no fatal variance, and, though it was not shown how the costs were taxed, the proceedings fixing their amount could not be presumed illegal.—Hunt v. Middlesworth, 44 Mich. 448.

¶ 63b. In a suit against a single defendant upon a judgment rendered in a foreign state against three defendants, and where the exemplification of the foreign judgment did not show any return of service upon the other two defendants, and contained recitals that they were proceeded against by publication, while the entry of judgment recited due service of summons upon all, and the judgment appeared to have been collected in part by seizure and sale of the property of one of the other defendants, and the plaintiff declared upon the judgments as one valid against all the defendants, giving no reason for proceeding against one alone, it was held that the judgment was not void on its face as against any of the defendants therein named, and that the plaintiff's declaration contained no allegations to warrant his going into evidence to show that the judgment bound the defendant alone. The foreign judgment, therefore, did not support a judgment against the single defendant.—Dart v. Goss, 24 Mich. 266.

§ 15. Burden of proof and evidence.

See also ante ¶ 6.
Prima facie showing of jurisdiction and rebuttal thereof, see also ante § 5.
Presumptions on the record of the judgment as to its validity, see ante § 6.
How proved collaterally in actions not on the judgment, see ante § 2.
General law of evidence, see Evidence.
Admissibility of documents and records, see Evidence, VIII.

¶ 64. A foreign judgment may have great force or even be conclusive as evidence, but it cannot be enforced as a judgment outside of the jurisdiction in which it is given without being established in new legal proceedings.—Dickinson v. Seaver, 44 Mich. 624.

¶ 65. In an action to recover the amount secured by a mortgage on lands in Canada, under which in case of default the mortgagee was authorized to sell the land at private sale without notice, a summons issued by the solicitors for the plaintiff in the former suit in Canada and served upon the defendant with a statement of the particulars of plaintiff's claim showing that the action was brought to recover the same indebtedness, less a specified sum received on a sale of land, is admissible to show such former sale and that defendant is entitled to credit for the sum released thereon.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315.

¶ 66. In the absence of Canadian cases condemning the practice of making service of process by minors, testimony tending to show a course of practice in Canadian courts

recognizing the validity of such service was competent in an action upon a judgment rendered in Canada.—Patterson v. Kennedy, 122 Mich. 343.

¶ 67. On a suit in this state by an assignee of a default judgment entered in Illinois against the defendant corporation, it sufficiently appears from the record that the defendant was lawfully served with process, for the purpose of admitting the record in evidence, if it appears that the defendant was sued as a domestic corporation, and there is nothing in the record to the contrary, and return was made on the summons as executed on a proper agent of the corporation.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 68. On a suit in this state on a judgment secured in Illinois, the court will not take judicial notice of the Illinois statutes, and so cannot determine from the record whether a foreign corporation may do business in Illinois, or if so on what conditions, or whether the defendant corporation in the Illinois suit was properly served by its statutes.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 69. In a suit in this state on an interlocutory default judgment in Illinois against the defendant, where the Illinois court had refused to vacate the judgment on motion of defendant on the ground that the person served was not the defendant's agent, the defendant not having made a general appearance in the case, from which ruling the defendant had not appealed, the trial court erred in refusing to consider testimony of the defendant that the Illinois judgment was secured by fraud, that no service was had on any agent or officer of the defendant, and that the person served was not the defendant's agent, for that judgment being interlocutory, the court could consider new or further motions to vacate the judgment.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

§ 16. Relief and judgment.

Judgment of nonsuit on the judgment as affecting the estoppel, see ante ¶ 51.

In actions on domestic judgments, see Judgments, XII.

¶ 70. In an action on a foreign judgment the fact that the judgment does not state the amount of the costs to be recovered, will not prevent recovery for the full amount of the judgment and the costs shown by the evidence to be due.—Schroeder v. Boyce, 127 Mich. 33.

¶ 71. In an action on a foreign judgment, it is error to allow 5 per cent interest on the judgment in the absence of any evidence showing that the judgment bears interest in the state in which it was obtained, as at common law a judgment did not bear interest.—Schroeder v. Boyce, 127 Mich. 33, but see note by reporter p. 36.

FOREIGN LAWS to FOREMEN.

Cross-References.

Foreign Laws—
See generally Conflict of Laws.
Judicial notice and presumptions, see Evidence, I, II.
Documentary proofs, see Evidence, VIII, C.

Foreigners—
See Aliens.

Foremen—
As vice principals or fellow-servants, see Master and Servant, III.
As agents or servants in general, see Agency; Master and Servant.

FORESTRY AND LUMBERING.

TREATS of matters of law peculiar to forests and to the industries of logging, driving, booming and lumbering, but not including general law of contracts (see Contracts; Sales; Vendors and Purchasers) or of real property (see Deeds; Real Property; etc.) or the law of Navigable Waters, which see.

Analysis.

I. In general; regulation and conservation.
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§ 4. Rights and title in lodged and sunken logs.
§ 5. Driving and booming.
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III. Liens and labor.

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I. IN GENERAL; REGULATION AND CONSERVATION.

§ 1. In general; cross-references.

Timber passed by deed of land, see Deeds, III.

Reservations of timber rights in deeds of the land, see Deeds §§ 72, 74.

Effect of time limits in timber reservations in deeds, see Deeds § 74.

Conditions for reverter in grant of timber, see Deeds § 87.

Estoppel to claim title to logs as well as lien on land, see also Estoppel ¶ 157.

Notice to subsequent purchaser of land of outstanding timber contract, see Notice and Record of Title.

Cutting timber and lumbering as act of adverse possession, see Adverse Possession § 22.

Right to cut timber under tax title, see Taxes, XII.

Sale of timber as personalty, see Sales.

Construction of sale contracts as to kind, amount, and time for removal, see Sales, II.

Passing of title to logs and lumber on sale, see Sales, IV.

Contracts between officers and lumbering corporations, see Corporations § 168.

Licenses to enter and cut timber and revocability of such licenses, see Licenses to Enter.

Confusing and commingling logs and forest products, see Accession and Confusion; Conversion § 5.

Taxation of forest lands and forest products, see Taxes.

Torts to timber in general, see Conversion; Trespass; Waste.

Injury to timber on state or public lands, see Public Lands; Trespass; Taxes.

Negligence of carrier in running trains into region of forest fire, see Carriers § 169, ¶ 476.

Conversion of logs into lumber, rights of parties, see Accession § 2.

Actions for conversion of timber, see Conversion.

Replevin for logs and lumber, see Replevin.

Waiver of tort for cutting timber and suit in assumpsit, see Assumpsit, I.

Assignability of cause of action for converting timber by cutting and removing, see Assignments § 10.

Person entitled to sue for trespass on lands descended or devised, see Trespass; Estates of Decedents, XI, A.

Continuing acts of conversion, election to sue as of different times, see Conversion § 12.

Measure of damages to one person owning part of logs in a mass, see Damages ¶ 564.

Place for attachment of forest products in transit, see Attachment § 50.

Lumber products as perishables subject to sale under attachment, see Attachment ¶ 396.

Judicial notice relative to logs and logging, see Evidence, I.

Judicial notice of meaning of "mill tally," see Evidence ¶ 35.

Deeds and bills of sale as evidence of ownership of timber, see also Evidence §§ 492, 493.

Award or decision by scaler as binding admission on owner, see also Evidence § 435.
Questions of lumbering for experts, see Evidence § 267.
Qualifications of logging experts, see Evidence § 284.
Scale and tally books as memoranda to refresh memory of witness, see Examination of Witnesses §§ 21-23.
State Forest Commission and its composition and duties, see Comp. L. 1915, chap. 34.

§ 2. Regulation and conservation.

Timber cutting as crime, see Crimes § 130.
Reforestation provisions of the constitution, see Const. art. X, § 14.
Statutes relating to preservation of forests, see Comp. L. 1915, chap. 34.
State forest reserve law, see Comp. L. 1915, § 746 et seq.
Fire regulations, see Comp. L. 1915, § 765 et seq.

II. LOGS AND FLOATAGE.

§ 3. Log marks and brands.

¶ 1. The failure of the owner of logs to record his log mark, as required by 2 Comp. Laws, § 5083, deprives him simply of the presumption that logs so marked are his property, but does not prevent his proof of ownership by other competent evidence.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

§ 4. Rights and title in lodged and sunken logs.

Abandonment of logs, see Abandonment ¶¶ 1-3.

¶ 2. Comp. L. 1897, § 5098, providing for the disposition of logs floating and lodging upon lands adjoining the streams, and for forfeiture of all right thereto by the owners, does not mean that the title to the property is forfeited by allowing it to remain for 18 months upon the land; and an instruction in replevin of lumber cut from logs claimed to have been abandoned upon a rollway on a river, evidently based upon such section and so stating the law, was erroneous.—Log Owners Booming Co. v. Hubbell, 135 Mich. 65.

¶ 3. Sunken logs, marked or unmarked, when not lost or abandoned by the owners, are not the property of the riparian proprietor adjoining the place where found.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 4. Where the owners of sunken logs, in reclaiming them, place them on the bank of the riparian proprietor to dry, they are guilty of trespass, but the riparian proprietor gains no title to the logs thereby.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 5. The recovery from a stream by the owner of marked or unmarked sunken logs, not abandoned or lost, is no infraction of the riparian owner's rights.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 6. The fact that the owners of sunken logs from which the marks have been erased, cannot tell what specific logs belong to them, does not deprive them of property in the logs.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 7. Where no owner's marks on sunken logs are distinguishable, the presumption is that the logs were originally marked as required by the statute, and that the marks have been worn off, and, as in the case of logs where the marks are discernible, there exists no presumption of abandonment by the owners from the mere fact that the logs have rested for a time on the river bottom.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 8. The mere fact that logs with the owner's mark on them, becoming watersoaked, sank to the bottom of the transporting river, and rested there for a time, is not sufficient evidence that the owner abandoned them.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 9. Where the owners of marked logs sunken to the bottom of the transporting river have taken steps each year to recover the same, the inference that they intended to abandon the logs is negatived.—Whitman v. Muskegon Log Lifting & Operating Co., 152 Mich. 645.

¶ 10. Under Comp. L. 1897, § 2494 permitting the board of supervisors to provide for the removal of obstructions arising from the erection of booms, or collecting of logs or rafts in navigable streams by any individual it is not meant that the board of supervisors should engage in removing obstacles to free navigation which had existed for half a century, but only those obstructions concurrently created. Therefore a contract entered into by the board with individuals employing them to remove such obstructions and to retain as pay for their services whatever they should "be able to collect or obtain as salvage from said logs or obstructions so removed" conveys no title to such old obstructions.—Gainer v. Nelson, 147 Mich. 113.

§ 5. Driving and booming.

Defenses to statutory right to compensation for breaking jams or driving logs, see post ¶ 34.
Contracts for cutting, running and manufacture, see post § 7.
Lien for driving out another's logs or for breaking jam, see post § 9.
Statutory or implied liability for driving, see post § 10.

Log driving companies as common carriers, see also Carriers § 1.
Liability between driver and owner for river tolls, see Contracts ¶ 870.
Estoppel by recognizing floatage rights, misuse in floating, see Estoppel ¶ 197.
Liability for injury to bridge in driving logs, see Bridges § 23.
Jurisdiction over tort to boom in navigable waters, see Admiralty ¶¶ 6, 7.
Piles and booms as fixtures, see Fixtures § 7.

¶ 11. A log-driving company is not liable as a common carrier for a failure to deliver logs received by it for driving to their destination.—Mann v. White River Log & Booming Co., 46 Mich. 38.

¶ 12. The question of whether logs were attempted to be moved at an improper time of year, imposing liability for negligence, is one of fact for the jury.—Croze v. St. Mary's Canal Mineral Land Co., 153 Mich. 363.

¶ 13. There can be no recovery in assumpsit at common law for the expense of moving aside the defendant's logs in a stream so as to permit a drive of the plaintiff's logs.—Doyle v. Pelton, 134 Mich. 398.

Damages caused by floating logs, see note, 2 N. C. C. A. 449-454.

§ 6. Rafting and towing.

Judicial notice as to seasons and times of open and floatable water, see Evidence § 14.
Negligence in towing logs and rafts, see Shipping, VI.
Floatage of logs as part of interstate commerce, see Commerce § 6.

¶ 14. Plaintiff sued defendant to recover payment for towing logs under a contract which provided that the plaintiff should be held responsible for the safe delivery of the logs. Defendant claimed recoupment for the loss of logs sustained by the breaking of plaintiff's boom. Held, the court erred in not instructing, as requested by defendant, that it was plaintiff's duty to use all diligence to recover the logs.—McLean v. Sandusky Lumber & Box Co., 160 Mich. 324.

¶ 15. If responsibility for the loss of the logs in towing is on the plaintiff, the owner, he could not shift it to the towing contractor by merely telling the captain of the tug-boat that he left the logs in his charge, and a requested instruction to that effect should have been given in an action on a contract of towage.—Karwick v. Pickands, 171 Mich. 463.

¶ 16. In an action on a contract for the towage of logs, the court's instruction that if the plaintiff's boom-man was to pick out the booms to be used, that the verdict should be for the defendant for any loss caused by defects in the quality of the booms used, was prejudicial error, where the plaintiff claimed to recover because, under the alleged contract, the boom sticks were insufficient in number and defective in quality, and under the defendant's version of the contract and his testimony given to support it, the plaintiff's agent was to select the number of boom sticks as well as the quality.—Karwick v. Pickands, 171 Mich. 463.

§ 7. Logging contracts.

Driving and booming contracts, see ante § 5.
Rafting and towing contracts, see ante § 6.
Construction of agreement as barring right to lien, see post ¶ 37.
Remedies and procedure under the contract, see post § 21 et seq.
Validity and effect of parol contracts for sale of timber, see Frauds, Statute of.
Implication that customary scale or measurement shall be used, see Contracts § 165.
Requisites and effect of customs and usages, see Customs.
Usage to control terms of logging and lumbering contracts, see Customs § 12.
Construction as entire or severable contract, see Contracts § 167.
Construction of provisions as to duration of contract, time for performance, time and terms of payment, etc., see also Contracts, VI, D.
Construction of contracts as to quantity, scales and measurements, see Contracts §§ 183-185; and see also Sales, V.
Construction of provisions of contract respecting expenses and reimbursement, see Contracts § 194.
Liability between parties as to cost of inspection and grading called for by contract, see Contracts ¶ 871.
Sale of land as breach of lumbering contract by disabling one's self to perform, see also Contracts § 224, ¶ 931.
Lack of water or breaking of dam as excuse for nonperformance, see Contracts §§ 233-236.
Sufficiency of performance by substitute or third person, see also Contracts § 220.
Admissibility of measurements, scales and quantities in actions on contracts, see Contracts § 318.
Questions of evidence and questions for court and jury in actions on lumbering contracts, see Contracts, X, B, C.
Contracts for sale of logs or lumber as chattels, see Sales.
Contracts for sale of timber lands, see Vendors and Purchasers.
Authority of agents in logging operations, see Agency §§ 34-38.
Measure and elements of damages for breach of logging and sawing contracts, see Damages.
Rescission and cancellation of logging contracts, see Rescission.
Rights of joint adventurers, partners, and tenants in common in logging operations, see Joint Adventures; Partnership; Tenants in Common.

Accounting of lumbering contracts, see Accounting Suits § 5; Joint Adventures; Tenants in Common.

¶ 17. Contract for cutting, running and the delivery of logs by the first party, and the advancement of money therefor, the sawing and manufacturing of them into lumber, and their shipping and sale by the second party, providing, furthermore, for the distribution of the proceeds, and for deductions on account of advances made, charges, freight, insurance, etc., construed to intend that the deductions should be from the gross undivided proceeds of sales, and not from the share of the second party alone.—Hersey v. Huron Salt & Lumber Mfg. Co., 27 Mich. 490.

¶ 18. In a contract by which one party was to furnish saw-logs to the other, the latter agreed that the former should not pay more than a fixed amount of stumpage on certain lands. Held, that this implied that the parties contemplated that the logs were to be obtained from those lands, and that the party who assumed to fix the price of the stumpage claimed the right to dispose of it, and thereby assured to the other party the right to cut on those lands.—Wetmore v. Pattison, 45 Mich. 439.

¶ 19. A contract for cutting and running logs to be delivered at the mouth of a certain river during the logging season provided that the cutting should be done "under the direction of a scaler" to be furnished by one of the parties. Held, that the scaler's authority related only to the manner of cutting, and that he had not the right to stop the cutting when he should be of the opinion that claimant could not get to the river during the contract time any more logs than were already cut.—McGregor v. Estate of Ross, 96 Mich. 103.

¶ 20. A contract for the cutting of timber is not ambiguous, which provides that the promisor shall cut "all the pine and hemlock timber" on a tract, again that he shall "cut clean," that he will take from the tree "everything that is suitable" for shingles or lumber, that he will cut such "for lumber as he shall be directed" to cut and the balance into shingle logs, and that he will deliver all of said lumber so cut afloat in a lake, the payment to be according to the scaled quantity of lumber logs including mill culls but not "dead culls." It means that all timber was to be cut and put afloat regardless of what it would produce or of the number of dead culls.—Brigham v. Martin, 103 Mich. 150.

¶ 21. A contract between M. and W. provided that W. should cut and should deliver in a certain lake "all" the timber on certain land, cutting from the trees everything suitable to work up into shingles or lumber; that he should furnish a scaler to be agreed upon by the parties, to scale the logs, such scaler to furnish the scale-sheets to M. each week; that M. should pay $2 per thousand for the lumber logs, according to such log-scale; that such scale should include mill culls but not dead culls; that W. was to be paid for mill culls the same as for other lumber; that upon the final settlement the shipping tally of a certain lumber firm which was to saw the logs should be final as to the number of thousand feet of said lumber, and that said settlement should be made acccording to said shipping tally. Held, that the contract was not ambiguous, and that W. was to have advancements upon his own scale, with final settlement and payment according to the shipping tally, which was to be final; that he was not to be paid for dead culls, even though some of the lumber called dead culls in the shipping tally included what, according to the grading of other dealers would be classed as mill culls, and although M. realized something from the sale of such dead culls.—Brigham v. Martin, 103 Mich. 150.

¶ 22. A lumbering contract, whereby the plaintiffs agree to manufacture lumber and shingles for the defendant and to saw for no other parties and the defendant agrees to furnish two million feet of timber for the lumber mill and timber enough to keep two hand machines running in the shingle mill, which is subsequently modified by a statement that the plaintiffs are no longer bound by the clause prohibiting them to use the lumber mill for others, "shingle mill excepted for the manufacture of their own stock only," is construed to permit plaintiffs to use the shingle mill personally to the exclusion of the defendants, and excuses the defendants from liability for failure to furnish the agreed stock.—Little v. Barry, 125 Mich. 211.

III. LIENS AND LABOR.

§ 8. Liens in general; statutes.

Necessity of strict compliance with statutes, see also post ¶ 94.

For breaking jams or driving logs, see post ¶ 9.

Common law lien for labor or services, see post § 13.

Statement and procedure to enforce lien, see post §§ 19-28.

Labor liens on forest products, see Liens.

Attachment under Log Lien Law, see generally Attachment.

Right to lien by possession as affected by custom, see Customs ¶ 24.

Log lien law as class legislation, see Constitutional Law § 222.

Statutory provisions for liens for labor and services, see Comp. L. 1915, § 14843 et seq.

¶ 23. Laws 1873, Act No. 185, providing for a lien for labor on lumber and logs, criticized as crude and incomplete.—Clark v. Adams, 33 Mich. 159; Shaw v. Bradley, 59 Mich. 199.

¶ 24. Sess. L. 1881, Act No. 145 (How. St., §§ 8412-8427), establishing a lien for labor and services on logs, etc., is remedial, and was enacted to provide additional security for the laborer; and it should be liberally construed to effectuate that object.—Shaw v. Bradley, 59 Mich. 199.

¶ 25. It is competent for the legislature to provide for security by way of a lien in behalf of a laborer, and also to provide a remedy for the enforcement of such lien by attachment, in cases where the possession of the property upon which the labor is performed is not retained by the person performing such labor.—Shaw v. Bradley, 59 Mich. 199.

¶ 26. The right of lien for work done upon forest products is in derogation of the common law and the requisites of the statute must be strictly observed.—Reynolds v. Marquette Circuit Judge, 125 Mich. 445.

¶ 27. How. St., §§ 8427a-8427p, providing that any person performing labor or services in manufacturing lumber or shingles shall have a lien thereon for the amount due for such labor or services, and the same shall take precedence of all other claims or liens thereon, and that any such debt, demand or claim shall not remain a lien on any of the mentioned products unless a statement thereof in writing, made under oath by the claimant or some one in his behalf, shall be filed in the office of the clerk of the county in which such labor or service is performed, which statement of lien shall be filed within 30 days after the completion or last day of such labor or service, and that any sale or transfer of the products upon which the lien is claimed during the time limited for the enforcement of the same shall not affect the lien, but the lien shall remain and be enforced against the products, in whosesoever possession the same shall be found, and that the lien may be enforced by attachment against any of the products, and that such lien claims shall cease to be liens upon the property named in the statement, unless suit be commenced within three months after filing of the statement for lien, gives a laborer a lien for his services which results from the performance of, and exists from the commencement of, the work, and is not created by the proceedings to enforce the lien, but only continued or secured thereby.—In re Kerby-Dennis Co., 95 Fed. 116.

¶ 28. Under the Log Lien Law (Comp. L., §§ 10756-10799), the statute imposes upon the owner of the logs the duty of knowing that his contract price with the contractor who hires all labor represents a sum at least sufficient to pay all labor, and the further duty of knowing that no more than the value of such labor is paid from time to time.—Becherl v. Pluchak, 171 Mich. 299.

§ 9. ——For moving obstructions or driving logs.

Statutory right to compensation for driving or breaking, see post § 10.

¶ 29. How. St., § 2035, prior to its amendment by Laws 1887, Act No. 66, did not give a lien for removing obstructions upon a stream that required the aid of artificial means in running the logs by means of dams, etc.—Kroll v. Nester, 52 Mich. 70; Shaw v. Bradley, 59 Mich. 199.

¶ 30. Boom companies have a lien for their services in breaking jams and driving logs whose owners have not put on a sufficient force to do it, not only under the statute relating to such companies (Comp. L., § 2793, How. St., § 3922), but under the general act relating to log-driving (Pub. L., 1879, p. 83).—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 31. A boom company's statutory lien for running logs is acquired if the work is done by one who has contracted with the company to do it as the company's agent, and who is to be paid a gross sum for the job.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

§ 10. Statutory or implied liability for driving logs.

Lien for breaking or driving under statute, see ante § 9.

Right to compensation for driving mass comprising individual's logs, see post ¶ 39.

Assumpsit for value of services, see post § 21 et seq.

Pleading in assumpsit, see post § 23.

Evidence as to labor necessary and as to value of same, see post § 24.

Express contracts for labor or driving, see Contracts.

Statutory right of action for breaking jams, due process of law, see Constitutional Law § 147.

¶ 32. Under statute, one who breaks a log jam acquires a distinct right of action in assumpsit against the owners of the logs for the expense incurred.—Chapman v. Keystone Lumber & Salt Mfg. Co., 20 Mich. 358; and see Woods v. Ayres, 39 Mich. 345.

¶ 33. The statutory right of compensation for breaking a jam caused by another's logs is not based on implied contract, though it supports an assumpsit.—Woods v. Ayres, 39 Mich. 345.

¶ 34. When parties in banking logs on the same grounds mix them indiscriminately, it is held that, in the absence of a special agreement, or of some general usage, or other controlling circumstances, each ought at the proper time to put on a force of men proportioned to his share of the logs to break the rollway and put the logs afloat, and if either fails in that duty he is liable to the other on an implied assumpsit for the reasonable

value of the extra work done by the latter in consequence. In defense to such an action, however, he can show that from the manner in which the work was done it was of no benefit to him, or was a positive injury. And when the other has put his own logs afloat he is not bound to continue putting in the remainder, and if he does so without the owner's knowledge or authority he cannot recover for his services, and will not be liable for any damages resulting from his not putting them all in.—Peters v. Gallagher, 37 Mich. 407.

¶ 35. Under Comp. L. 1897, § 5075, making it the duty of lumbering companies to put on men enough to prevent obstruction of navigation and giving injured parties the right of compensation, a defendant is liable if he attempts a drive below the plaintiff's, which drive consists of hardwood timber not in condition to drive, notwithstanding that afterward he used all diligence and employed all the men that could be used on the work.—Bellows v. Crane Lumber Co., 126 Mich. 476.

¶ 36. Assumpsit will not lie to recover expenses of moving aside the defendant's logs so as to complete the plaintiff's drive, as this is not included in Comp. L. 1897, § 5075, which provide recovering for service in driving the defendant's logs or breaking a jam.—Doyle v. Pelton, 134 Mich. 398.

§ 11. Right to lien and waiver.

Necessity of strict compliance with statutes, see also ante § 8, post ¶ 126.
Inception and derivation of the lien, see ante ¶ 27.
Effect of parting with possession, see post § 12.
Common law lien, see post § 13.
Discharge of lien, see post § 14.
Persons entitled and subject to lien, see post §§ 15, 16.
Materials and haulage as proper items, see post § 17.
Right to lien for saw bill under terms of contract, see post § 17.
Property subject to lien and extent of lien, see post § 18.
Necessity and sufficiency of statement, see post §§ 19, 20.
Time for filing lien statement, see post § 19.
Burden of proof and evidence as to waiver, see post § 24.

¶ 37. A saw-mill was leased without rent, but the lessees were to saw all logs furnished by the lessor and ship and season lumber as ordered. This agreement was to be in force through the whole period of the lease. Held, that this contract evidently did not contemplate a lien, since (a) the amount of work agreed for was indefinite and consisted of various items, and the rental value could not well be apportioned on it; (b) work was to continue until the end of the lease, when the lessee would be bound to quit and could not remain on the premises to enforce his lien; and (c) the obligation to ship was unlimited and might exhaust the whole of the lumber.—McMaster v. Merrick, 41 Mich. 505.

¶ 38. Where a log-owner demands all his logs from a boom company which claims a lien for its services in driving them, the latter does not lose its lien by detaining more of the logs than is necessary to preserve it, though such a detention may possibly give ground for an action.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 39. Where the logs of an individual owner have become intermingled with those in the charge of a boom company without his consent, but without the fault of the company, the latter acquires a lien for its services in driving them which it does not waive by refusing to deliver them to the owner on demand, unless he tenders not only a reasonable compensation for the services, but enough to cover the cost of separating his logs from the rest.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 40. A lienholder cannot be said to refuse to state the amount he claims when he merely refuses to vary from schedule rates of which both parties have knowledge.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 41. How. St., § 8427a, giving to "persons who perform any labor or service in manufacturing lumber a lien thereon for the amount due for such labor or services," gives a lien to an owner of a saw-mill who saws lumber under a contract, notwithstanding the fact that he has a lien at common law; and he does not waive his statutory lien by reserving in his statement the lien which he has by virtue of his possession of the lumber.—Phillips v. Freyer, 80 Mich. 254.

¶ 42. Acceptance of time-drafts for a bill for sawing logs does not discharge the lien on the lumber unless received as payment, and then only pro tanto.—Hughes v. Tanner, 96 Mich. 113.

¶ 43. The mere fact that one who is sawing lumber for another at his own mill does not assert a lien thereon when a third person is examining it does not estop him from claiming such lien as against such person when the latter claims title under a sale no knowledge of which at the time is brought home to the sawyer.—Hughes v. Tanner, 96 Mich. 113.

¶ 44. Where a boom company has taken time-acceptances for its claim for services upon rafts of logs delivered to the owners thereof, such owners have a right to demand and receive the residue of their logs, released from any lien for services upon the rafts delivered. There being no agreement or understanding that the logs on hand might be

retained as security for a future payment of a demand not then payable, such an agreement cannot rest in implication. And the lien being thus once lost could not be revived by the maturing of the acceptances.—Au Sable River Boom Co. v. Sanborn, 86 Mich. 358.

¶ 45. Whether, as between a boom company and the original owners of logs rafted by it, there could be any question that the taking of time-acceptances for its claim for services would be a waiver of any lien therefor on logs remaining in their custody, there could be none as between the company and a third person to whom the property has been sold without notice of any claim for services in respect to logs previously delivered. If one by his purchase acquires an immediate right to remove his property he cannot lose it by any subsequent default of his vendor.—Au Sable River Boom Co. v. Sanford, 86 Mich. 358.

¶ 46. The indorsement and discount of notes, and later securing them by a chattel mortgage, for the amount of a saw bill is consistent with a subsequent claim of a lien for the sawing.—McEwan Bros. & Co. v. Carpenter, 111 Mich. 522.

¶ 47. A lien on lumber for sawing is released by taking a note for the sum due only when such note is shown to have been taken in payment.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 48. That by the contract between the parties the owner of logs was to take up, on or before a certain date, the notes of one who sawed them "from proceeds of sales of lumber," that the time for paying for the sawing was extended beyond such date, and that lumber was in fact shipped by the sawyer to the owner from time to time, held, not to deprive the sawyer of his lien upon lumber remaining in his possession.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 49. A sawyer's lien on logs is relinquished where notes are accepted in payment of the bill and afterwards renewed and the sawyer also points out the timber to a purchaser without indicating in any way that he claims a lien thereon.—Germain v. Central Lumber Co., 120 Mich. 61.

¶ 50. An instruction by the lienor to pay his wages to the principal defendant does not operate as a waiver of the lien, only so far as such instruction has been acted upon and the amount paid.—Dowd v. Dowd, 126 Mich. 649.

¶ 51. In attachment proceedings under the log lien law Comp. L. 1897, § 10756 et seq. giving a right of lien under both express and implied contracts for labor performed, evidence that the owner treated the contract as fully performed and the fact that on the trial he raised no question as to its not having been completed, will prevent intervening subsequent purchasers from defeating the lien on that ground.—Kangas v. Boulton, 127 Mich. 539.

§ 12. ——Loss of possession.

Right to lien on logs kept in possession after taking notes for labor, see ante ¶ 48.

¶ 52. By allowing sale and delivery of lumber upon which he has a lien, to purchasers ignorant of his rights, a sawyer waives his lien to the extent of such sales.—Chadwick v. Broadwell, 27 Mich. 6.

¶ 53. A lien upon lumber for the saw-bill was not lost by the removal of the lumber from the mill-yard to a distant place of shipment, where, under the agreement, the possession remains in the sawyer until inspection at such place.—Chadwick v. Broadwell, 27 Mich. 6.

¶ 54. The owner of a saw mill who sawed lumber under a contract and retained possession of such lumber to secure the payment of the value of his services under his common law lien thereon, waived such lien when he commenced his suit by attachment of such lumber; since by so doing he voluntarily gave up his possession and placed such property in the hands of the sheriff.—Phillips v. Freyer, 80 Mich. 254.

¶ 55. An agreement that all lumber sawed from logs is to remain on the sawyer's docks and in his possession until he is paid is not inconsistent with his right to claim a lien.—Hughes v. Tanner, 96 Mich. 113.

¶ 56. Where a mill-owner, knowing that lumber sawed and remaining to be sawed from logs had been sold, sawed the remaining logs as directed by an agent of the vendee, piled the lumber by itself, marking it with vendee's initials, and took vendor's note for the saw-bill, he waived his right to a lien on the lumber.—Tyler v. Blodgett & Davis Lumber Co., 78 Mich. 81.

¶ 57. That lumber sawed from logs is marked with initials of vendees thereof does not take it out of the sawyer's possession where he still has a duty to perform in regard thereto and where neither party regards the marking as having any significance as a delivery or transfer of possession.—Hughes v. Tanner, 96 Mich. 113.

¶ 58. Where one has sawed logs into lumber, the fact that part of the lumber was shipped by the owner thereof and by his vendees, without paying the sawing-bill and without protest from the sawyer, does not preclude the latter from claiming a lien on the rest, where the right to ship before payment was not expressly reserved.—Hughes v. Tanner, 96 Mich. 113.

§ 13. ——Common law lien.

Statutory lien as additional to common law lien of sawyer, see ante ¶ 41.

Waiver or loss of lien by parting with possession, see ante § 12.

¶ 59. One who performs labor in cutting, hauling, and driving logs for another, under a contract which gives him the right to retain possession of the logs until he is paid for his services, has a common-law lien on the logs for such services.—Haughton v. Busch, 101 Mich. 267.

¶ 60. The doctrine that one who has failed to comply with the terms of his contract may nevertheless recover, upon a quantum meruit, the value of his services, less such damages as the other party may show have been occasioned by his breach, cannot be extended so as to entitle a contractor to maintain a common-law lien upon logs in his possession under a contract for the cutting, hauling, and driving of the same, when he has failed to comply substantially with the terms of his contract.—Haughton v. Busch, 101 Mich. 267.

¶ 61. Where, through a vendee's failure to remove within the time stipulated logs cut under contract, they revert to the vendor, the vendee, in replevin for the logs by the vendor's assignee, cannot assert a special property in them by way of lien for his labor.—Gamble v. Gates, 97 Mich. 465.

§ 14. Discharge of lien.

Waiver of lien, see ante § 11.

Waiver of lien by parting with possession, see ante § 12.

Burden of proof of discharge, see post § 24.

¶ 62. Payment by owner to contractor of amount agreed for work does not discharge liens of contractor's laborers, which liens hold to the amount of the contract price. The log-owner must guard against loss by informing himself whether or not the laborers have been paid.—Federspiel v. Johnstone, 87 Mich. 303.

§ 15. Persons entitled.

¶ 63. Whether the Sess. L. 1881, Act No. 145, in declaring that the word "person" or "persons" in the first section thereof (How. St., § 8412) shall be interpreted to include cooks, blacksmiths, artisans and all others usually employed in performing such labor and services, would operate to give a lien to cooks, blacksmiths, etc., between whom and the owner there exist no contract relations, quære.—Shaw v. Bradley, 59 Mich. 199.

¶ 64. An independent contractor, that is, one who enters into a contract with the owner of logs to drive and deliver them, is entitled to a lien under Sess. L. 1881, Act No. 145.—Shaw v. Bradley, 59 Mich. 199.

¶ 65. Laws 1887, Act No. 229, giving a lien for labor or services in manufacturing lumber, is not confined to persons who perform personal labor under the contract.—Phillips v. Freyer, 80 Mich. 254.

¶ 66. The Log Lien Law (Laws 1887, Act No. 229) does not apply to the case of a contractor for hauling logs, who has not performed personally any of the labor for which payment is claimed.—Kieldsen v. Wilson, 77 Mich. 45, overruled in Phillips v. Freyer, 80 Mich. 254.

¶ 67. An employee of one operating a sawmill and a farm, whose time is kept but not apportioned, is entitled to a lien upon the products of the mill for the labor performed thereon, and to that end may estimate the time devoted to that branch of the work.—Menery v. Backus, 107 Mich. 329.

§ 16. Persons subject to lien.

Liens for labor on logs of several owners in mass, see also post ¶ 79.

Necessity of debt and judgment against employer to sustain lien against purchaser of the logs, see post ¶ 99.

Buyer from log owner of logs at mill for sawing, see ante ¶¶ 43, 45.

Issues open to intervening purchaser, see post § 23.

Propriety of judgment in personam, see post § 27.

Estoppel to hold purchaser from lienor in trover, see also Estoppel ¶ 141.

¶ 68. Where a contract for the sale of stumpage permits the vendee to have the logs manufactured, and consequently to create a lien upon them for the labor, the vendor, in subsequently dealing with the vendee's assignee with regard to the sawed lumber, is bound at his peril to ascertain whether the lien has been satisfied or waived, or whether the assignee has such possession of the lumber as to warrant the inference that no lien then exists; and he cannot claim the rights of a bona fide purchaser under the assignee's mere formal oral transfer to him of the lumber in consideration of a pre-existing debt for the purchase price of the logs.—Chadwick v. Broadwell, 27 Mich. 6.

¶ 69. The lien for cutting logs provided by Laws 1873, Act No. 185, could not be enforced as against those who had purchased from the debtor without notice of the claimant's lien as shown by his petition on file or by his actual possession.—Haifley v. Haynes, 37 Mich. 535.

¶ 70. Where a contract for sawing logs provided that the quantity sawed was to be determined by the sales or inspection bills at the place of shipment, it was held that any possession that might be taken by purchasers of the sawed lumber, as the inspection proceeded, must be regarded as only inchoate and conditional until payment should be made for the sawing, and that purchasers partici-

pating in the transaction and necessarily apprised of the lien were not wronged by its being insisted upon.—Chadwick v. Broadwell, 27 Mich. 6.

¶ 70a. It must be presumed that a contract for the purchase of posts, poles and ties is entered into with full knowledge of the rights of a laborer to a lien on forest products for labor thereon, upon the employers' default, under the Log Lien Law and to enforce the same where such contract provides for advances or payment in instalments as the work progresses up to 50 per cent of the contract price for ties and poles piled at the bank of the landing, to be estimated by the purchaser's inspector, and the remaining 50 per cent at delivery on board the vessel, all advances to be secured by a "bill of sale on cedar standing or cut on lands from which timber is to be cut."—Hughes v. Hughes, 197 Mich. 690.

§ 17. Charges covered by lien.

¶ 71. A contract for manufacturing lumber from logs was held to give a lien for the saw-bill, notwithstanding a provision for the payment of the bill for sawing "as often as once a month after the lumber is delivered out of said mill."—Chadwick v. Broadwell, 27 Mich. 6.

¶ 72. Laws 1887, Act No. 229 (How. St., §§ 8427a-8427p), which gives a lien for labor and services upon logs, lumber, etc., covers a claim for shingle bands furnished a contractor for the manufacture of shingles.—Bourgette v. Williams, 73 Mich. 208.

¶ 73. How. St., § 8427a, gives a lien for hauling logs and timber but not for hauling from the mills manufactured lumber.—Villenuve v. Sines, 92 Mich. 556.

¶ 74. Under How. St., § 8427a, which gives one who performs "any labor or service" a lien therefor, the owner of a team let for a stated time at a stipulated price to a laborer or contractor is not entitled to a lien for such price.—Mable v. Sines, 92 Mich. 545.

¶ 75. Under the statute (How. St., § 8427a) giving a lien for "cutting, skidding, falling, hauling, scaling, banking, driving, running, rafting or booming any logs," etc., recovery may be had for labor in "cutting, skidding, hauling, chopping, sawing, swamping, loading and falling."—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

§ 18. Extent of lien; property subject.

Inception and source of the lien, see also ante ¶ 27.

Retention of too many logs as affecting right to lien, see ante ¶ 38.

Persons entitled and subject to lien, see ante §§ 15, 16.

Charges and items for which lien may be had, see ante § 17.

Cost of separating logs as item covered by lien, see also ante ¶ 39.

Verdict for proper portion of claim, see post § 26.

¶ 76. One who saws a quantity of logs for another has a lien on any part of the lumber for the whole bill, where the contract was entire.—Hughes v. Tanner, 96 Mich. 113.

¶ 77. Where shingles manufactured by plaintiff out of defendants' lumber under a continuous contract at so much per 1,000 were mingled and sold by defendants without regard to the time of their manufacture, plaintiff's lien for labor done after the time up to which he had received pay was held to apply to shingles manufactured before that time.—Craddock v. Dwight, 85 Mich. 587.

¶ 78. A laborer who has performed work on a drive of logs belonging to different owners cannot enforce his whole lien upon the logs belonging to one or more of such owners, and he can have his lien enforced against a particular owner's logs only so far as he shows the amount of labor expended upon the logs of that owner.—Appleman v. Myre, 74 Mich. 359.

¶ 79. Where the owners of adjoining timber lands enter into several agreements with a logging contractor, and the agreements do not indicate that any confusion of the work of the several owners is contemplated, a workman who is employed under the various contracts, no separate account being kept of the labor performed by him upon the logs of each owner, will not be permitted to assert a lien for labor against the entire quantity of logs produced; the labor not being such as must have been bestowed on mingled logs in a mass.—McGuire v. McCallum, 110 Mich. 91.

¶ 80. In an action of attachment under Comp. Laws, 1897, §§ 10756-10799, to enforce a claim for labor performed on lumber, the statement of the lien, as well as the affidavit and writ, recites that the lien is claimed "for work and labor performed by Chas. Becherl in wheeling and shoving the following described property." Plaintiff's wife was to cook for the men and the services of both was to be $2.25 per day. The earnings of both were $174.94, of which plaintiff received $87.16, which he gave his wife as her share. Held, that plaintiff had a lien for $87.78.—Becherl v. Plutchak, 171 Mich. 299.

§ 19. Statement of lien and affidavit.

Descriptions in the petition, see post § 23.

Evidence to supply omitted date of filing, see post ¶ 118.

Effect of omission of affidavit to state by whom labor was done, see also post ¶ 129.

Filing statement of lien as prerequisite to attachment, see Attachment § 4, ¶ 12.
Averments in affidavits for attachment, see Attachment § 30.
Needlessness of inventory in log lien attachment, see Attachment § 54.
Provisions requiring statement, see Comp. L. 1915, § 14844.
Form and requisites of the statement, see Comp. L. 1915, § 14845.
Time for filing lien statement, see Comp. L. 1915, § 14846.
Recording, filing and copies of statements and fees for same, see Comp. L. 1915, § 14858.

¶ 81. Statements of lien are as much a part of the proceeding and as essential as the affidavit for attachment; and if the two, taken together, show that the claims of several claimants who have joined in the proceeding are each less than $100, it is sufficient to give the court jurisdiction, though it is better practice to show the fact in the affidavit also.—Wiggins v. Houghton, 89 Mich. 468.

¶ 82. The filing of the statement is sufficiently shown by an averment in the affidavit for attachment that a statement of lien required by law was on a specified date filed with the clerk of the county where the labor was performed.—Wiggins v. Houghton, 89 Mich. 468.

¶ 83. Where, under a continuous contract for the manufacture of shingles, periodical statements of amounts due were made and time acceptances received thereon, the thirty days within which, under Laws 1887, Act No. 229, a statement of lien was to be filed did not begin to run from the date when each statement of the amount due was rendered.—Craddock v. Dwight, 85 Mich. 587.

¶ 84. A statement of lien sworn to before a notary public is not invalid because it has no caption.—Sullivan v. Hall, 86 Mich. 7.

¶ 85. A statement of lien sworn to before a notary public is not invalid because it does not show in its jurat or otherwise the county where the oath was administered.—Sullivan v. Hall, 86 Mich. 7.

¶ 86. A statement of lien sworn to before a notary public is not invalid because the notary subsequently appears as claimant's attorney to enforce the lien.—Sullivan v. Hall, 86 Mich. 7.

¶ 87. A log lien is filed within 30 days after the last day's labor was performed where the testimony shows that the plaintiff lienor worked on the logs continuously for six months, except for a short lay-off at the employer's request, that lienor was paid in full for the last three months, but no final settlement made for the balance due for the previous work.—Hammond v. Pullman, 129 Mich. 567.

¶ 88. Plaintiff brought an action of attachment under Comp. Laws 1897, §§ 10756-10799, to enforce a claim for labor performed on some lumber belonging to certain defendants under a contract made with the principal defendant. Held, that property described in the lien filed as "about 700,000 feet of maple, beech, elm, and basswood lumber (the same being lumber that was sawed by Gustave Plutchak for S. Crawford & Sons and now piled near said Pluchak mill in Cedarville township) in the county of Menominee," is sufficient to continue the lien beyond the thirty days from the date of the last day's labor.—Becherl v. Plutchak, 171 Mich. 299.

§ 20. ——Combining lien claims.

Lien of one of several claimants, see also ante ¶ 80.

¶ 89. Under Laws 1887, Act No. 229 (How. St., § 8427a et seq.), any number of persons each having claims under $100 may appoint as their agent one of the claimants against the same products, though his claim exceeds $100.—Wiggins v. Houghton, 89 Mich. 468; Villenuve v. Sines, 92 Mich. 556.

¶ 90. Claims for log liens aggregating $200 are properly united in a suit by one of the claimants whose claim is $133.20.—Villenuve v. Sines, 92 Mich. 556.

¶ 91. Comp. L. 1897, § 10762, relating to the consolidating of labor claims in one log-lien, was evidently designed for the benefit of those whose claims were individually less than $100, and not for the benefit of those who might have claims exceeding that sum.—Van Slyck v. Arseneau, 140 Mich. 154.

¶ 92. A statement of a labor claim for over $100 filed under the Log-Lien Law (Comp. L. 1897, § 10757), is not invalid, even though an attempt was made to include other claims in the same statement.—Van Slyck v. Arseneau, 140 Mich. 154.

¶ 93. Under Comp. Laws 1897, § 10762, providing that two or more persons claiming a lien for labor on forest products may unite their claims and designate one of their number as agent to bring suit, which claim shall be considered as one lien, such authority to sue is not in reality an assignment and can be conferred orally.—Craig v. Brown, 171 Mich. 256.

§ 21. Actions and procedure.

Notice or process and service, see post § 22.
Pleading and issues, see post § 23.
Evidence and presumptions, see post § 24.
Jury questions and instructions, see post § 25.
Verdict, findings and judgment, see post §§ 26, 27.
Executions on judgment, see post § 28.
Combining lien claims in one statement and suit, see also ante § 20.

Attachments under the Log Lien Law, see Attachment.
Strict construction of attachment provisions of law, see Attachment § 2.
Effect of excessive levy to vitiate proceedings, see Attachment ¶ 249.
General law of procedure not peculiar to log labor claims and liens, see specific topics treating of the various remedies and proceedings, e. g., Contracts, X; Assumpsit; Attachment; Process; Appearance.
County where suit is to be brought, see Venue, I.
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Proof of labor claim as set-off, see Set-off.
Due process in lien laws, see Constitutional Law § 149.
Statutory mode of procedure to enforce, see Comp. L. 1915, § 14847.
Right of claimants to intervene, see Comp. L. 1915, § 14855.

¶ 94. Compliance with statutory provisions in all respects is required in proceedings to enforce a lien upon logs, etc.—Appleman v. Myre, 74 Mich. 359.

¶ 95. In an action to recover for running defendant's logs which were obstructing the stream, it is not necessary to make B. a party plaintiff, though plaintiff had agreed to drive B.'s logs as well as his own, the actual cost thereof to be divided pro rata between them, since B. was not a partner and the only result to him would be that his share would be reduced if recovery was had in the present action.—Bellows v. Crane Lumber Co., 131 Mich. 630.

¶ 96. The statutory action of assumpsit for breaking a log jam lies, if at all, against the owner of the logs and not against those whom he has hired to run them; it is the owner's duty to see that they do not obstruct the watercourse.—Butterfield v. Gilchrist, 53 Mich. 22.

¶ 97. In proceedings to enforce a lien on logs the appearance and plea of a claimant does not waive previous jurisdictional defects in the proceedings, where the judgment is in form against the logs and there is no judicial determination that the claimant is the sole owner of them.—Two Hundred Thousand Feet of Logs v. Sias, 43 Mich. 356.

¶ 98. In proceedings under the Log Lien Law against one claiming under a tax title, the real owner of the premises may intervene and attack the validity of such title, where the possession of the holder thereof was such only as was incident to cutting and removing the timber from the lands. Such a case is not within the rule precluding the litigation of title to realty in a personal action.—Cook v. Cook, 106 Mich. 164.

¶ 99. Before the plaintiff in proceedings by attachment under the Log Lien Law, Comp. Laws 1897, § 10756 et seq., as amended, How. 2nd Ed., § 13843 et seq., can subject the property of the purchaser of logs, with whom he has no contractual relations, to a lien under the statute for labor, it is incumbent upon him to show himself entitled to, and obtain a judgment against, his employer.—Hughes v. Hughes, 197 Mich. 690.

¶ 100. Where a lumbering contract is breached by a failure to pay for work done the contractor may, upon filing a proper statement of lien under the Log Lien Law, Comp. Laws 1897, § 10756 et seq., How. 2nd Ed., § 13843 et seq., either sue upon a quantum meruit under the statute or for a breach of contract irrespective of the statute.—La Vasser v. Chesbrough Lumber Co., 190 Mich. 403.

§ 22. ——Notice and service.

Allegations as to giving and manner of notice, see post § 23.
Sufficiency of service and return in attachment proceedings, see Attachment §§ 71, 80, 83, 86.
General law of process, see Process.

¶ 101. Under Laws 1881, Act No. 145, an owner's logs cannot be seized to pay the debt of his contractor or other person without reasonable notice and an opportunity of contesting the suit.—Reilly v. Stephenson, 62 Mich. 509.

¶¶ 102, 103. Where a purchaser of standing timber, the title to which was retained by the land-owner until the purchase-price was paid, sold the logs to a corporation, which acquired all of his interest in the same before the logs were attached at the suit of his workmen under the Log Lien Law, and notice was served on the corporation, but not upon the land-owner, who had not then been paid for the timber, and, after making such payment, the corporation replevied the logs from the sheriff, the failure to serve notice upon the land-owner will not defeat such lien proceedings in the replevin suit.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

§ 23. ——Pleading and issues.

Sufficiency of the statement and affidavit, see ante § 19.
Questions triable on petition to dissolve attachment, see Attachment § 121.
General law of pleading, see Pleading.
Form and requisites of declaration, see Comp. L. 1915, § 14853.

¶ 104. A petition under Comp. L. 1871, §§ 1662-3 (How. St., § 2038), to enforce a lien on logs is fatally defective if it does not allege the jurisdictional fact that they are within the county where the suit is begun.—Two Hundred Thousand Feet of Logs v. Sias, 43 Mich. 356.

¶ 105. Where a petition to enforce a lien on logs alleged that the petitioner had run

the logs to a certain boom, held, that the court could not take judicial notice that the boom was within the county where the suit was begun so as to cure the omission of the averment that the logs were within the county and therefore subject to the jurisdiction.—Two Hundred Thousand Feet of Logs v. Sias, 43 Mich. 356.

¶ 106. A lien cannot be enforced upon logs not described in the writ or declaration.—Appleman v. Myre, 74 Mich. 359.

¶ 107. An allegation in a declaration under Laws 1873, Act No. 185, that the plaintiffs, on a day named, "caused to be mailed to each of said defendants a notice of the filing of said petition or statement, as required by the act aforesaid," is not an explicit statement of the service of such notice, "by depositing the same in the postoffice directed to the owner of the logs or timber, his agent or attorney, at his or their place of residence, and paying the full postage thereon," which is the mode of service by mail expressly specified by the statute.—Clark v. Adams, 33 Mich. 159.

¶ 108. In assumpsit to recover for expenses in clearing the way for driving logs through the defendant's drive under Comp. L. 1897, § 5075, the declaration should state the facts which constituted the cause of action.—Doyle v. Pelton, 134 Mich. 398.

¶ 109. In an action of attachment under the Log Lien Law for services performed by plaintiff in driving defendant's logs, an unliquidated claim made by a third person who had logs in the river above plaintiff's drive, and who, in consequence of plaintiff's not putting on a sufficient force to keep the river unobstructed, put men upon plaintiff's drive, cannot be shown defensively under the general issue without notice.—Shaw v. Bradley, 59 Mich. 199.

¶ 110. The intervening owner by purchase of property attached under the Log Lien Law, Comp. Laws 1897, § 10756 et seq., as amended, How. 2nd Ed., § 13843 et seq., who appears to contest the validity of a claimed lien for labor has the right, in connection therewith, to contest the amount claimed to be due from the employer, so far as it may have any bearing upon the amount of any lien claimed against his property.—Hughes v. Hughes, 197 Mich. 690.

§ 24. ——Evidence and presumptions.

Presumption that purchaser takes with notice of liability to lien, see also ante ¶ 70a.
General law of evidence, see Evidence.
Cross-examination as to wrongful jamming of stream, see Examination of Witnesses ¶ 300.
Order of proof and proper matter in chief, see Trial, V, B.

¶ 111. One who buys from the owner lumber in a sawyer's possession has the burden in replevin against the sawyer of showing that the lien for sawing was extinguished.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 112. Where the issue is whether or not a lien on lumber for sawing was waived by receiving notes in payment or by surrendering possession of the lumber, the sawyer's testimony that he did not intend a waiver is not admissible.—Germain v. Central Lumber Co., 116 Mich. 245.

¶ 113. It was error to permit plaintiff in an action to enforce a lien on logs to introduce in evidence the affidavit, writ of attachment, and return of service, the same having no bearing upon any question to be submitted to the jury.—Dillon v. Howe, 98 Mich. 168.

¶ 114. In an action involving the existence of a lien for services, a full showing should be had as to the items that go to make up the claim, and full cross-examination should be permitted.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

¶ 115. In an action to recover for running defendant's logs which were obstructing the stream, it is competent for plaintiff to show what part of defendant's logs plaintiff had to run and drive in order to bring their own logs down.—Bellows v. Crane Lumber Co., 131 Mich. 630.

¶ 116. In an action to recover for running defendant's logs which were an obstruction to the stream, plaintiff may show that hardwood logs, such as defendant's, put in the river early in the spring will not float readily and that because of this a custom has grown up of not putting them in the river until the softwood logs have gone down, the purpose of such testimony being to account for the large amount of work required to run the logs in question.—Bellows v. Crane Lumber Co., 131 Mich. 630.

¶ 117. A log lien under Comp. L. 1897, § 10756 is unaffected by a subsequent sale; and testimony by an intervening purchaser that he has paid the full purchase price is properly included.—Kangas v. Boulton, 127 Mich. 539.

¶ 118. Where, in an action to enforce a log lien, a certified copy of the lien was introduced in evidence which failed to show the date of filing, oral proof of the date of delivery to the clerk for filing is admissible.—Harris v. Doyle, 130 Mich. 470.

¶ 119. In proceedings by attachment under the Log Lien Law, Comp. Laws 1897, § 10756 et seq., as amended, How. 2nd Ed., § 13843 et seq., against the employer and purchaser of posts, poles and ties for the enforcement of a lien for labor, evidence held to present an inference from which the jury might con-

clude that the poles, ties and posts attached were what plaintiff had worked upon.—Hughes v. Hughes, 197 Mich. 690.

¶ 120. In proceedings by attachment under the Log Lien Law, Comp. Laws 1897, § 10756 et seq., as amended, How. 2nd Ed., § 13843 et seq., against employer and purchaser of posts, poles and ties for enforcement of a lien for labor, where plaintiff, a camp foreman, furnished no definite data by which the jury could determine and differentiate between the time spent on the purchaser's timber and at other things, held that a verdict for $893, or $10 less than plaintiff's entire claim, was based upon mere conjecture.—Hughes v. Hughes, 197 Mich. 690.

¶ 121. Where one who is allowed by way of accommodation to bank logs on another's ground has to put afloat the latter's logs in order to get his own out, he is not necessarily entitled to charge for the service unless it is so agreed. And to fix the relative rights and obligations of the parties a jury may consider the agreement or circumstances under which the permission was given, the extra labor and expense in managing the logs occasioned by the additional quantity, and such other facts as would fairly tend to aid them in arriving at a proper understanding of the entire case.—Peters v. Gallagher, 37 Mich. 407.

§ 25. ——Jury questions and instructions.

Court and jury questions in actions on contracts generally, see Contracts, X, C.

Instruction in replevin as to right to logs, see Replevin, IV.

¶ 122. The reasonableness of the lien claim for driving logs is for the jury, and they cannot be instructed as to their conclusions thereon.—Hall v. Tittabawassee Boom Co., 51 Mich. 377.

§ 26. ——Verdicts and findings.

Conjectural verdict as to amount, see post ¶ 120.

Sufficiency of verdict to support lien judgment as distinguished from personal judgment, see also post ¶ 128.

General law of verdicts and findings, see Verdicts and Findings.

Statutory requisites of the findings, see Comp. L. 1915, § 14854.

¶ 123. A finding that certain old logs and some new ones that defendant admitted contracting for were cut more than 30 days before claim made with no finding as to other logs in controversy, is equivalent to a finding of no lien under instructions that there could be no lien on logs cut without authority or more than 30 days before claim; where there was a dispute as to certain of the logs whether they were cut under a contract or not or subject to any lien.—Demars v. Conrad, 73 Mich. 151.

¶ 124. Where a contractor takes proceedings under the Log Lien Law of 1887 (Act No. 229 against the log-owner, with whom he claims to have made a contract for their hauling, and recovers a verdict for the amount claimed to be due on said contract, the fact that his nonperformance of the labor in person deprives him of a lien under said statute will not affect said verdict.—Kieldsen v. Wilson, 77 Mich. 45.

¶ 125. A contractor's bookkeeper, who had drawn for plaintiff a time order for his work, testified that he included therein a portion of another laborer's time, but did not state how much, and gave no reason for including such time. Time orders were given each man separately. Held, that the jury might find plaintiff entitled to the amount of the order less what had been paid thereon.—Federspiel v. Johnstone, 87 Mich. 303.

§ 27. ——Judgment and relief.

Execution on the judgment, see post § 28.

General law of judgments, see Judgments.

Costs on appeal where judgment is sustained as personal judgment but does not support lien, see Costs ¶ 401.

Irregularities in proceedings to establish a lien as affecting the operation of the decree as res adjudicata, see Former Adjudication ¶ 40.

Judgment for quantum meruit in lien proceeding as bar to action for breach of contract, see Former Adjudication ¶ 220.

¶ 126. Laws 1873, Act No. 185, authorized no personal judgment as for damages, but simply a proceeding in rem to enforce a lien, and those who avail themselves of it must show that they have strictly followed its provisions.—Clark v. Adams, 33 Mich. 159.

¶ 127. Sess. L. 1881, Act No. 145 (How. St. §§ 8412-8427), authorizes a personal judgment as well where a lien is found to exist as where the amount found due is not a lien upon the property.—Shaw v. Bradley, 59 Mich. 199.

¶ 128. A judgment declaring a lien upon defendant's logs cannot be sustained as a lien where the jury failed to find that the sum found due was for labor and services performed upon the logs described in the declaration, or was a lien thereon and where the verdict did not discriminate between charges, and there was some testimony opposed to a lien.—Demars v. Conrad, 73 Mich. 151.

¶ 129. The failure of one of several plaintiffs in several respective log-lien suits against the same debtor, where the attachments were levied upon the same logs and made returnable at the same hour, at which time the debtor appeared and joined issue in each suit, to state in his affidavit by whom the labor was performed for which recovery was sought, did not invalidate a judgment

in a suit in replevin subsequently brought, for the return of the property. It lessened, however, the lien upon such logs in the amount of the judgment in such plaintiff's favor.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 130. The illegal taxation of an attorney fee in a log-lien suit, under Laws 1887, Act No. 147, will not invalidate the judgment, nor interfere with the lien, except in so far as the illegal excess of costs may reduce it in amount.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

§ 28. ——Executions.

General law of executions, see Executions.
Executions based on attachments in general, see Executions § 8.
Estoppel to urge defects in execution sale, see Executions § 95.

¶ 131. A writ of execution levied upon logs after judgment in a log-lien suit is valid where the logs were described therein as those mentioned in plaintiff's declaration, since such logs were sufficiently pointed out to the officer who held them under his attachment.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 132. After the levy of an execution issued upon a judgment in a log-lien suit brought under Laws 1887, Act No. 229, upon the logs, and the posting of notices of sale, the officer holds the property under such levy, and not under the prior attachment.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

FORFEITURE to FORMER ACQUITTAL.

Cross-References.

Forfeiture—
See Penalties and Forfeitures.
For forfeiture of particular rights, see specific topics treating of such rights, e, g., Contracts, VII; Insurance, XII; Fraternal Associations, V; Corporations, XXIII.
Forfeiture of bail, see Arrest, § 47; Civil Arrest, IV.
Forgery—
See Crimes §§ 83-85; Indictment.
Genuineness of instruments civilly considered, see Execution of Instruments.
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Liability of carrier delivering goods on forged papers, see Carriers § 36.
Formal Words—
See Contracts, VI; Deeds, III; Statutes, V; Wills, VI; Pleading; Indictment, I.
Former Acquittal—
See Crimes, I, D.

FORMER ADJUDICATION.

TREATS of the general law of res adjudicata as distinguished from collateral attack (see Judgments, VII) and law of the case (see Appeal, XII, G, XV; Courts, IV). Not only the effect of a judgment as a bar of the cause of action or defenses to it, but also its effect as an estoppel of particular facts is treated here. The general law of Judgments is treated in that topic, and the merger of crimes in judgment and bar of second prosecutions is treated in Crimes, I, D. The effect to be given to foreign judgments and to those of sister states under the "full faith and credit clause" is treated in Foreign Judgments.

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Full faith and credit clause applied to judgments of other states, see Foreign Judgments, II.
Estoppel or conclusion by papers in the case or by proceedings therein of an admissive or representative character, see Estoppel, III; and see also Stipulations.

¶ 1. The judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, and as evidence conclusive between the same parties and their privies upon the same matter directly in question in another court.—Wales v. Lyon, 2 Mich. 276; Prentiss v. Holbrook, 2 Mich. 372.

¶ 2. A judgment is res adjudicata upon the points directly involved and determined therein in a subsequent suit between the same parties.—Harris v. Clark, 74 Mich. 334.

¶ 3. A matter once fully adjudicated is conclusively adjudicated as between parties and privies.—Hazen v. Reed, 30 Mich. 331.

¶ 4. An adjudication is conclusive in respect to (1) the subject-matter of the litigation, and (2) the point of fact or law, or both, necessarily settled in determining the issue on the subject-matter.—Jacobson v. Miller, 41 Mich. 90.

¶ 5. Judgments are admissible in evidence when the same subject-matter again comes in controversy between the same parties.—Phillips v. Jamieson, 51 Mich. 153.

¶ 6. Parties to a controversy cannot, after judgment, revive it in another court and cause, in order to raise again the questions already in issue and adjudicated.—Hudson v. Detroit Superior Court Judge, 42 Mich. 239.

§ 2. Basis of the doctrine.

¶ 7. The reason why judgments of courts having jurisdiction are conclusive on parties and privies is because such parties have had an opportunity to assert or defend their rights in the court giving judgment.—Axford v. Graham, 57 Mich. 422.

¶ 8. Estoppel by a previous judgment does not depend on its justice, but on the fact that the merits have been passed upon.—Fifield v. Edwards, 39 Mich. 264.

§ 3. Judgment as evidence without estoppel.

See also post ¶¶ 117, 395.
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Judgment against covenantee as evidence against covenantor in action for breach, see Covenants for Title § 26.

Admissibility of judgment as proof of damages from breach of bail bond, see Civil Arrest § 63.

¶ 9. A judgment in ejectment in favor of A. against B. is not prima facie evidence, as a defense in an action for the purchase price of land by C., that B., who had been in possession under a deed from C., obtained no title by that deed, unless it is shown that C.'s title was in fact litigated in the ejectment suit.—Reeves v. Kelly, 30 Mich. 132.

¶ 10. In trover by the sheriff against persons who have converted to their own use a growing crop on which he had levied an attachment, the judgment in attachment, though rendered after the conversion, is admissible to show the amount of plaintiff's lien.—Grover v. Buck, 34 Mich. 519.

¶ 11. A defendant sued for work done in repairing her house, for which plaintiff had previously sued her husband, may put in evidence the judgment obtained against her husband. Whether it would operate as an estoppel or not, it was relevant.—McCausland v. King, 60 Mich. 70.

¶ 12. Although an indemnitor is not notified of the former suit, a judgment against the indemnitee is prima facie evidence of the amount of the damages for which the indemnitor is liable.—Clark v. Clune, 172 Mich. 323.

¶ 13. While in an action to reform a lease upon the ground of mistake a decree and the proceedings leading to it are not conclusive as against a surety not made a party thereto; they are prima facie evidence against the surety of the mistake for which reformation was decreed, and cast the burden upon him of showing that the minds of the parties met as to time of payment as specified in the lease.—Stevens v. Pendleton, 83 Mich. 342, modified on reconsideration of record in 85 Mich. 137, holding it was for the jury.

¶ 14. A judgment for return in favor of defendant in replevin is not evidence of title to the property in question as against one not a party to the proceeding and who has possession of the property, but is not shown to have acquired such possession or to claim title under either party.—Rathbun v. Ranney, 14 Mich. 382.

¶ 15. A replevin judgment does not show general ownership as against any one.—Rathbun v. Ranney, 14 Mich. 382.

¶ 16. Records of other suits between the same parties involving the same subject-matter and having some bearing upon the question whether or not a settlement was made, and of defendant's understanding thereon, are admissible.—Baumier v. Antiau, 79 Mich. 509.

¶ 17. The record of a suit upon a decree in which a vessel was sold for repairs is not evidence against the insurers to prove an acceptance of abandonment of the vessel, where they were not made parties to such suit.—Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934.

¶ 18. A judgment for the United States on an official bond is admissible as prima facie evidence of liability on a collateral bond of indemnity given to the surety.—Lee v. Wisner, 38 Mich. 82.

¶ 19. In an action by a depositor against a bank for moneys paid out on checks signed in his name by another person, direct evidence of the incidents of another suit brought by the plaintiff against that person, but to which the bank had not been a party, was inadmissible to affect this litigation.—American Nat. Bank v. Bushey, 45 Mich. 135.

II. ADJUDICATIONS OPERATIVE AS BAR OR ESTOPPEL.

A. IN GENERAL.

§ 4. Judicial nature of decision.

Award by arbitrators as bar or estoppel, see Arbitration § 19.

Finding of referee in bankruptcy, see also Bankruptcy § 19.

Decision and order of claims commissioners, see Estates of Decedents § 187.

Conclusiveness upon courts of rulings of fraternal benefit association, see Fraternal Association, VIII.

¶ 20. An order of a city council vacating a street is an adjudication in rem and is res adjudicata of the matter decided.—Detroit Real Estate Co. v. Wayne Circuit Judge, 137 Mich. 108.

§ 5. Regularity and validity of the adjudication.

Conclusiveness of unjust judgment, see ante ¶ 8.

Effect of mere irregularities, see post § 7.

Effect of voluntary submission to irregular or excessive proceeding, see post § 6.

Finality of the decision and decisiveness of the merits, see post II, B.

Effect of judgments not appealed from, see post § 26.

Federal court decisions affecting probate matters, see post ¶ 297.

Pleading jurisdiction in plea of bar or estoppel, see post § 94.

Requisites of jurisdiction to bring party under judgment, see Courts § 39 et seq.

Estoppel to object to jurisdiction, see Courts § 83.

Collateral attacks on judgments, see Judgments, VII.

Non-estoppel by unlawful collusive divorce decree, see Divorce ¶ 376.

¶ 21. Previous proceedings that are void for want of jurisdiction do not bar like ones before a proper court.—In re Buddington, 29 Mich. 472; Basom v. Taylor, 39 Mich. 682.

¶ 22. A debt is not merged in a judgment until a valid judgment has been obtained upon it.—Wixom v. Stephens, 17 Mich. 518.

¶ 23. A judgment rendered in a court that by statute could have no jurisdiction over defendant's person is no bar to a suit in a competent court.—Basom v. Taylor, 39 Mich. 682.

¶ 24. As an executor cannot be sued in justice's court upon his liability for a creditor's distributive share (Comp. L. 1871, § 5250 (How. St. § 6815), a justice's judgment thereon against him is void, and is no bar to an action in the circuit court. The cases in which an executor, etc., may be sued enumerated.—Basom v. Taylor, 39 Mich. 682.

¶ 25. A child under fourteen years residing with her guardian in Livingston County was summoned to appear as a witness in Wayne County. At the trial she committed perjury, and was committed to the custody of a probation officer by the Probate Court of Wayne County. The Circuit Court of Wayne County upon habeas corpus refused to release the child. Held that since, under Act No. 6, Pub. Acts 1907, the Wayne County Probate Court had no jurisdiction to commit the child, the ruling of the circuit court did not render the case res adjudicata so as to preclude habeas corpus proceedings before the supreme court.—In re Mould, 162 Mich. 1.

¶ 26. Land was reserved by a treaty, by the force of which the title itself passed, and required no patent. Subsequently congress passed an act for the issue of a patent for the land reserved, to a person claiming to be assignee of the reservee, on proof being taken of the assignment. Proofs were taken, and patent issued. Held, that as the title was beyond the control of legislation, the act and proceedings under it could not be given in evidence for the purpose of showing that the assignor of the patentee bore the name of the reservee named in the treaty. They were res inter alios, and the proofs extrajudicial.—Campau v. Dewey, 9 Mich. 381.

¶ 27. A judgment in form against all of two or more joint debtors of whom only one was served with process does not extinguish the debt so as to bar a subsequent action thereon.—Hitchcock v. Frackelton, 116 Mich. 487.

¶ 28. Where suit was brought in the State of New York against two joint debtors, one of whom was not served with process, and did not appear in the action, and judgment in form was rendered against both under the joint debtor act, it was held that this judgment was not an extinguishment of the demand sued upon, and that an action brought subsequently in this state against the two was properly brought on the original demand instead of upon the judgment.—Bonesteel v. Todd, 9 Mich. 371.

¶ 29. Proceedings in rem bind every one, but they must have been commenced by the proper person.—Besançon v. Brownson, 39 Mich. 388.

¶ 30. A defendant in divorce is not estopped as to the main issue by a decree of divorce entered by his own procurement, since collusive divorces are unlawful.—Friend v. Friend, 53 Mich. 543.

¶¶ 31, 32. Judgment which is ineffectual by reason of a mistake in the name of one of the plaintiffs will not prevent them from bringing a new suit upon it.—Wixom v. Stephens, 17 Mich. 518.

§ 6. ——Voluntary submission to irregular or excessive jurisdiction.

Judgment as conclusive upon persons appearing specially to object to jurisdiction, see post § 56.

Collusive judgment against principal as affecting surety, see post § 72.

¶ 33. Although under How. St. § 8749, giving chancery a supervisory jurisdiction over assignments for creditors and authorizing it to make orders as to management and disposition of property of the assignor, and for the recovery of property from third persons on application of the assignee, there is no conclusion of a third person to claim his property from the assignee in a court of law; yet if such third person voluntarily submits his claim to the jurisdiction of chancery under the assignment proceedings, the decision there is binding.—Sawyer v. McAdie, 70 Mich. 386.

§ 7. ——Mere irregularities and errors.

Effect of wrong reasons for a correct decision, see post ¶ 132.

Errors and irregularities as ground for collateral attack, see Judgments, VII.

¶ 34. If one sues in assumpsit for the value of chattels, where by strict rules only an action of tort would lie, and obtains judgment, the judgment will determine the matters in issue as conclusively as though the proper action had been brought.—Jennings v. Sheldon, 44 Mich. 92.

¶ 35. The record of a judgment in attachment against a firm, where partnership property was attached and one partner served, ought not to be rejected as evidence on the ground that the first name of the partner not served was different from that given to him in the writ.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 36. In replevin against an officer having an attachment, the proceedings in the attach-

ment suit are admissible even though one of the plaintiffs was misnamed therein and in the judgment, if it is also shown that an amendment to correct this error has been allowed.—Barmon v. Clippert, 58 Mich. 377.

¶ 37. Where, in ejectment by one of the heirs of the remainder-man against the purchaser of the estate of the life tenant and of her interest in the land as another of the heirs of the remainder-man, no objection is made by defendant on account of the non-joinder of his wife as a codefendant, and he is allowed compensation for improvements by him made after the termination of the life-estate, which he accepts and retains, and is denied compensation for improvements made prior to that event, such non-joinder does not void the proceedings in the ejectment suit, and the same are res judicata as to a claim by defendant for compensation for such prior improvements, made in a partition suit brought by the plaintiff, in which the wife of defendant in ejectment is joined as a defendant.—Curtis v. Fowler, 99 Mich. 240.

¶ 38. Where an agricultural society which had sold its land without applying to the circuit court for authority as required by How. St. § 2308, filed a bill in chancery, before it became aware of the necessity of such application, to quiet, subject to the contract of sale, the title to certain of the lots sold, held, that a decree quieting the title and confirming the sale, was binding, not having been appealed from, against the vendee who had been made a party.—Going v. Oakland County Agricultural Soc., 117 Mich. 230.

¶ 39. Although a bill of interpleader is filed where there is no ground for it, the defendants are bound by a decree on the merits if they do not appeal.—Atkinson v. Flannigan, 70 Mich. 639.

¶ 40. While a mere trespasser is not entitled to a lien upon logs for labor and expenses as against the owner, the latter cannot, in replevin for the logs, deny upon that ground the validity of a lien established in proceedings under How. St. § 8427e et seq., wherein he was served, appeared, and defended the action.—Carr v. Brick, 113 Mich. 664.

¶ 41. Where by mistake a judgment entered on confession on a note is for less than the amount due, the note is nevertheless merged in the judgment, and the plaintiff cannot maintain a suit for the balance.—Town v. Smith, 14 Mich. 348.

§ 8. Equity decisions res adjudicata at law.

Voluntary submission to chancery jurisdiction, see also ante ¶ 33.
Law judgments as res adjudicata in equity, see post § 9.
Decree pro confesso as conclusive at law, see post § 21.
Identities of legal and equitable causes, see post III.
Decree as conclusive upon a law court of defenses and set-offs which might have been interposed, see post §§ 50, 51.
Equity decree as estoppel to question that decided matter was within equity jurisdiction, see also post ¶ 446.
Decrees in equity as res adjudicata of particular facts, see post § 87.
Necessity of pleading the former decree, see post § 94.
Right to sue for costs after denial in equity of set-off of costs, see also post ¶ 211.

¶ 42. A decree from which an appeal is not taken, against the complainant in a chancery action to enjoin the alteration by a municipality of the grade of a street, is res adjudicata in a subsequent action at law brought by him on the same grounds for the recovery of damages.—Labadie v. Village of Ford, 185 Mich. 402.

¶ 43. A decree in equity sustaining the validity of drain proceedings is conclusive upon that point in an action at law involving the same question.—Clark v. Wiles, 54 Mich. 323.

¶ 44. A decree for the complainant in a chancery proceeding in which the validity of a tax deed was directly involved, is a bar to a subsequent mandamus proceeding against the auditor general to cancel the same tax deed.—Hanchett v. Auditor General, 124 Mich. 424.

¶ 45. Where the supreme court in chancery has set aside a deed as forged, the grantee's administrator cannot bring an action at law against the grantor's attorney for the mutilation of such deed.—Bates v. Alpena Circuit Judge, 82 Mich. 91.

¶ 46. The files in a chancery suit, resulting in a decree declaring a deed executed by the complainant to one of the defendants to have been a mortgage, and decreeing a reconveyance by the other defendant, who had purchased the land with notice of the complainant's rights, are admissible as evidence, in a suit brought by the complainant against such purchaser to recover the value of wood cut by him from timber on said land, to establish plaintiff's title to the timber.—Clink v. Gunn, 90 Mich. 135.

¶ 47. Where a purchaser of land under a contract providing that payment should be forfeited in the event of his default, seeks to obtain relief in equity from the penalty of his default by bill for specific performance, and suffers his bill to be dismissed because of his refusal to pay the balance due upon the contract, he is thereafter estopped from maintaining an action at law to recover the forfeited payments and the pro-

spective profits.—Lowrie v. Gourlay, 112 Mich. 641.

¶ 48. The dismissal of a bill to enjoin a suit in ejectment on the ground that the complainant has an equitable title, is res adjudicata as to the defense of the same equitable title in the trial of the ejectment suit. —Rausch v. Briefer, 138 Mich. 284.

§ 9. Judgments at law conclusive in equity.

Decrees of equity as res adjudicata at law, see ante § 8.

Finality of decision in mandamus to be conclusive in equity, see also post § 15.

Right to relitigate in equity defenses not asserted in prior mandamus proceeding, see post § 50.

Right to use as an equitable set-off a claim which might have been interposed in a prior action at law, see post § 51.

Necessity of pleading the former judgment, see post § 94.

Suits in equity for relief from judgments or to set them aside, see Judgments, VI.

Immunity of law judgments from collateral attack in equity, see Judgments, VII.

¶ 49. An insurance company which, upon the ground of misrepresentation as to the ownership of a mortgage, has unsuccessfully defended an action upon a policy, payable to the mortgagee as his interest may appear, cannot have the question retried in equity upon a bill to enjoin the collection of the judgment.—Farmers' Fire Ins. Co. v. Johnston, 113 Mich. 426.

¶ 50. Parties basing their defense in an ejectment suit upon alleged valid deeds found by the jury to have been forged will not be permitted to sue in equity upon the ground that they are void because of the forgery.—Cline v. Wixson, 128 Mich. 255.

¶ 51. A bill in equity does not lie to review alleged unlawful act of the officers of a city in revoking a license granted an itinerant trader, and to prevent his repeated arrest for selling without a license, where all questions involved were determined against the complainant in the circuit court on certiorari to review a conviction in justices' court for selling without a license, since the remedy at law by way of appeal from such conviction, of which he failed to avail himself, furnished a complete and adequate remedy.—Vernakes v. City of South Haven, 181 Mich. 274.

¶ 52. In a suit at law judgment was entered against garnishee defendants and a motion made by them to set aside the same, which motion was denied. Later said defendants filed a complaint to vacate said judgment and restrain the execution of same, and alleged that they were not indebted on the judgment obtained against them; that they omitted to file the disclosure in garnishment because of misrepresentations to them by the counsel of plaintiff in the suit at law; that they were prevented from having their default set aside solely by reasons of Circuit Court Rule 12; and that it was inequitable and unconscionable for plaintiff in the suit at law to collect said judgment. A demurrer was filed to said complaint. Held, said demurrer could not operate to admit said allegations where the findings of the law court were contrary to said allegations, the facts in said allegations being so passed upon by motions to vacate the law court judgment as to render the matters involved in the suit in equity res adjudicata.—Steele v. Bliss, 170 Mich. 175.

¶ 53. In cases where claims or defenses are of a purely equitable character, and therefore not properly cognizable at law, a judgment at law cannot be pleaded as res adjudicata in a suit in equity instituted to establish equitable rights.—Nash v. Morrell, 171 Mich. 658.

¶ 54. Complainant filed a bill to reform a note and mortgage on account of mistakes in omitting the amount of the indebtedness and in names of the parties. In a prior suit in a justice's court by complainant to replevin the mortgaged property, judgment was rendered for defendant. Held, the former judgment of the justice did not render the matter res adjudicata so as to preclude complainant's suit in equity, since the matter in issue in equity could not have been litigated in a court of law.—Nash v. Morrell, 171 Mich. 658.

¶ 55. A., who had already conveyed part of a lot to B., executed a warranty deed of the whole to C., relying on the scrivener's representations made in C.'s presence that C. would only take what was left, inasmuch as both A. and C. fully understood the matter; A., being sued by C. for breach of warranty, pleaded mistake and fraud, and the court charged that if the defense were made out C. would be entitled to nominal damages only; but substantial damages were recovered. Held, that the judgment would not bar suit in equity to reform the deed and enjoin collection of the judgment, as the relief sought was not available in the action at law, and that, if the facts stated were true, no damages should have been recovered in that action.—Bush v. Merriman, 87 Mich. 260.

¶ 56. A bill by the administratrix of a deceased husband against the widow to enforce specific performance of an ante-nuptial contract, to assert equitable estoppel, and for injunction against a suit for dower and proceedings for widow's allowances is not barred by proceedings in the probate court, decision against her and an appeal; since the relief sought in chancery is much more than could be decided by the probate court. —Carr v. Lyle, 126 Mich. 655.

¶ 57. A judgment in favor of the covenantee in an action for breach of warranty, wherein the defense was fraud and mistake in the drawing of the deed, is not res judicata so as to bar a proceeding in equity to have the deed reformed.—Bush v. Merriman, 87 Mich. 260.

¶ 58. A judgment on a note against a cestui que trust, who made it, obtained in an action begun by one to whom the trustee transferred the note after purchasing it and by garnishment of the trustee, is not res adjudicata on the right of the trustee to make such a purchase for his own interest when pleaded in a suit for an accounting; since the trustee's conduct was a matter for equitable cognizance and the rectitude of his conduct could not have been determined in the action on the note.—Petrie v. Badenoch, 102 Mich. 45.

¶ 59. The election of a plaintiff in ejectment to abandon the land and take judgment for its value without improvements does not operate to oust a court of equity of jurisdiction on a pending bill to declare defendant in ejectment entitled to a lien on the land by subrogation to a mortgage which has been paid by him, and to restrain sale under the judgment in ejectment. The court having jurisdiction of the parties and of the subject-matter of the suit under a general prayer for relief can make such a decree as equity demanded.—Taylor v. Roniger, 147 Mich. 99.

¶ 60. Decision in a mandamus proceeding precludes defeated party from suing in equity upon the ground of a defense that he omitted to make in the mandamus case.—State v. Sparrow, 89 Mich. 263.

¶ 61. A judgment in a law court was taken against the principal defendant and the garnishee defendants. The latter moved to vacate the judgment against them upon the ground that the plaintiff had fraudulently obtained same by representing to the garnishee defendants that he would not take judgment against them, thereby inducing them to refrain from appearing and defending and to allow the case to go by default. The circuit court denied said motion. Later defendant garnishees filed a bill in equity to set aside the judgment and restrain the execution upon the identical grounds urged in their said motion before the law court. Held, the bill should be denied, the matter being res adjudicata.—Steele v. Bliss, 170 Mich. 175.

§ 10. Criminal decisions in criminal cases.

Judgment as evidence without estoppel, see ante § 3.

Former conviction or acquittal of crime as bar to further prosecution, see Crimes, I, D.

Admissibility in a prosecution for perjury of the judgment in the case wherein the perjury was committed, see Indictment, VIII, B.

¶ 62. In criminal cases as well as in civil the rule applies that a fact determined is conclusive between the parties in subsequent prosecutions though the subject-matter and issues are not the same in all respects.—People v. Albers, 137 Mich. 678.

§ 11. Criminal decisions in civil proceedings.

Judgment as evidence without estoppel, see also ante § 3.

Proper scope and terms of judgments in criminal cases, see Indictment, XI.

¶ 63. A conviction in criminal proceedings is conclusive proof of probable cause unless procured by false or fraudulent testimony or other unlawful means, although the judgment of conviction was subsequently reversed by a higher court and plaintiff acquitted and discharged.—Thick v. Washer, 137 Mich. 155.

¶ 64. Plaintiff was arrested for violation of an ordinance and convicted. Upon appeal, the ordinance was held void and the conviction reversed. In an action for malicious prosecution based on the prosecution, held, that the conviction was conclusive proof of probable cause.—Thick v. Washer, 137 Mich. 155.

¶ 65. In an action for malicious prosecution the defendant may show the plaintiff's guilt of the offense notwithstanding an acquittal in the criminal prosecution.—Mack v. Sharp, 138 Mich. 448.

¶ 66. The acquittal in a justice's court, on the charge of violating a city ordinance in the constructing of a building within the fire limits of the city, is not res adjudicata of the question of the right of the municipality in issue in an injunction suit based on its threat to abate as a nuisance under such ordinance such building; since a greater degree of proof is required to convict in the criminal proceeding than is required to obtain relief in the civil action.—Micks v. Mason, 145 Mich. 212.

¶ 67. In an action for malicious prosecution for obstructing a highway, evidence of the former adjudication of the validity of the proceedings to lay out the highway is competent to show the good faith of the defendant in instituting the prosecution where he had knowledge of such adjudication.—Fowles v. Hayden, 129 Mich. 586.

¶ 68. Record of husband's conviction for drunkenness is admissible on the question of damages but not to prove the drunkenness in wife's action for wrongful sale of liquor to him by defendant.—Lucker v. Liske, 111 Mich. 683.

¶ 69. In a wife's action to recover for the wrongful sale of intoxicating liquor to her husband, the record of his conviction for drunkenness resulting proximately from such sale is admissible not to prove the fact of drunkenness, but to show the extent and nature of the injury suffered by plaintiff.—Lucker v. Liske, 111 Mich. 683.

¶ 70. In replevin the record of a criminal prosecution of the defendant upon complaint of the plaintiff, together with an entry in the minutes of the justice of the peace before whom it was prosecuted, that such prosecution was wilful, malicious and causeless was held inadmissible, being res inter alios. Evidence of a compromise of defendant's claim for damages for false imprisonment in said prosecution was also held irrelevant.—English v. Caldwell, 30 Mich. 362.

¶ 71. In an action on a promissory note the defense was that it was given by defendants to plaintiff to procure the release of a third person who was in jail upon a criminal charge on plaintiff's complaint. Held, that a discontinuance filed by the prosecuting attorney after the making of the note in suit, giving as a reason for not filing an information the absence of sufficient evidence to secure a conviction, was inadmissible as evidence for plaintiff.—Fosdick v. Van Arsdale, 74 Mich. 302.

¶ 72. The fact that a person engaged in an affray with another pleads guilty in a self-induced criminal proceeding is not conclusive in an action against him for assault and battery by his opponent, as such plea constitutes mere evidence of guilt, the weight of which is for the jury.—Anders v. Clover, 198 Mich. 763.

§ 12. Civil adjudications in criminal cases.

Criminal adjudications in civil cases, see ante § 11.

Civil adjudications in criminal cases, see post § 12.

Effect of civil recovery to bar prosecution for crime, see also Crimes § 18.

¶ 73. That plaintiff in a civil suit for assault and battery has recovered damages does not bar a criminal prosecution against him.—People v. Kenyon, 93 Mich. 19.

¶ 74. Prosecution for assault and battery is not barred by the victim's having recovered damages in a civil suit for the assault, etc.—People v. Kenyon, 93 Mich. 19.

¶ 75. Where a civil contempt proceeding has resulted in acquittal on the merits the same act will not be again punished as a criminal contempt; and that is true though the acquittal was in the circuit court having jurisdiction of the proceeding and the subsequent cause is in the supreme court.—City of Eaton Rapids v. Horner, 126 Mich. 52.

§ 13. Special, extraordinary and summary proceedings.

Land office proceedings for issuance of patent, see also ¶ 26.

Judgment in summary proceedings as concluding omitted defenses, see post § 50.

Conclusiveness of order appointing a receiver, see post ¶ 341.

Effect and conclusiveness of the various special proceedings, see also specific topics treating of such proceedings.

Award by arbitrators as bar or estoppel, see Arbitration § 19.

Operation and effect of judgment in attachment, see Attachment § 135.

Proceedings in bankruptcy, see Bankruptcy, §§ 13, 19.

Effect of judgment in summary proceedings on right to standing crops, see also Forcible Entry § 45.

Inconclusiveness of finding of amount of rent due in verdict in summary proceedings, see also Forcible Entry ¶ 159.

Effect of judgment in habeas corpus, see Habeas Corpus.

Force and effect of report upon reference, see Reference, V.

[Note. The conclusiveness and effect of probate court decisions is treated in Probate Courts, III, and in the various portions of Estates of Decedents; Guardianship; Insane Persons; and Wills, which deal with procedure. The conclusiveness of such orders and decrees is so intimately connected with the nature of the order itself that it has been thought unwise to attempt a separation of the cases to admit of classification in Former Adjudication. The effect of each of the various orders is therefore treated in its own specific place and the general conclusiveness of probate orders is treated in Probate Courts, III.]

Conclusiveness and effect of probate orders and decrees, see Probate Courts, III.

Conclusiveness and effect of report of commissioners on claims against decedent, see Estates of Decedents § 187.

Conclusiveness and effect of grant of letters, see Estates of Decedents §§ 32, 53.

Conclusiveness and effect of accountings by representatives, see Estates of Decedents §§ 351-355.

Conclusiveness and effect of order of distribution, see Estates of Decedents § 377.

Conclusiveness and effect of probate partitions and decrees determinative of heirship, see Estates of Decedents § 395.

Conclusiveness of probate proceedings for determination of heirship, see Estates of Decedents §§ 397-398.

Conclusiveness and effect of guardianship orders and decrees, see also Guardianship.

Effect of adjudication of insanity, see also Insane Persons, I.

¶ 76. Under a proceeding to determine the right of a parent or guardian to the care and custody of a child, the determination

of the right by a court of competent jurisdiction will not be reviewed or set aside by another court exercising the same jurisdiction upon the same facts.—In re Mould, 162 Mich. 1.

¶ 77. A proper final adjudication on writ of habeas corpus, brought to determine the right of a parent or guardian to the care and custody of a child, conclusively determines all questions necessarily involved as between the same parties and upon the same state of facts.—Martin v. Benzie Circuit Judge, 200 Mich. 549.

¶ 78. A decision on habeas corpus, though not ordinarily res adjudicata, is so upon the question of the validity of the judgment involved, where the prisoner was held under a capias satisfaciendum and brought the writ, and by virtue of Comp. L. 1897, § 9885, the judgment plaintiff on notice given came in and defended with the result that the prisoner was discharged on the ground that the judgment was void; accordingly it is an estoppel on that fact in a later action by the prisoner against the judgment plaintiff for false imprisonment under the capias.—Castor v. Bates, 127 Mich. 285.

¶ 79. A lessor before the expiration of the three-year term of a lease brought summary proceedings to recover possession on the ground that the lessee had violated the conditions of the lease by subletting the same without the lessor's consent. The jury found that plaintiff had consented to the sublease made. Later the lessee gave notice that he would avail himself of the additional two-year term provided for in the lease in addition to the three-year term and to be enjoyed at the option of the lessee whereupon plaintiff started new summary proceedings. Held, the matter was res adjudicata.—Flynn v. Bachner, 168 Mich. 424.

¶ 80. Defendant, in May, 1907, gave a lease for twenty years to one Blessed. Plaintiff was at the time in possession of the premises, his lease expiring September 1, 1907. Plaintiff claimed that by parol agreement defendant extended his lease for one year, and refused to vacate. Blessed in summary proceedings obtained a judgment for possession. Plaintiff in this suit sues defendant for damages for breach of the oral agreement. Held, the judgment obtained by Blessed did not render plaintiff's suit res adjudicata.—Rooks v. Booth, 160 Mich. 62.

B. NECESSITY THAT DECISION BE FINAL AND ON MERITS.

Finality of decrees, judgments and orders for purposes of appeal and error, see Appeal, III, B.

Finality and completeness of judgment for purpose of issuing execution thereon, see Executions §§ 3-5.

Procedure to make judgment or order final and requisites of judgment or order, see Judgments, I-III; Justices of the Peace, IV, F; Motions and Orders.

§ 14. In general.

Judicial nature of decision, see ante § 4.

Decisions on applications for writs and process looking to further hearing and action, see post § 15.

Decisions on interlocutory motions and petitions, see post § 16.

Dismissals and nonsuits, see post §§ 17, 18.

Disposal of action as premature, see post § 19.

Decisions by consent, default or stipulation, see post §§ 20, 21.

Verdicts alone or without judgment thereon, see post § 22.

Opinions, reasons and recitals in but not necessarily essential to judgment, see post §§ 23, 24.

Effect of possibility of new trial, rehearing, appeal or other review which may change judgment, see post §§ 25-27.

Decisions by appellate court, see post §§ 28, 29.

Vacated or opened judgments, see post § 30.

Decisions and orders after judgment, see post § 32.

Effect of conflicting or neutralizing judgments, see post § 31.

Parol evidence to show that judgment was not on the merits, see post § 97.

Sufficiency of evidence to show that judgment was not on the merits, see post § 98.

Necessity and sufficiency of rendition, entry and record of judgments, see Judgments, III.

¶ 81. A judgment, to be a bar to a subsequent action, must have been rendered upon the merits of the subject-matter, and between the same parties.—Tucker v. Rohrback, 13 Mich. 73; Buck v. Lockwood, 193 Mich. 242.

¶ 82. In order to be a bar both the issue and judgment must be taken and rendered upon the merits.—Greenlee v. Lowing, 35 Mich. 63.

¶ 83. A disallowance of a claim presented to commissioners on an estate is not a bar to a subsequent suit where the claim was not adjudicated upon the merits and where there was no opportunity for such adjudication.—McKinney v. Curtiss, 60 Mich. 611.

¶ 84. A judgment of a circuit court, on appeal from a probate court, confirming the disallowance of a claim by a trustee for the benefit of creditors against the estate on a note signed by decedent as additional security for the liabilities of the debtor, on the ground that there could be no recovery until the amount of deficiency remaining after determination of the value of land which had been illegally sold by the trustee was determined, is not a bar to a subsequent suit in

chancery in another county by creditors to reach such property and to determine the amount of such deficiency.—Buck v. Lockwood, 193 Mich. 242.

¶ 85. Where in a suit in replevin the justice of the peace renders judgment in favor of the plaintiffs and against the defendant for the right of possession of the goods in question, such order is not a final judgment under Comp. Laws 1897, §§ 10660, 10676 and 10677, and results in a mistrial, and plaintiff is not precluded thereby on the ground of res adjudicata from prosecuting a later suit in replevin in the circuit court.—Friedberg v. Bennett, 166 Mich. 558.

¶ 86. An undetermined suit to establish an equitable set-off cannot affect the statutory right to set off an execution (How. St., § 7709).—Lyon v. Smith, 66 Mich. 676.

¶ 87. The sufficiency of a plea is admitted by replication, and a hearing on the issue thus raised usually ends the case. But a defendant in a partition suit pleaded adverse possession in bar on a stipulation that if the plea was overruled he might answer. Held an anomalous stipulation; but where in following it the court below treated the hearing as on the sufficiency of the plea merely, it left the question of adverse possession undecided; until this was passed on, however, no other court could interfere with the right arising under such action and plea.—Dubois v. Campau, 37 Mich. 248.

§ 15. Denial or grant of process or extraordinary writs.

¶ 88. The award of mandamus proves nothing and cannot be pleaded in bar.—Burland v. Northwestern Mut. Ben. Ass'n, 47 Mich. 424.

¶ 89. A decision denying mandamus is res judicata only if made upon the merits, and not if denied because it was not the proper remedy, or because relator had a manifest legal remedy, or because no case was made which appealed to the discretionary power of the court.—Hoffman v. Silverthorn, 137 Mich. 60.

¶ 90. A decision refusing an application for mandamus to compel the vacation of a certain order on the ground of irregularities disclosed by the record, because of laches, is final as against petitioner's right to raise these irregularities by filing a bill of review.—Daniel v. Citizens' Mut. Fire Ins. Co. of Jackson, 149 Mich. 626.

¶ 91. The supreme court reversed a judgment in favor of one who had appealed to the circuit court from the disallowance by commissioners of his claim against a decedent's estate, for error in permitting a recovery upon an alleged oral contract, when, as was found, claimant's own evidence showed a contract in writing. Thereafter, permission to amend the pleadings so as to set up a breach of trust under the written contract was refused by the circuit judge, and mandamus to compel the allowance of the amendment was denied in the supreme court, without discussion of the merits. The claim sought to be so interposed was subsequently disallowed in the probate court, and an appeal was taken to the circuit. Held, that the effect of the previous decision was not to render the controversy res adjudicata, but merely to determine what should be the basis of the judgment, and that the denial of mandamus did not affect the issue.—Sullivan v. Ross's Estate, 113 Mich. 311.

¶ 92. Where, in granting a mandamus against the state land office commissioner to compel the reservation from sale of certain lands selected on contract, relator's right to the lands is affirmed, the state cannot sue in equity, upon the ground of a defense omitted in the mandamus case, to set aside patents issued to relator on the strength of the decision in such case.—State v. Sparrow, 89 Mich. 263.

§ 16. Interlocutory orders and rulings during trial.

Objection to jurisdiction and decision thereon as bar to objection by collateral attack, see also Courts § 83, ¶ 302.

Nature and effect of orders generally, see Motions and Orders.

Order of court granting leave to sue on bond over objection of sureties as res adjudicata on right of recovery against sureties, see Estates of Decedents ¶ 1232.

Conclusiveness and effect of probate order under statute for leave to sue on bond of representative or guardian, see Probate Courts, III.

¶ 93. An interlocutory decree is no evidence of anything on the merits.—Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

¶ 94. The denial of a motion for a new trial, unless proceedings by mandamus are taken to review the decision as an abuse of discretion, is res adjudicata upon the ground urged in support of the motion.—Gray v. Barton, 62 Mich. 186.

¶ 95. The refusal of a motion to compel a sheriff to set off an execution would not bar relief in equity.—Lyon v. Smith, 66 Mich. 676.

¶ 96. The order of the circuit court denying a motion to set aside a judgment against a garnishee by default is conclusive on the facts decided against a subsequent bill setting up the same grounds for vacation.—Valley City Desk Co. v. Travelers' Ins. Co. of Hartford, 143 Mich. 468.

¶ 97. The doctrine of former adjudication does not apply in a suit under the Bulk

Sales Act, Pub. Acts 1905, No. 223, How. 2nd Ed., § 2612 et seq., by reason of the action taken against the defendants as defendants in garnishment proceedings where there was no adjudication on the merits in such proceedings owing to the fact that no issue was formed or tried as to their liability and no summons to show cause was taken out against them within the time provided by law, but the case was continued without day against them, after disclosure by another defendant, and judgment against him and the principal defendant.—Humiston, Keeling & Co. v. Bridgman, 195 Mich. 82.

¶ 98. A petition in chancery to set aside a decree for tax sale on the grounds that the treasurer failed to resort to personal property in payment of the tax and that the warrant for collection was prematurely returned, which was granted by the circuit but dismissed by the supreme court, was in effect an application for a rehearing and could only be based upon errors in the proceedings of the chancery court; and therefore such dismissal was not res judicata as to a subsequent sale of a state bid by the auditor general which was void because of the nonpayment of subsequent taxes.—Conley v. Auditor General, 123 Mich. 83.

§ 17. Dismissal, discontinuance and nonsuit.

Dismissal of bill in equity as res adjudicata at law, see also ante § 8; effect of voluntary dismissal of bill, see also Equity § 198.

Dismissal of application for rehearing in chancery, see ante ¶ 98.

Discontinuance of prosecution as evidence in civil cases, see ante § 11.

Effect of dismissal of appeal or quashal of writ of error or of discontinuance of error or appeal, see post § 29.

Dismissal of suit for divorce as barring later suit for divorce, see post ¶ 172.

Dismissal of bill for injunction as barring other legal remedies, see post ¶ 173.

Conclusiveness of decree dismissing a bill to restrain expenditures by trustee under a will, see post ¶ 196.

Effect of discontinuance as obstacle to new action, see also Discontinuance § 6.

¶ 99. To operate as a bar to a subsequent suit, the dismissal must be upon the merits, or, if voluntary, after proofs taken, and the cause in readiness for hearing.—In re Ward's Estate, 152 Mich. 218.

¶ 100. The unqualified dismissal of a bill on the merits generally estops the complainant from introducing matters involved thereby in any other litigation on the same subject-matter.—Adams v. Cameron, 40 Mich. 506.

¶ 101. A decree dismissing a bill after a hearing is an adjudication sufficient to establish res adjudicata.—Schulmeister v. Township of Blendon, 126 Mich. 488; Dalton v. Mertz, 197 Mich. 390.

¶ 102. A decree dismissing a bill in equity, if made upon the merits, or a voluntary dismissal, after proofs taken, and when the cause was in readiness for hearing, is a bar to a new bill for the same matter, unless words of qualification prevent such bar.—Edgar v. Buck, 65 Mich. 356.

¶ 103. A discontinuance is not a bar to another suit, and is not made so by a justice's unofficial and unauthorized coupling therewith a statement that the case is settled.—Shank v. Woodworth, 111 Mich. 642.

¶ 104. A judgment of nonsuit is not a final disposition of the subject-matter in litigation, and ordinarily is not a bar to a subsequent suit for the same cause of action.—Bowne v. Johnson, 1 D. 185.

¶ 105. Where an employee, after a judgment in his favor against his employer for a negligent injury has been reversed and a new trial granted by the state supreme court, takes a nonsuit, he is not precluded from maintaining in the federal court a new action upon evidence tending to prove a state of facts like that which the evidence in the state courts tended to prove.—Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140.

¶ 106. Where, upon the trial of an action based upon negligence, defendant moved at the close of the evidence for a directed verdict, and the court, having intimated that he thought plaintiff was guilty of contributory negligence, began to address the jury to such effect, and plaintiff thereupon submitted to a nonsuit, the judgment upon such nonsuit is not a bar to a subsequent action upon the same cause of action.—Deneen v. Houghton County St.-Ry. Co., 150 Mich. 235.

§ 18. ——When deemed to be on merits.

Necessity that pleading aver the dismissal to have been on the merits, see post ¶ 475.

Presumption as to being on merits, see post § 95.

¶ 107. The force of a final decree upon the merits, and upon pleadings and proofs in a suit in equity, is not avoided by the appearance on the record of the cause, prior to the decree, of a voluntary dismissal of the bill by the complainant, entered without notice and without leave of the court.—Newark v. Newark, 22 Mich. 292.

¶ 108. When in a foreclosure suit a defendant files a cross-bill, setting up an equitable mortgage as entitled to priority to the one in suit, and his cross-bill is dismissed at the hearing on pleadings and proofs, the decree of dismissal must be regarded as a final adjudication on the merits, whether the case was a proper one for a cross-bill or not.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 109. Where a bill filed to have certain mortgages executed by complainant declared invalid has been dismissed because complainant's title was not such as enabled him to ask for the relief sought, the decree of dismissal cannot be said to have been on the merits and res adjudicata as to the question of the validity of the mortgages.—Sessions v. Sherwood, 78 Mich. 234.

¶ 110. The dismissal of a bill because there is a remedy at law does not prejudice complainant as to any rights that have not been put at issue and adjudicated.—Peters v. Hansen, 55 Mich. 276.

¶ 111. A decree dismissing petitions questioning the validity of tax deeds is a bar to a subsequent mandamus proceeding to cancel the same tax deeds and involving the same issues.—Cook v. Auditor General, 124 Mich. 430.

¶ 112. A decree dismissing a bill against the auditor general to cancel a tax deed is a bar to a mandamus proceeding against the auditor general to cancel the same deed upon grounds not stated in the bill.—Sayers v. Auditor General, 124 Mich. 259.

¶ 113. A decree dismissing a bill alleging that an agreement to allow an attorney a certain interest in real estate as compensation, was obtained by fraud, is conclusive of the validity of the agreement when subsequently attacked in another proceeding, brought by the attorney under the agreement to enforce his interest in the real estate.—Moran v. L'Etourneau, 118 Mich. 159.

¶ 114. A question was tried in an action at law, and adjudicated. A bill was then brought, which was dismissed below, and the decision affirmed in the supreme court on the ground that the matters it covered were res adjudicata by the suit at law. A motion in the lower court was then made to have the bill dismissed without prejudice, and a petition filed for a bill of review. Held, both the motion and petition were properly denied.—Public Schools of Wyandotte v. Harding, 160 Mich. 185.

¶ 115. In a suit against a township, a highway commissioner and adjacent land owners to enjoin the opening of a highway, the legality of the proceedings to lay out the highway was held res adjudicata by previous suit against the same parties (and some adjacent land owners), in which answer under oath was not waived and the defendants answered alleging the legality of the proceedings but the replication was filed too late and the decree records that the cause came on to be heard on bill and answer, and decreed that the bill be dismissed without costs. It is a decree upon hearing.—Schulmeister v. Township of Blendon, 126 Mich. 488.

(3 Mich. Dig. 60)

¶ 116. A claim against an estate for board and attendance is not barred by a decree dismissing a bill for specific performance of a contract to convey property in return for the same service where the bill was dismissed in part on the ground that the filing of the claim for allowance before the commissioners and the retention of that case in court was inconsistent with the suit in equity.—Laird v. Laird's Estate, 127 Mich. 24.

¶ 117. The predecessor in title of a defendant in an ejectment suit had brought a bill to have corrected a mistake made by said predecessor's grantor in the description of the premises in question in the ejectment suit. The bill was dismissed and no relief was asked by or given to the defendants to the bill. Held, the files and records in such chancery suit were not admissible in evidence and the decree in such suit was not conclusive against the defendant in the ejectment suit.—Tuthill v. Katz, 163 Mich. 618.

§ 19. Judgment that action was premature.

¶ 118. A judgment in a proceeding begun before any cause of action has accrued can have no bearing on another proceeding begun by the same party; there can be no presumption of identity, and there is no occasion to inquire whether the judgment is pleadable in bar or in abatement.—Hart v. Lindley, 50 Mich. 20.

¶ 119. The plea of former judgment cannot be sustained if it does not appear that plaintiff in the former suit had a right to bring his suit at the time he brought it, and that it was decided on its merits. And the contrary may be shown in meeting such a plea.—Wood v. Faut, 55 Mich. 185.

¶ 120. Judgment for defendant for costs, on the ground that the claim sued was not yet due, is no bar to a new suit.—Franks v. Fechelmer, 44 Mich. 177.

¶ 121. Special findings of a jury on the first trial are not res judicatae as to the facts found where judgment was entered in favor of the defendants in the first suit on the ground that, as shown by said findings, the suit was prematurely brought.—Whitney v. Bayer, 101 Mich. 151.

§ 20. Judgments on confession or by stipulation.

See also post ¶ 197.

Judgment erroneous as to amount, see ante ¶ 41.

Collusive judgment on confession against principal as unconclusive upon principal, see post § 72.

Nature and requisites of judgment on stipulation or by agreement, see Judgments, I-III.

Effect of collusive divorce decree, see Divorce § 101.

Assent to drafting and form of order as estoppel, see also Estoppel ¶ 159.

¶ 122. A judgment rendered upon confession has the same effect as one rendered upon a trial.—Town v. Smith, 14 Mich. 348.

¶ 123. A decree of divorce entered by defendant's consent, given by his solicitor, is binding unless impeached for fraud or mistake.—Brick v. Brick, 65 Mich. 230, aff'd on the merits on rehearing.

¶ 124. Where a consent order appointing a receiver for a firm states that the firm is composed of certain persons, the question as to who compose the firm is not open to dispute.—Russell v. White, 63 Mich. 409.

¶ 125. Where, in order to close probate proceedings, it was agreed that an account rendered in that court might be formally balanced, and the parties settled on terms which they announced to be private, the decree of settlement based on such agreement raises no estoppel against the establishment of the claim actually existing between them on the private settlement.—Hooper v. Hooper, 26 Mich. 435.

¶ 126. A decree entered by consent in a foreclosure suit, adjudging that the mortgagee "has been and is in possession, and is entitled to the possession and control, of the premises, * * * and empowered to collect all rents," is a concession by the mortgagor that the mortgagee is entitled to the rents, which is binding upon the mortgagor's administrator.—Kelly v. Bowerman, 113 Mich. 446.

§ 21. Default or pro confesso decrees.

Conclusiveness as to all matters which might have been litigated, see post § 49 et seq.

Facts admitted or waived by suffering default and conclusiveness thereof, see Defaults, IV; Justices of Peace, IV.

Right to appear and put in answer after default judgment on published service, see Defaults § 29.

Conclusiveness of default judgments in ejectment, see Jud. Act, chap. XXIX, §§ 29-32; Comp. L. 1915, §§ 13196-13199.

¶ 127. A judgment in a breach of covenant case taken by default against a party for failure of title to a portion of timber included in a bill of sale, and satisfied by such party, was not such an adjudication as estopped such party, subsequently made defendant in a replevin suit in which his former vendee was plaintiff, from claiming that an instrument, produced and relied upon by plaintiff, purporting to be a bill of sale of timber in which such portion was included, was a forgery.—Metropolitan Lumber Co. v. McColeman, 140 Mich. 333.

¶ 128. A joint defendant in equity who has allowed the bill to be taken as confessed as to himself is not thereby precluded from bringing an action at law involving the same subject-matter, if the bill itself made out no case for relief.—Wheeler v. Hatheway, 58 Mich. 77.

¶ 129. Where one allowed judgment to go by default for the full amount of the debt on which he had made some payments, he could not set off such payments in a subsequent action by the assignee of the judgment.—Huntoon v. Russell, 41 Mich. 316.

§ 22. Verdict alone as estoppel.

Admissibility of the verdict alone upon the question of former adjudication, see also post § 96.

Effect of verdict generally, see Verdicts and Findings, VI.

Conclusiveness of verdicts and findings of fact against review on appeal or error, see Appeal, XII, E.

¶ 130. The mere verdict of the jury rendered in one case cannot be shown in another case involving the same transaction, for the purpose of fixing the quality of the transaction.—Wheeler v. Wallace, 53 Mich. 364; Murray v. Inner Shoe Tire Co., 163 Mich. 676.

¶ 131. The only exceptions to the general rule that a verdict cannot operate as an estoppel until it has received the sanction of the court are where the parties have agreed to abide by a verdict, or where the statute makes the verdict conclusive, leaving with the court no control over the action of a jury.—Whitney v. Bayer, 101 Mich. 151.

§ 23. Opinions or reasons in decision.

Distinction between decision and reasons for decision as a precedent, see Courts §§ 19-24.

Incorrect reason for correct decision as harmless error, see Harmless Error, II.

¶ 132. A complainant cannot be estopped by wrong reasons given for a correct decree in his favor in a former suit brought by himself.—Zabel v. Harshman, 68 Mich. 273.

§ 24. Recitals in order or judgment.

¶ 133. An order's superfluous recital concerning a matter not necessarily involved in the main issue is not conclusive as an adjudication.—Rice v. Rice, 53 Mich. 432.

¶ 134. The certificate of the trial judge in a judgment in an action of trespass, made as authorized by the statute for the purpose of settling the question of costs, that the question of title to land did not come in issue, being a finding which the court was empowered to make, must be taken as conclusive in the absence of any showing upon the record to the contrary.—Keyser v. Sutherland, 59 Mich. 455.

§ 25. Judgments susceptible of new trial or rehearing.

Possibility that appeal, error or other review may be had, see post § 26.

¶ 135. In ejectment any person in actual occupancy of the premises, and claiming ad-

versely to plaintiff, must be made defendant; and the fact that plaintiff has previously recovered against such person makes no difference so long as it does not appear but that the latter is entitled to a new trial since unless that appears the judgment is not conclusive.—Hoyt v. Southard, 58 Mich. 432.

¶ 136. Until four days after rendition of verdict, a judgment against an attachment plaintiff is not admissible to show in trover against a sheriff for the attached goods that there was nothing due from the attachment defendant when the writ was issued; since it is not conclusive sooner.—Treat v. Dunham, 74 Mich. 114.

§ 26. Judgments open to appeal or review.

See also ante ¶ 42.

Availability of appeal at law as making legal judgment bar in equity, see also ante ¶ 51.

Possibility of new trial or rehearing by order of trial court, see ante § 25.

Pendency of appeal or error and possibility of change in the judgment, see post § 27.

Judgments open to review and times or conditions when review is possible, see Appeal; Certiorari.

¶ 137. A decree not appealed from stands as a judgment.—German American Seminary v. Saenger, 66 Mich. 249.

¶ 138. A decree not appealed from binds all the parties to the suit and all claiming under them.—Walsh v. Varney, 38 Mich. 73; Atkinson v. Flannigan, 70 Mich. 639.

¶ 139. One who does not appeal from a decree that he did not take under a will, cannot raise the same question in a subsequent action.—Hatt v. Green, 180 Mich. 383.

¶ 140. One who did not appeal from a decree cannot, when it is reversed on his codefendant's appeal as to such codefendant, and the cause remitted to the court below with instructions to enter a new decree, reopen matters affecting himself only which the first decree settled.—Sheldon v. Holmes, 63 Mich. 704.

¶ 141. The force of a judgment as a bar to subsequent actions does not depend upon the right to appeal, which is a statutory right; and a plaintiff who brings an action for negligent injury, based on different counts, where it is held that the breach of duty set up in one count does not entitle the plaintiff to a verdict, and where the recovery on the other count is reversed on error, cannot contend that another action can be brought on the count which is stricken, on the ground that the plaintiff could not appeal from the rule of the trial court.—Jungnitsch v. Michigan Malleable Iron Co., 121 Mich. 460.

¶ 142. An unappealed judgment in a replevin suit, rendered on appeal to the circuit, finding that defendant to the writ, a chattel mortgagee in possession, was entitled to a sum certain and costs, is conclusive in an action on the replevin bond that the property was taken under the writ and the defendant thereby damaged.—Stafford v. Baker, 141 Mich. 44.

¶ 143. A decree, from which no appeal was taken, determining the right of the Village of Highland Park to empty sewage into the sewers of the City of Detroit, and reserving to the court power to take further action on the application of either party on subsequent changes of existing conditions, held res adjudicata fifteen years later on such an application, as to all questions disposed of by such decree.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 143a. Plaintiff sued a defendant on a note given in payment of a running account. That action was begun before a justice and was appealed to the circuit court. He later sued in another court on the running account, and the verdict in that court found plaintiff indebted to defendant on its set-off. Judgment had not been entered, and the time for appeal in the second suit had not expired when the first suit on the note was being heard. Held, that the judgment in the second suit on the running account was not conclusive in the first suit on the note.—Murray v. Inner Shoe Tire Co., 163 Mich. 676.

§ 27. Pendency of appeal, error or certiorari.

Effect of appeal or review and supersedeas and stay of proceedings, see Appeal, IX; Stay, II.

¶ 144. Pending an appeal the decree appealed from is suspended, and cannot be used as evidence in another suit.—Day v. De Jonge, 66 Mich. 550.

¶ 145. In a suit for malpractice, plaintiff is not barred from recovery by the fact that defendant has recovered judgment in a justice's court for services rendered in the case in question, where an appeal from said judgment is pending in the circuit court.—Adams v. Henry, 165 Mich. 554.

§ 28. Appellate judgment or disposal of case.

Effect of dismissal of appeal or quashal of writ, see post § 29.

Nature and requisites of decision and judgment on review, see Appeal, XIII.

Effect and operation of appellate decree or judgment, see Appeal § 499.

Appellate judgment as binding rule of law on retrial after remand or on second appeal or error, see Appeal, XII, G, XV.

¶ 146. Questions of whether work under a logging contract had been terminated, and, if so, by whose act or default, presented upon a second trial after reversal in supreme court were not res judicata so as to authorize ver-

dict to be directed; where at the former trial it was claimed that by the terms of such logging contract, the plaintiff, a lumberman, could upon performance of the work contracted for, purchase the teams furnished him by the other contracting party, applying upon the purchase price thereof, any balance due him under such contract, and it was claimed by plaintiff that when work ceased, there was due him for work performed sufficient to pay for such teams, and that therefore, title to the teams passed to him; and where the trial court rendered judgment for such plaintiff; but where on appeal therefrom, the supreme court held that the state of the account between the parties to the contract, during the continuance of the work provided for therein, had no effect upon the title to such teams:—Hood v. Olin, 80 Mich. 296.

¶ 147. In proceeding by a street railroad company to condemn private property to build an embankment, with openings therein for intersecting streets, to carry its track over a railroad, the supreme court denied the right, holding that Act No. 101, Public Laws, 1905, amendatory of Comp. Laws 1897, § 6446, limited their right to the construction of trestles for overhead crossings. Subsequently on a new proceeding between the same parties to condemn the same land, the supreme court overruled the former decision and held that Act No. 133, Public Laws, 1905, amendatory of the same statute and section as Act No. 101, containing no such limitation and conferring the same right of eminent domain as possessed by railroad companies, repealed Act No. 101. Held, the former decision was not res adjudicata of the rights of either party.—Detroit United Ry. v. Barnes Paper Co., 172 Mich. 586.

¶¶ 148, 149. While as to the facts as found and returned in answer to a writ of certiorari issued to review proceedings leading to the conviction of the defendants in this case by the recorder's court of the city of Detroit, for creating and maintaining a nuisance, the return is conclusive and binding, and call for the affirmation of such conviction and the consequent judgment, the result thus reached will not be considered as binding upon the supreme court in another proceeding in which the evidence and facts may be directly fully presented.—People v. Detroit White Lead Works, 82 Mich. 471.

§ 29. ——Discontinuance and dismissal of appeal or writ of error.

Dismissal of a bill to establish an easement in an alley as res adjudicata, see post ¶ 445.

Effect of dismissal of writ of error on conclusiveness of judgment, see Appeal § 169, ¶¶ 727, 728.

Effect of dismissal of certiorari on judgment below, see Certiorari § 63.

¶ 150. When plaintiff discontinues in the circuit court an action appealed by him from a justice's judgment of no cause of action, such judgment does not bar a new suit in the circuit; though dismissal of the appeal would revive the judgment appealed and it would be a bar.—French v. Weise, 112 Mich. 586.

¶ 151. Dismissal of a writ of error leaves the judgment upon which it was sued out operative and conclusive.—Hitchcock v. Pratt, 51 Mich. 263.

§ 30. Judgments vacated or set aside.

Conclusiveness upon legatees of finding set aside on the appeal of one of them, see post ¶ 396.

Defenses available to defendant on opening default, see Defaults § 40.

¶ 152. If, when sued on his bond, a surety in certiorari shows as a defense a former judgment against himself, it is proper to rebut this by testimony that it was vacated because he had notified the plaintiff's attorney that no judgment could be given against him without a direct suit on the bond. —Porter v. Leache, 56 Mich. 40.

¶ 153. An order vacating a judgment as to one of two defendants cannot, in a subsequent suit against them both for the same cause of action, be treated as merging the whole claim in a judgment against the other defendant, if court, counsel and parties have meanwhile dealt with the judgment as wholly set aside.—McArthur v. Oliver, 53 Mich. 299.

§ 31. Conflicting or neutralizing adjudications.

Priority in decisions, see also ante ¶ 143a.

Contrary later decision by appellate court, see also ante ¶ 147.

Conflict between decree and order based thereon, see also ante ¶ 156.

Overruling precedents, see Courts, § 33 et seq.

¶ 154. In an action of replevin in the circuit court brought by the mortgagee of chattels under a mortgage given to secure payment to plaintiff of a collateral note, it was found that the debt had been paid, and judgment went for defendant and was affirmed on appeal. Pending the replevin plaintiff sued the note in justice's court and recovered judgment, which became final and was not pleaded in the replevin case. Held, that the judgment in the replevin suit being rendered in the suit first brought, being based upon the primary obligation, being the judgment of the superior court, and having been rendered last, would control.—Bateman v. Grand Rapids & I. R. Co., 96 Mich. 441.

¶ 155. Where the husband and wife each file suit for divorce in different counties and each obtained a decree awarding the custody of their children, hers being prior in time but being vacated at his motion, the wife having submitted to the jurisdiction of the court in the husband's suit by suffering judgment against her on a plea in abatement, is

estopped by it to claim the custody of the children in a collateral proceeding of habeas corpus.—In re Wrisley, 126 Mich. 109.

§ 32. Conclusiveness of orders after judgment or decree.

Conclusiveness and effect of orders generally, see Motions and Orders.

¶ 156. Matters set up in defense to a writ of assistance cannot be received to affect the decree for the enforcement of which the application of the writ was made.—Howe v. Lemon, 47 Mich. 544.

III. IDENTITIES OF FORMER AND PRESENT ACTIONS.

See explanatory note, post under division IV.

Identity of subsequent action with pending one as ground for abatement, see Abatement §§ 11-13.

§ 33. In general.

Requisite finality of the judgment, see ante II, B.

Particular elements of identity, see post §§ 34-38.

Identities requisite to estoppel on particular facts, see post § 39.

Defenses barred by former judgment, see post § 44 et seq.

Identities between pending former action and action abatable thereby, see Abatement § 11.

Similarity of other case as disqualifying prosecuting attorney employed therein, see Attorneys § 63.

Decisions that street was lawfully occupied as bar to recovery of damages in another form of action, see also Courts ¶ 105.

Decree determining sufficiency of release of right of way as bar to suit on same question by other party, see Drains § 106, ¶ 314.

Resort to contempt against delinquent officer as bar to other remedy, see also Sheriffs, VI.

¶ 157. To render a former judgment a bar to a subsequent action it must have been rendered upon the merits, upon the same subject-matter, and between the same parties.—Tucker v. Rohrback, 13 Mich. 73; Love v. Francis, 63 Mich. 181.

§ 34. Identities of causes of action.

Identities of subject-matter, see post § 37.

Continuing wrongs admitting of successive recoveries, see Damages § 30.

Admissibility in ejectment of former judgment in ejectment, see Ejectment ¶ 152.

Right to bring separate actions for separate wrongful executions, see also Executions ¶ 321.

¶ 158. The doctrine of pleading a former suit in bar has no application where the actions are for entirely different and distinct causes.—Black v. Miller, 75 Mich. 323.

¶ 158a. A divorce decree to the husband in 1909 for extreme cruelty on the ground of separation and refusal to cohabit from and after 1906 is not a bar to an action for alienation of affections accomplished in 1908, since the two causes of action are not inconsistent with each other.—Philpott v. Kirkpatrick, 171 Mich. 495.

¶ 159. A judgment for defendant on a general demurrer to the declaration is not a bar to a new action where a different state of facts is declared upon.—Rodman v. Michigan Cent. R. Co., 59 Mich. 395.

¶ 160. A note holder who sues on the instrument in assumpsit and is successfully met with the statute of limitations may begin an action against the same defendant for false representations in inducing him to take the note.—Black v. Miller, 75 Mich. 323.

¶ 161. A judgment in a replevin suit for the value of only such goods described in the writ as were found and were in the possession of the defendant, is no bar to a subsequent assumpsit for goods which were described in the writ but not found and not in his possession and which therefore the replevin action in no event could pass on.—Reid, Murdoch & Co. v. Parks, 122 Mich. 363.

¶ 162. A decree cannot be set up in bar of a proceeding to set it aside for fraud.—Adair v. Cummin, 48 Mich. 375.

¶ 163. A trustee to whom land had been conveyed to secure creditors, sold the lands under a chancery decree, applied the proceeds to the debts, reported a deficiency but made no effort to collect it. A creditor who had not been paid in full brought an action at law against the debtor for the balance due him. Held that the chancery proceeding was not a bar to such action.—National City Bank v. Torrent, 130 Mich. 259.

¶ 164. Where a township treasurer defaults in paying over money due the county, the township is liable to the county, but such liability is to be enforced by mandamus to have the amount of taxes reassessed against the township; and this remedy is not barred by an adverse judgment in a suit on such treasurer's bond.—Hart Township v. Oceana County, 44 Mich. 417.

¶¶ 165, 166. A decree granting an application for a writ of assistance and determining that the court had jurisdiction in the auditor's proceeding for tax sale, was res adjudicata in subsequent ejectment by the former owner, in which other and different reasons for want of jurisdiction than those assigned by him in the application for a writ of assistance, were set forth.—Peters v. Youngs, 122 Mich. 484.

¶ 167. A party being sued on a note secured by mortgage set up as a defense that a foreclosure had been commenced and carried to

a decree. Held, that this was no bar to the action, but was matter of abatement or cause for a stay; and hence could not be made defensively.—Goodrich v. White, 39 Mich. 489.

¶ 168. A recovery by a minor son, in an action for negligent injury prosecuted by his father as his next friend, for the value of the loss of his services during minority, which is insisted upon by the father as an element of the son's damages, is a bar to a recovery by the father for the loss of such services in a suit thereafter brought in his own name.—Baker v. Flint & P. M. R. Co., 91 Mich. 298.

¶ 169. A tenant who had been evicted by another tenant claiming under a prior lease brought suit upon his landlord's alleged agreement to indemnify him for the costs and expenses of appealing from the eviction proceedings; judgment went for defendant. Held, that this barred a later action for outlays in litigating liability on the appeal bond, alleged to have been made under the same agreement but subsequent to the former suit.—Cummerford v. Paulus, 66 Mich. 648.

¶ 170. Judgment recovered in Michigan by a foreign executor suing in his own name on a note belonging to the estate and payable to bearer bars any subsequent proceeding against defendant.—Knapp v. Lee, 42 Mich. 41.

¶ 171. The fact that a judgment has been recovered on a note secured by mortgage is no answer to a suit by the mortgagors to have the mortgage set aside on showing that the note has actually been paid.—Rickle v. Dow, 39 Mich. 91.

¶ 172. The dismissal, on the ground of the illegality of the marriage, of a bill for divorce does not bar another suit based upon a later and valid marriage.—Filer v. Filer, 77 Mich. 469.

¶ 173. An order dismissing a bill seeking to enjoin an act already performed merely settles the question of injunction, but does not prevent the complainant in the bill from pursuing his other legal remedies against a mortgagee making an unauthorized sale of the mortgaged property.—Hicks v. J. B. Pearce Co., 158 Mich. 502.

¶ 174. A decree dismissing a bill in chancery after a hearing upon the merits is a bar to a subsequent suit having the same object, and based upon the same state of facts, although the transaction is set forth in amplified form, and the prayer for relief is not identical with that of the former bill.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368.

§ 35. Identities of issues.

Second bill like former but more specific, see also ante ¶ 174.

Identities of particular suits and actions, see post § 36.

Decree on bill to annul decree on one ground as bar to second bill on other grounds, see also Actions ¶ 16.

Tax decree as working estoppel to question validity of law by foreclosing all questions affecting objector, see also Constitutional Law ¶ 152.

Construction and effect of pleadings as to issues presented and joined, see Pleading, IX.

¶ 175. The first essential of the rule of res adjudicata is the identity of the matter in issue, and the "matter in issue" is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings.—Le Roy v. Collins, 165 Mich. 380.

¶ 176. A judgment is not res adjudicata unless the identical matter in issue in the subsequent proceeding was determined by the former adjudication.—Murphy Chair Co. v. American Radiator Co., 172 Mich. 14.

¶ 177. In a second suit for rent for subsequent months where the defendant's plea and notice are the same as in a former suit, the questions raised are res adjudicata.—Jenkinson v. Wysner, 125 Mich. 89.

¶ 178. A decree in chancery is no bar to a suit that does not involve the same questions, even though they might have been brought into the first case by a cross-bill, but were not.—Nims v. Vaughn, 40 Mich. 356.

¶ 179. The rulings of the supreme court in a dispute in equity are not binding in an action at law between the same parties in regard to the same subject-matter so long as the issues are distinct.—Blake v. Hubbard, 45 Mich. 1.

¶ 180. A defendant cannot interpose a special notice of defense setting forth the opinion of the supreme court upon the reversal of a judgment recovered by plaintiff on a former trial as a defense to a declaration on a new state of facts upon questions decided in the former trial.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 181. D. and M. held chattel mortgages from P. upon the same property, M.'s mortgage being older but filed later than D.'s; and after M. had replevied the chattels from P., D. replevied from M. Held, that a judgment subsequently recovered by M. against P. was not res adjudicata of the questions involved in D.'s replevin.—Damm v. Mason, 102 Mich. 545.

¶ 182. A judgment for the buyer in assumpsit for purchase price and the care of a horse on rescission of the purchase is not res adjudicata of a further claim for care covering a period between the commencement

of the original suit and the date of trial, where the bill of particulars in such suit limited the claim to the period ending with the date of commencement of suit, even though the case was submitted under instructions permitting a recovery to the later date. —Rosema v. Porter, 112 Mich. 13.

§ 36. ——Specific suits and actions and issues therein.

Causes, claims and defenses merged in former trover, trespass or replevin judgment, see post § 43.

¶ 183. Proceedings under the bastardy act do not bar the mother's right to sue the father for the injury done her.—Sutfin v. People, 43 Mich. 37.

¶ 184. Judgment for mesne profits in ejectment does not bar trover against the defendant for cutting and removing timber while in possession since the questions involved are different.—Wilson v. Hoffman, 93 Mich. 72.

¶ 185. A judgment in a suit for trespass to lands does not bar a subsequent action of ejectment for the same premises between the same parties.—Keyser v. Sutherland, 59 Mich. 455; and see Fahey v. Crotty, 63 Mich. 383.

¶ 186. Judgment in ejectment for plaintiff does not estop a defendant in ejectment from subsequently purchasing a title derived from plaintiff, or from holding it as any one else would hold it.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 187. Separate actions were brought against an administrator on his general bond and on his bond given on sale of real estate. Suit on the general bond was tried first and recovery therein was not confined to moneys other than those received on sale of real estate, nor was there any special accounting for the fund realized from such sale. The penalty of the general bond not being large enough to recover the amount due the estate, held, that judgment thereon did not bar action on the special bond.—Durfee v. Joslyn, 92 Mich. 211.

¶ 188. In a suit by one son against another to recover securities claimed by the former to have been given to him by the father in his lifetime, the suit is not rendered res adjudicata by a former decision in the contest of the father's will involving the questions of mental competency and undue influence.—Shepard v. Shepard, 164 Mich. 183.

¶ 189. Where, after the commencement of an action in which judgment for damages for detention was subsequently rendered and paid, there was a new and independent taking, such judgment was held no bar to another suit.—Blaisdell v. Scally, 84 Mich. 149.

¶ 190. By recovering in replevin such goods, fraudulently purchased, as were in the vendee's possession when the writ issued one is not barred from bringing trover for the rest of the goods so purchased.—Reid Murdoch & Co. v. Ferris, 112 Mich. 693.

¶ 191. In an action upon a note by a bank against husband and wife, in which action the husband defaulted, a judgment upon a directed verdict in favor of the wife upon the ground that the debt was a joint obligation and that the proof did not trace the proceeds to her separate estate, was not res adjudicata as to a replevin suit by the bank for property described in a chattel mortgage which was given as security for such note. —First Nat. Bank of Reed City v. Sweet, 136 Mich. 615.

¶ 192. An adjudication that a claim filed under a general assignment could not be based on a contract of purchase of goods which the claimant vendors had rescinded for fraud does not bar a claim for the conversion of the goods.—Farwell v. Myers, 64 Mich. 234.

¶ 193. Under an original habeas corpus proceeding to determine the right of a parent or guardian to the care and custody of a child, the supreme court will not be concluded by the finding of facts made by the court which committed the child as a delinquent. —In re Mould, 162 Mich. 1.

¶ 194. The decision of the supreme court that the Smoke Nuisance Ordinance of the city of Detroit, §§ 1, 6, prohibiting ferryboats from emitting dense black or gray smoke is unreasonable and impossible of observance due to the fact that there is no known device utilizable in marine practice to prevent such emission, will not be a bar to a future action under such ordinance if, in the advance of art, appliances are invented which in marine practice are efficient and practical.—People v. Detroit, Belle Isle & Windsor Ferry Co., 187 Mich. 177.

¶ 195. A prior decision of the recorder's court to the effect that there are no known devices for the prevention of smoke from ferryboats possible of installation in marine practice is not res judicata of the question, since in the progress of the art of smoke prevention new devices are discovered and applied.—People v. Detroit, Belle Isle & Windsor Ferry Co., 187 Mich. 177.

¶ 196. Where a bill to restrain certain expenditures by trustees under a will, and an appeal from the order of the probate court approving the account of the trustees, are both pending, and involve the same issues, and by consent of the parties the bill is dismissed, the decree of dismissal does not adjudicate all the issues involved in the pleadings in the injunction suit where there is evidence that such was not the intent of the parties.—In re Ward's Estate, 152 Mich. 218.

¶ 197. A consent decree in a suit to enforce a mechanic's lien, dismissing it as to the wife who owned the land, and against her husband for the amount involved, is not a bar to a creditor's bill and a bill in aid of execution levied against the property upon which the improvements had been made.—Brand v. Connery, 132 Mich. 88.

¶ 198. An intervening petition seeking to obtain a decree declaring an execution sale to be illegal and void because without leave of court while the property was in the hands of a receiver, is not barred by the dismissal of a former petition asking the removal of the receiver and for an accounting and a personal judgment against the receiver.—Campau v. Detroit Driving Club, 130 Mich. 417.

§ 37. Identity of subject-matter.

¶ 199. The subject-matter of a litigation is the right which one party claims as against the other, and on which he demands the judgment of the court.—Jacobson v. Miller, 41 Mich. 90.

¶ 200. One who is sued in respect to one subject-matter is not precluded in any after litigation involving the same questions, though relating to a different subject-matter, from introducing defenses not used in the former suit.—Jacobson v. Miller, 41 Mich. 90.

¶ 201. A judgment in replevin for the value of goods against a vendor who replevied them from one in whose possession they were, does not bar trover by the vendor for their value, since the subject-matter of the latter suit was not involved in the former.—Robinson v. Kunkleman, 117 Mich. 193.

¶ 202. The decision of the court of a foreign state as to the validity of a note given for the purchase price of land is conclusive in another controversy involving the same subject-matter.—Bishop v. Dodge, 196 Mich. 231.

¶ 203. A judgment in a replevin suit for the value of only such goods described in the writ as were found in the possession of the defendant, is no bar to a subsequent suit for goods described in the writ but not found.—Reid, Murdoch & Co. v. Parks, 122 Mich. 363.

¶ 204. A suit for an instalment due on a contract which is not a mere contract for services is not barred by a judgment in a prior suit for an earlier instalment.—Raymond v. White, 120 Mich. 165.

§ 38. Identity of parties.

[Note. Frequently a party complaining or impleaded in the former action in one right or capacity is made party or sues in the later action in a different right or capacity, and it then becomes a question whether he is concluded in one capacity or right by the adjudication had in the other. Generally this depends on whether in the one he was representative of the rights or status asserted in the other. See post §§ 57, 58.]

Sufficiency of garnishment proceedings to bring principal defendant under the judgment, see Garnishment.

§ 39. Identities requisite to support estoppel.

See also post ¶¶ 298, 462.

Parties regarded as identical because represented in earlier action, representative relationships, see post §§ 64-76.

¶ 205. Where the record in a former suit between the same parties tends to show that any fact involved in the issue in the second suit was litigated and set at rest in the former suit, it is competent evidence of that fact, although it may not be conclusive upon all of the questions involved in the second suit.—Bond v. Markstrum, 102 Mich. 11.

IV. CAUSES, CLAIMS AND DEFENSES BARRED OR MERGED IN JUDGMENT.

[Note. The bar of causes as dependent on the identity of the former with the later action is treated ante, III; while the question of bar as dependent on the range and scope of the matters litigated or which were open to litigation in the former action is treated in this division, IV. The present division deals with technical "bar" by judgment, while division VI, post, deals with "estoppel" by judgment in the technical sense. The diverse rules as to pleading and proof applicable to pleas in bar or objections of estoppel are treated post, VII.]

Effect and conclusiveness of judgments of sister states and of foreign countries, see Foreign Judgments, II.

Effect of earlier foreign decree rendered in suit commenced later than domestic suit, see also Divorce ¶ 693.

Abatement of second action brought pending first, see Abatement § 10 et seq.

§ 40. Nature, scope and construction of adjudication.

Nature of res adjudicata doctrine, see ante § 1.

Adjudications operative as bar, see ante, II.

Regularity and validity of the judgment as essential to merger, see ante § 5.

Judgment on joint cause with service of part only of joint defendants, see also ante ¶¶ 27, 28.

Equity decisions as bar to proceedings at law, see ante § 8.

Judgments at law as bar to proceedings in equity see ante § 9.

Judgment on demurrer, see also ante ¶ 159.

Effect of judgment in bastardy as bar to mother's suit for the tort, see also ante ¶ 183.

Presumption as to scope and matters decided, see post § 95.

Evidence as to scope and matters decided, see post §§ 96-98.
Questions of law and fact and instructions as to scope and matters decided, see post § 99.
Discharge of representative as bar to appointment of administrator de bonis non, see Estates of Decedents ¶ 1209.
Garnishment as bar to second writ, see Garnishment.

¶ 206. A decree dismissing a bill brought to have a mortgage declared void for fraud, and to have a foreclosure under the power of sale set aside, does not estop complainant from attacking the regularity of the foreclosure proceedings, where such regularity was not put in issue or contested.—Bonker v. Charlesworth, 33 Mich. 81.

¶ 207. Dismissal of a bill to clear a title clouded by tax-sales does not prevent a defense at law against the tax-titles.—Gamble v. City of East Saginaw, 43 Mich. 367.

¶ 208. The adjudication of the rights of secured creditors of an insolvent under their several securities, postponing them to a certain mortgage, will not preclude them from asserting as against unsecured creditors, their superior claim to a fund appropriated by the trustee under the prior mortgage to the payment of an invalid claim.—Burrows v. Leech, 116 Mich. 32.

¶ 209. An injunction decree granted to mortgagee restraining a chattel mortgagor from cutting timber and also directing that the chattel mortgage (given to mortgagor's comaker) be assigned to the payee of the note and the payee sell enough of the mortgaged chattels to pay the note and exonerate the comaker, is conclusive in a replevin action brought by the payee against the comaker, injunction defendant and replevin defendant, to recover possession of the mortgaged chattels as directed by the decree, which was allowed to become final for want of appeal.—Vincent v. Sherwood, 118 Mich. 64.

¶ 210. A creditor filed a bill against the devisee of the deceased debtor, joining as codefendants the executor and the devisee's mortgagee, and alleging that there were no assets but the land devised and mortgaged, as described in the bill, and that the mortgagee took with notice of the debt due to complainant. Defendants answered and set up that the mortgage was made to raise money to discharge claims due from the debtor's estate and that the money had been applied; and the mortgagee asked to be subrogated. Complainant claimed no priority over other general creditors, among whom was the devisee himself. In the decree it was found what and how much were these other debts due from decedent "which would stand on an equal footing with complainant's claim and pro rate with it." The right to subrogation had been previously found. The decree then adjudged that complainant should "stand prior in her rights under this decree, and the lien declared by it, to all other sums represented in the said mortgage" * * * for the full amount hereby declared to be her due. It then provided that on paying complainant the mortgagee should be subrogated to her rights. Held, in view of the purpose of the bill, not to have made any adjudication of priority as between the claim of complainant and the rights of the mortgagee; and accordingly an enumeration and description in the decree of the claims paid out of the mortgage proceeds was not to establish the order and extent of the mortgagee's rights but was merely to state which the complainant was to pro rate with, and which were to be inferior to complainant's claim, but all those rights were left open for a distribution of the proceeds resulting from a sale under complainant's decree.—Van Vleck v. Conklin, 123 Mich. 442.

¶ 211. One denied set-off in equity of costs of one suit against costs in others involving the same subject-matter but different parties is still entitled to proceed at law to recover costs in such suits, if not barred by delay.—Carpenter v. Hood, 172 Mich. 533.

§ 41. Merger of demand in judgment.

Necessity that judgment be valid, see ante ¶ 22.
Merger of note in judgment on confession for wrong amount, see ante ¶ 41.
Defenses barred or merged, see post § 44 et seq.
Effect of judgment against one of joint debtors, see also post § 71.
Merger of attorney's lien in judgment against client, see Attorneys § 51.
Nonmerger of crime in civil judgment for tort, see Crimes § 18.
Former partial recovery as mitigating damages, see Damages § 167.
Effect of probate decree assigning estate to persons entitled as merger of agreement among heirs as to manner of division, see also Estates of Decedents ¶ 1192.

¶ 212. A demand is merged in the judgment obtained thereon, and it no longer subsists for any purpose.—Huntoon v. Russell, 41 Mich. 316.

¶ 213. A decree in foreclosure merges the obligation and security and determines conclusively the amount of the debt.—Wallace v. Field, 56 Mich. 3; Haldane v. Sweet, 58 Mich. 429.

¶ 214. A party sued on a note secured by mortgage set up as a defense that a foreclosure had been commenced and carried to a decree. Held, that this was no bar to the action, but that defendant should have moved the court pending the foreclosure to restrain the unauthorized action.—Goodrich v. White, 39 Mich. 489.

¶ 215. Where no sale has been made under a decree granting a lien upon land for past-due instalments of interest, there is no such merger as prevents a recovery for instalments subsequently accruing.—Near v. Donnelly, 93 Mich. 460.

¶ 215a. A note is not so merged in a judgment in attachment as to bar a personal action on it, or its assignment to a third person, if there has been no personal service appearance in the attachment suit, and no part of the judgment satisfied.—Smith v. Curtiss, 38 Mich. 393.

¶ 216. Under Comp. Laws 1857, chap. 133, p. 1219, providing that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been served upon either of them the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that, "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence," a partnership note is not merged in a judgment against all of the members of the partnership, where only one member thereof was served with process.—Mason v. Eldred, 6 Wall. (73 U. S.) 231, 18 L. ed. 783.

¶ 217. A judgment recovered for breach of contract against an assignor, after an assignment because of insolvency, does not operate as a merger of the claim in the judgment recovered, so that such claim cannot be introduced as a set-off or recoupment of damages, there being evidence that the course taken in procuring a judgment for the breach of contract was due to concealment of the assignor, of the fact of assignment, or at least, of the mistake of the defendant in supposing that the claim belonged to the assignor, in which event the hardship and injustice of a strict application of the rule of merger is so apparent that the court is justified in holding that, although the plaintiff assignee was not strictly in privity as to the judgment, he was as to the cause of action upon which it was based, wherefore the defense is proper.—Bacon v. Reich, 121 Mich. 480.

¶ 218. Claimant took a deed of land as security for services as attorney rendered the deceased during his lifetime. A certain mortgagee of the deceased brought a bill to reform his mortgage so as to include the land held as security by claimant. The decree of the court allowing the bill fixed the amount of claimant's lien. Held, that in a claim against the estate of deceased, claimant could not recover interest on the account prior to the decree establishing the lien, since that decree liquidated all accounts up to its date.—Warren v. Sheehan, 156 Mich. 432.

§ 42. Same cause asserted in different form.

Chancery decree adjudging tax deed valid and mandamus to compel cancellation, see also ante ¶ 44.

Same act as civil and criminal contempt, see ante ¶ 75.

Alternative causes based on same transaction, see post § 44.

Waiver of tort to sue in assumpsit, see Assumpsit, I.

Decree determining sufficiency of releases of right of way as bar to suit on same question by other party, see Drains § 106, ¶ 314.

¶ 219. Where seduction has been proved in aggravation of damages in a breach of promise case the recovery will bar any future action for the seduction.—Sheahan v. Barry, 27 Mich. 217.

¶ 220. Where, upon breach of a lumbering contract by failure to make payments, the contractor proceeds under Comp. Laws 1897, § 10756 et seq., How. 2nd Ed., § 13843 et seq., and files a statement of lien, a judgment upon quantum meruit in such proceeding is a bar to a subsequent action for breach of contract based upon the same facts.—La Vasser v. Chesbrough Lumber Co., 190 Mich. 403.

¶ 221. Where plaintiff agreed to purchase an automobile of defendant and turn in as part payment a secondhand automobile, and the contract was canceled by mutual agreement and a deposit returned, and plaintiff maintained an action of assumpsit for the value of the secondhand car against defendant upon the theory that defendant became the owner of the car and was liable for the purchase price, and the case was tried on the merits and the judgment in defendant's favor was not appealed from, plaintiff could not repudiate his contention and bring an action of tort based upon the inconsistent theory that defendant was not the owner, but was in tortious possession.—McDonald v. Young, 198 Mich. 620.

¶ 222. A suit between the state and a railroad, brought for the purpose of destroying the immunity of the railroad from liability for general taxes by a judicial decision compelling it to reorganize under the general railroad law, which was decided against the state, is conclusive of the validity of the railroad special charter under which it claimed such immunity, in subsequent quo warranto proceedings and suits by the state to recover taxes from the railroad.—People ex rel. Attorney General v. Detroit, G. H & M. Ry. Co., 157 Mich. 144.

¶ 223. The refusal of the court to issue execution to enforce payment of a deficiency arising on a foreclosure sale concludes the proceedings in the case, and a subsequent order for leave to bring a suit at law upon the note is unauthorized.—Shields v. Riopelle, 63 Mich. 458.

¶ 224. Where one party to a contract claims that it has been rescinded and recovers judgment against the other party upon the quantum meruit, he is estopped, in a later litigation with the same party, from claiming the right to carry out the contract.—Martin v. Boyce, 49 Mich. 122.

§ 43. ——Effect of prior recovery in conversion, trespass or replevin.

See also post ¶ 470.

Identities of the actions, see ante, III.

Splitting cause and recovery as bar, see also post § 46.

Persons concluded, see post, V.

Particular facts concluded by judgment in trover, trespass or replevin, see post § 83.

Recovery of goods in replevin as bar to claim under chattel mortgage, see also Chattel Mortgages ¶ 421.

[Note. The rule that a judgment for damages for conversion or trespass to goods and the satisfaction of such judgment passes the title of the goods from plaintiff to defendant is not technically a rule of res adjudicata alone. It also depends on the discharge of liability by the satisfaction and the nature of the action. For this reason such decisions are treated in the specific topics Conversion § 44; Trespass, II; Replevin, IV.]

¶ 225. Whether trespass can be brought to recover the damages which one has sustained by the unlawful detention of his property after he has recovered the property in replevin, quære.—Delevan v. Bates, 1 Mich. 97.

¶ 226. A judgment in trespass is a bar to a subsequent action for defendant's forcibly entering the premises and destroying trees, etc.—Lemerand v. Flint & P. M. R. Co., 117 Mich. 309.

¶ 227. Although a judgment in replevin does not in itself decide anything more than the right of possession, yet it may be rendered conclusive by showing that the right of property was in fact tried and determined.—Lansing v. Sherman, 30 Mich. 49.

¶ 228. A judgment in replevin, where there is no assessment of damages, does not necessarily determine title, but merely determines the right of possession at the time, and is not inconsistent with the right of the defeated party to recover it back under a change of circumstances.—Deyoe v. Jamison, 33 Mich. 94; Pearl v. Garlock, 61 Mich. 419.

¶ 229. Judgment for the return of goods replevied from a buyer by the seller restores to the buyer the possession of the goods without impairing the seller's rights under their contract of sale.—Adams v. Wood, 51 Mich. 411.

¶ 230. A judgment in replevin for the defendant adjudging a return to him of the property taken on the writ, ordering assessment of damages which was done, does not conclude the adverse party that defendant was entitled to the property and prevent the showing in a subsequent suit on the replevin bond that plaintiff, obligor in the bond, delivered the property to an administrator to whom defendant also would have had to deliver it. The rule that where return is waived the value of the goods and all questions of damages must be litigated and are concluded does not apply where return is not waived but judgment is taken for it and damages for detention are assessed.—Simmons v. Robinson, 101 Mich. 240.

¶ 231. Where the defendant at the commencement of a replevin suit is not in possession of the goods in question a subsequent action for assumpsit will lie for the value.—Friedberg v. Bennett, 166 Mich. 558.

¶ 232. A replevin suit in which the property is not taken on the writ and the plaintiff proceeds for damages determines the title to the property.—Parmalee v. Loomis, 24 Mich. 242.

¶ 233. Trover was brought against an execution purchaser by one who claimed through a prior purchase from the execution debtor. The record of a replevin suit between the same plaintiff and the constable who levied the execution being offered in evidence, it was objected that replevin does not determine the title, but only the right of possession at the beginning of the suit; held, that as said judgment was not rendered till after the execution sale, though the suit was begun before and was pending when the sale took place, it was not admissible as evidence against the plaintiff in trover.—Lansing v. Sherman, 30 Mich. 49.

¶ 234. A judgment for defendant in replevin, for exempt property taken by him on execution, bars trover against him for its conversion, unless after the return of the property and before its sale the claim of exemption is plainly made.—McGuire v. Galligan, 57 Mich. 38.

¶ 235. It seems that a judgment in replevin cannot settle the title to land.—Busch v. Nester, 62 Mich. 381; Busch v. Nester, 70 Mich. 525.

§ 44. Alternative causes and defenses.

Same cause suable in different forms, see ante § 42.

Action for partial breach or performance as bar to recovery on entire contract or sale, see also post § 45.

Defenses not made and rights not asserted which might have been presented, see post §§ 49-52.

Right to recover entire damages, including prospective damages as proper element of recovery in one action, see Damages, I.

¶ 236. Where, in an action for the price of goods sold, defendant recovers judgment of no cause of action because the goods do not meet plaintiff's warranty, such judgment is not a bar to an action by plaintiff to recover the value of the goods on defendant's refusal to surrender them.—Aldine Mfg. Co. v. Barnard, 84 Mich. 632.

¶ 237. A judgment in assumpsit, upon a contract for the sale of an article under which title to such article was reserved in plaintiff until paid for, did not constitute an election of remedies so as to bar subsequent replevin.—Canadian Typograph Co. v. Macgurn, 119 Mich. 533.

§ 45. Several causes and split causes.

[Note. What constitutes a splitting of an entire cause depends on the nature of such cause, the scope of the action resorted to for redress, and the measure of damages or compensation allowable in the action. For cases on those questions, see specific topics treating of the specific causes and actions, e. g., Assumpsit; Conversion; Ejectment; Replevin; Trespass; Nuisances; Negligence; Assault, II; Damages.]

Satisfaction of judgment for part of cause of action as release of whole cause, see Releases, III.

¶ 238. Where a party has recovered on a contract the purchase price of staves that were to be delivered by him thereunder to defendant, his failure, by reason of the absence or drunkenness of a witness, to prove the delivery of a certain lot, and the withdrawal of that item in his claim, will not authorize him to bring another suit for it; this item was not a distinct cause of action, and the former judgment was a final determination of the damages he was entitled to recover under the contract.—Dutton v. Shaw, 35 Mich. 431.

¶ 239. Plaintiff sued in attachment against the defendant and declared for two payments on a building contract only one of which was shown by the proofs to be due at the time of the attachment. Plaintiff by leave of court then withdrew the second claim and took judgment for the first payment due. Held, that such a judgment did not bar a subsequent action to recover the second payment. —Love v. Flitcraft, 149 Mich. 149.

¶ 240. All damages arising from one cause of action must be assessed and recovered once for all, and do not renew the cause of action as they mature.—Thompson v. Ellsworth, 39 Mich. 719.

¶ 241. Judgment in an action for slander is a bar to any future action for any repetition thereof open to proof on the trial.—Leonard v. Pope, 27 Mich. 145.

¶ 242. A prior judgment is a bar to all matters that might have been tried under the issues made, and in an action for negligent injury, based on different counts, where a verdict recovered on one count is reversed without a new trial, a subsequent action cannot be maintained on the negligence averred in the other count, the cause of action not being divisible.—Jungnitsch v. Michigan Malleable Iron Co., 121 Mich. 460.

¶ 243. A judgment in trover against a sheriff for conversion by levy precludes trespass for entry to make the levy.—Finn v. Peck, 47 Mich. 208.

¶ 244. A defendant in replevin who takes judgment for the return of the property, but refuses to assess his damages for the seizure and detention, cannot afterwards maintain a separate action therefor.—Drewyour v. Merrell, 112 Mich. 681.

¶ 245. It seems that bringing suit against only one of several persons to recover an entire sum received by him under a constructive trust, but divided with the others, should preclude separate suits against the rest if the complainant had full knowledge of their interests when he elected to sue a particular defendant on the principle that courts of equity will not encourage the needless splitting up of causes of action.—German American Seminary v. Kiefer, 43 Mich. 105.

¶ 246. Where judgment was rendered against the defendant in an action on an appeal bond, given in summary proceedings by a vendor to obtain possession of the premises after default of a contract purchaser, which bond was conditioned upon the payment to complainant of all rent due or to become due up to the time complainant obtained possession, and at the time of the trial of the action on the appeal bond there was due as rent a sum exceeding the amount of the appeal bond, and no claim was made for rent of the farm for the year that the purchaser was wrongfully occupying the farm, held, that in permitting recovery on a bond conditioned for the accounting to the clerk of court of the proceeds of crops for such year, and authorized in lieu of a provision for the appointment of a receiver for such crops, there was not an allowance of a double recovery.—Brown v. Brown, 196 Mich. 677.

§ 46. ——Splitting set-offs.

Set-offs and recoupments withheld, see post § 52.

¶ 247. Comp. L. 1897, § 4721, limiting justice's jurisdiction to claims for not over

$100.00 does not give the defendant the right to split an inseparable cause of action; and, having recovered for a part of it by way of set-off in the action in justice court, he cannot recover the balance in a subsequent suit. —Andreas v. Leavitt T'p School District No. 4 Fractional, 138 Mich. 54.

¶ 248. Comp. L. 1897, § 776, precluding set-offs in suits for unliquidated damages will not operate to allow the defendant having obtained judgment for such set-off to the amount of $100.00 in a justice court, to bring suit and recover for the balance of an inseparable cause of action.—Andreas v. Leavitt T'p School Dist. No. 4 Fractional, 138 Mich. 54.

§ 47. Matters passed on as defenses.

Dismissal of cross-bill as final adjudication on merits, see ante ¶ 108.

Presumption as to matters passed on, see post § 95.

¶ 249. When issue is taken upon a plea either in the first instance or after it has been allowed upon argument, if the truth of the matters pleaded is established, the suit is barred so far as the plea extends.—Niles v. Lee, 169 Mich. 474.

§ 48. Defenses and rights not available in former suit.

Defenses and rights not asserted which might have been asserted or partly asserted which might have been more fully asserted, see post §§ 49-52.

¶ 250. A judgment in ejectment does not estop the defendant from setting up in a subsequent action a title obtained by him pending the former suit through foreclosure of a mortgage executed by plaintiff therein after suit begun.—Snyder v. Hemmingway, 47 Mich. 549.

¶ 251. A defendant in ejectment who after issue joined acquired tax-titles from a third party, but did not set them up in defense, was not estopped by the judgment against him from afterwards asserting them; in such a case they do not relate back.—Hemmingway v. Drew, 47 Mich. 554.

¶ 252. A judgment in ejectment does not estop defendant's grantee from setting up a quitclaim acquired pending suit from one who held a valid tax-title on the premises that had matured before suit brought.—Hemmingway v. Drew, 47 Mich. 554.

¶ 253. Where one is made defendant in a foreclosure suit, who is holder of both a second mortgage on the lands and a chattel mortgage of fixtures, the decree in the usual form will bar his rights under the mortgage of the lands, but will leave his chattel mortgage unaffected.—Crippen v. Morrison, 13 Mich. 23.

§ 49. Matters which might have been litigated before.

Defenses actually passed on, see ante § 47.

Defenses not available in former suit, see ante § 48.

Matters available by cross-bill, see also ante ¶ 178.

Defenses withheld, see post § 50.

Deductions, counterclaims and payments withheld, see post § 51.

Set-off and recoupment withheld, see post § 52.

Omission to assert claim on former occasion as depriving party of costs, see Costs § 21.

Prior claim or nonassertion of claim as an admission against interest, see Evidence §§ 388-391.

Failure to assert claim in final account as raising estoppel to question full title passing by administrator's deed, see Estoppel ¶ 16.

¶ 254. A judgment by default is conclusive upon the questions that might have been raised.—Jacobson v. Miller, 41 Mich. 90.

¶ 255. An outstanding claimant under a mortgage proved his claim, but did not show whether it arose before or after a levy that was given priority to the mortgage. Held, that he was bound by the decree.—McKee v. Grand R. & R. L. St. R. Co., 41 Mich. 274.

¶ 256. A wife who is made a party under foreclosure, and fails to assert rights available to her thereunder, will not be heard to assert them upon a bill to set aside a foreclosure sale.—Butters v. Butters, 153 Mich. 153.

§ 50. ——Defenses not made or incompletely made before.

Set-offs and recoupment withheld, see post § 52.

¶ 257. A defense cannot be withheld to be used in the retrial of a dispute respecting the same subject-matter when a single suit could end the whole controversy.—Jacobson v. Miller, 41 Mich. 90.

¶ 258. Matter that was properly a defense in a suit which has gone to final judgment cannot, in a subsequent suit involving the same subject-matter, be used by a privy of one party against the other party.—Hoppin v. Avery, 87 Mich. 551.

¶ 259. In an action for rent due under a lease, it is the duty of defendant to interpose all the defenses upon which it relies; it cannot, therefore, in a later action for subsequent rent due under the same lease, interpose a defense upon which it did not rely in the first action; the judgment in the former suit rendered defendant's liability res adjudicata.—Harrington v. Huff & Mitchell Co., 155 Mich. 139.

¶ 260. Where it does not appear that a defendant in foreclosure had attended the reference for the computation or the amount due on the mortgage, he is nevertheless barred by the decree in foreclosure from suing the complainant to recover back money alleged to have been paid the complainant to apply on the mortgage, but which he claims had not been so applied. It is presumable that he had notice, where the subsequent proceedings imply that the reference had gone on regularly; and the determination of the exact amount due on the mortgage involves the determination of the precise amount of any payments, and these questions are finally adjudicated by a decree in foreclosure.—Hazen v. Reed, 30 Mich. 331.

¶ 261. Where a defendant in foreclosure does not avail himself of defenses that are open to him, he cannot, when sued in ejectment, use them against the absolute foreclosure decree.—Adams v. Cameron, 40 Mich. 506.

¶ 262. A foreclosure decree under a mortgage of the property of a summer resort association estops it as a party to claim that the mortgage was not authorized by the requisite vote of the stockholders, and that it was only authorized by the directors, such defense having been open and not made in the suit.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

¶ 263. Judgment in ejectment and decree in partition in a widow's favor for her dower interest preclude one who was a party to both suits from raising in her subsequent action for possession the defense that he had a homestead right in the land, and that his wife was not made a party to the former suit in ejectment.—Bemis v. Conley, 95 Mich. 617.

¶ 264. After mandamus to compel the State Land Commissioner to reserve from sale certain lands selected on contract the state cannot sue in equity to cancel patents issued to relator on the strength of the mandamus decision, basing its suit on defenses omitted in the mandamus.—State v. Sparrow, 89 Mich. 263.

¶ 265. A claim against an estate upon a note cannot be defended by the executor on the ground that the claimant is chargeable with a breach of a guaranty that a specified sum should be realized from accounts transferred to decedent before he should become liable upon the note, where such defense was the subject-matter of a suit between the claimant and the decedent in his lifetime, and was determined adversely to the latter on the ground of lack of diligence, although the pleadings therein were not so framed as to admit of the showing, which the executor desires to make, that the claimant had waived the right to insist upon such diligence.—Kellogg v. Thompson's Estate, 115 Mich. 618.

¶ 266. In summary proceedings defendant exhibited a written agreement showing his right of possession until August 8, 1909, and thereupon complainant dismissed his suit. After said date complainant instituted new proceedings. Held, defendant was not estopped from introducing another agreement showing his right to possession until 1912 by reason of the fact that he failed to show such agreement upon the hearing of the first proceedings.—Baldwin v. Baldwin, 166 Mich. 157.

¶ 267. Each party to an arbitration deposited his note with the arbitrators, the arrangement being that they should indorse down the note of the one they found to be debtor to the amount of their award against him and deliver it to the other party. This having been done, and suit brought on such note, the debtor filed a bill to have the award corrected by giving him credit for an item which by accident or mistake was not brought to the arbitrators' attention. He obtained a decree, suit on the note being stayed. Held that when suit on the note was again moved, the debtor could not set up the defense that the award was not valid. A party who has got relief on one basis will not be permitted to litigate the matter over again on another basis, on the suggestion that he has a defense which he did not see fit to rely on before.—Beam v. Macomber, 35 Mich. 455.

¶ 268. A decree of divorce granted to a wife on the ground of extreme cruelty is not so conclusive of that question of fact as to prevent the husband from contesting it when he is sued by a third person for necessaries furnished the wife during the divorce proceedings.—Corry v. Lackey, 105 Mich. 363.

¶ 269. In an action for alienating a wife's affections, the fact that the husband failed to set up the charge of adultery in defense of a wife's prior suit for divorce on the ground of cruelty will not preclude his declaring on the ground of criminal conversation and introducing evidence upon that subject.—Knickerbocker v. Worthing, 138 Mich. 224, distinguishing Gleason v. Knapp, 56 Mich. 291, on the ground that the divorce decree was not conclusive on a third person.

¶ 270. A husband divorced for cruelty cannot base an action crim. con. upon intercourse by defendant with his wife, of which he had knowledge before the divorce suit; since it was a complete defense which was barred by the divorce decree.—Gleason v. Knapp, 56 Mich. 291. [Note. The fact that there was no identity between the plaintiff in divorce and defendant in the criminal conversation suit, seems to have passed unnoticed in the foregoing case. Editor.]

¶ 271. A defendant in ejectment cannot go behind or call in question an absolute decree of foreclosure against him to introduce defenses that were open to him, if at all, in the proceedings in equity, but which he did not then rely on.—Adams v. Cameron, 40 Mich. 506.

§ 51. ——Deductions, counterclaims and payments not claimed before.

¶ 272. A claim which was a proper matter of defense in an action at law cannot afterwards be made the subject of an equitable set-off.—Kinney v. Tabor, 62 Mich. 517.

¶ 273. A decree in foreclosure necessarily covers the question of what payments had been made upon the mortgage, and bars a suit in assumpsit by the mortgagor to recover back the amount of a payment not allowed by the mortgagee in taking the decree.—Hazen v. Reed, 30 Mich. 331.

¶ 274. Where, after the death of a partner, a bill for an accounting and for a sale of the partnership assets is filed, the wife of such partner being made a defendant, it is her duty if she claims a dower interest in the firm's realty to assert it in such suit, and failing to do so she is estopped from setting up such claim against an innocent purchaser who relies upon the decree rendered in such suit.—Free v. Beatley, 95 Mich. 426.

¶ 275. Where a tenant in common had neglected to seek compensation for improvements when a partition suit to which he was made a party defendant was brought, he was not allowed to raise the claim in subsequent partition proceedings brought by him. —Pierson v. Conley, 95 Mich. 619.

¶ 276. If one allows judgment to go against him by default on a claim which he has paid in part, he cannot set off such payment when sued on the judgment.—Ringelberg v. Peterson, 76 Mich. 107.

§ 52. ——Set-off and recoupment withheld.

Splitting set-offs, see ante § 46.
Defenses wholly or partly withheld, see ante § 50.
Deductions not amounting to set-off or recoupment, and payments not claimed in partial defense, see ante § 51.
Judgment for breach of contract against assignor after assignment as merging the claim so as to prevent its being set off in subsequent suit, see ante ¶ 217.

¶ 277. Where a defendant's set-off consists of an independent claim against the plaintiff outside of the contracts sued on by plaintiff, it is optional with defendant whether he will litigate his set-off in that action or bring a subsequent suit, but when his credit grows out of the contracts sued upon by plaintiff, and the issue is to determine what is due under those contracts, and the subject-matter of the set-off must be used in determining the amount, the defendant must present his whole claim by set-off; if he fails so to do he will be estopped from afterwards asserting it in a counter-action.—Paccalona v. Peninsula Bank & Lumber Co., 171 Mich. 605.

¶ 278. If a counterclaim is not based on payments made, but constitutes proper set-off, the only effect of failing to appear and plead and prove it would be that, in any subsequent action to recover it, costs could not also be recovered.—Huntoon v. Russell, 41 Mich. 316.

¶ 279. A defendant can withhold his claim of set-off to be litigated in another suit.—McEwen v. Bigelow, 40 Mich. 215.

¶ 280. A claim available in recoupment may be withheld and used separately.—Ward v. Fellers, 3 Mich. 281; Morehouse v. Baker, 48 Mich. 335; Mimnaugh v. Partlin, 67 Mich. 391.

¶ 281. B. had a contract with M., but sued him on the common counts before a justice to recover back an overpayment. He did not put the contract in issue, though he gave M. credits under it. M. filed no set-off, but immediately sued B. before another justice for the whole amount of his bill. Held, that the judgment in the first suit did not bar the second.—McEwen v. Bigelow, 40 Mich. 215.

¶ 282. Plaintiff contracted with defendants to sell them all the shingles he should cut at a certain price. Defendants claimed that by the true construction of the contract he was bound to cut shingles for them, while he claimed he was only bound to sell them what he should cut. He cut and delivered a few and refused to cut more, and they sued him for the refusal. Held, that he was not bound to use by way of recoupment in the suit any sum the defendants owed him for the shingles they had received.—Morehouse v. Baker, 48 Mich. 335.

¶ 283. A defendant who, when sued upon a contract, does not recoup his damages for plaintiff's negligent performance, but sues separately for such damages and gets judgment, cannot plead such judgment in bar of the action against him; nor is the plaintiff in the former action estopped from prosecuting it by the judgment in the latter.—Mimnaugh v. Partlin, 67 Mich. 391.

§ 53. Conclusiveness of judgments or decrees in ancillary, supplementary or executive proceedings.

See also ante ¶¶ 162, 387.
See also other cases in Foreclosure § 175.
Dismissal as bar to bill of review or motion for relief, see also ante ¶ 114.
Conclusiveness of order after judgment, see ante § 32.
Conclusiveness on suggestion of damages for withholding dower of the judgment awarding dower, see Dower ¶ 153.

Invalidity of original judgment as defense in creditors' suits, see Creditors' Suits § 16.

¶ 284. Where a deed was declared a mortgage for a designated amount and an accounting by the grantee in possession for rents and profits ordered, all questions pertaining to the liability of the grantor are res adjudicata.—Miller v. Peter, 184 Mich. 142.

¶ 285. A foreclosure decree determines the amount of defendant's debt, and a petition for execution for deficiency cannot be resisted on grounds inconsistent with the decree.—Ransom v. Sutherland, 46 Mich. 489; Wallace v. Field, 56 Mich. 3; Haldane v. Sweet, 58 Mich. 429.

¶ 286. Where a decree found the amount due upon certain notes and mortgages and that defendants were personally liable therefor, and that the premises should be sold and the deficiency reported, leaving open the question of the effect of a discharge of defendants in bankruptcy, defendant cannot set up as a defense to a deficiency that his liability was not determined by the proceedings.—Field v. Howry, 132 Mich. 687.

¶ 287. A decree for foreclosure of a land contract adjudging a deficiency against the wife of the vendor, who had joined with him in assigning it with an undertaking that the unpaid balance would be paid thereon, she having disclaimed any interest on the bill and having denied any personal liability, is conclusive of her liability when petition is made for execution on the deficiency judgment.—Ward v. Obenauer, 119 Mich. 17.

V. PERSONS CONCLUDED OR ENTITLED TO ASSERT CONCLUSIVENESS.

Effect and conclusiveness of foreign judgments, see Foreign Judgments, II.

§ 54. In general.

Nature of doctrine and basis of conclusiveness, see ante §§ 1, 2.
Judgment as prima facie evidence against or for third person, see ante § 3.
Conclusiveness upon persons who, without good grounds, interplead in the former suit, see ante ¶ 39.
Who regarded as parties, see post § 55.
Persons appearing specially, see post § 56.
Persons in special or representative capacities, see post §§ 57, 58.
Persons notified to appear and defend, see post § 60.
Proper parties not notified or impleaded, see post § 61.
Third persons participating in the proceedings, see post § 62.
Persons bound because in privity to parties, see post §§ 63-76.
The public and parties in public interest, see post § 59.
Estoppel of party to claim res adjudicata, see post § 78.
Sufficiency of evidence to show that a certain person was a party to the former suit, see post § 98.
Persons bound by foreign judgments and decrees and probate orders, see Foreign Judgments § 10.
Immunity of judgment from collateral attack, see Judgments, VII.
Right of defendant in action for wrongful death to show that plaintiff was not widow of decedent as found in granting letters of administration, see also Death by Wrongful Act ¶ 64.
Inconclusiveness of judgment in garnishment on persons not parties or privies, see Garnishment, VI.

¶ 288. Legal proceedings, other than those in rem, bind only parties and their privies.—Besançon v. Brownson, 39 Mich. 388.

¶ 289. A decree is conclusive upon the parties and their privies.—Kent County Agric. Soc. v. Houseman, 81 Mich. 609; Walsh v. Varney, 38 Mich. 73; Atkinson v. Flannigan, 70 Mich. 639.

¶ 290. As a general rule judgments bind only parties and their privies, and no one is bound by a proceeding to which he is not a party.—Hale v. Chandler, 3 Mich. 531; Hodson v. Van Fossen, 26 Mich. 68; Huntoon v. Russell, 41 Mich. 316; Bachelder v. Brown, 47 Mich. 366; Damm v. Mason, 102 Mich. 545.

¶ 291. A judgment between strangers cannot be allowed to prove anything more, whether presumptively or absolutely, than what was alleged and determined as between them, since it would shift the burden of proof in one case according to something done in another, in which the party had no power to intervene.—Hines v. Jenkins, 64 Mich. 469.

¶ 292. A decree in equity is not binding on any one who is not a party or who is not in any way represented by, or in privity with, a party.—Greiner v. Klein, 28 Mich. 12; Jones v. Pashby, 62 Mich. 614.

¶ 293. One cannot be bound by a decree rendered in a cause wherein she is not a party, and against one whose interest she had acquired long before the suit.—Smith v. Williams, 44 Mich. 240.

¶ 294. One cannot be bound by the court's action who is not regularly before the court; nor can a decree be rendered against any party before the court settling any right which can only be lawfully settled by reaching an absent party.—Reed v. Baker, 42 Mich. 272.

¶ 295. A decision of the circuit court upon a question of law is not conclusive in an

action by one not a party to the former suit. —Willsie v. Common Council of Ionia, 137 Mich. 445.

¶ 296. A judgment or decree binds those only who are parties to it, and those parties who have never had their day in court are free to have it when contingencies arise on which they desire to act.—West Michigan Park Ass'n v. Pere Marquette R. Co., 172 Mich. 179.

¶ 297. A decree by a federal court cannot affect strangers to the record, or interfere with the regular probate of an estate in a state court which has jurisdiction.—Dickinson v. Seaver, 44 Mich. 624.

¶ 298. To constitute a judgment an estoppel there must be an identity of parties as well as subject-matter, or else the parties in the second action must be in privity with the parties in the former action.—Fowler v. Blount, 191 Mich. 575.

¶ 299. A recorded mortgage is not cut off by foreclosure sale under a prior mortgage so long as no party to the foreclosure suit had, or seemed or was supposed to have, any right or interest in the other mortgage or any power or control over it. It still remains an incumbrance and a foundation for redemption.—Avery v. Ryerson, 34 Mich. 362.

¶ 300. The assignee of a junior mortgage is not bound by foreclosure of the first mortgage where he had no notice of the proceedings.—Sherman v. Fisher, 138 Mich. 391.

§ 55. What constitutes one a party.

Rules for parties and who are proper or necessary parties, see Parties.

¶ 301. To be a party bound by judgment one must be directly interested in the subject-matter, and have the right to make defense or control the proceedings, and appeal from the judgment.—Hale v. Chandler, 3 Mich. 531.

§ 56. ——Persons who appeared specially to object to jurisdiction.

Necessity of jurisdiction to render judgment res adjudicata, see ante § 5.

Effect of special appearance and matters admitted thereby, see Appearance § 9.

¶ 302. The fact that a receiver had been appointed for a limited partnership association prior to the issue of a mandamus to compel the circuit judge to order the production of the books of the association for the purpose of ascertaining the amount of capital stock remaining unpaid, and to cause execution to issue therefor, does not, where there was nothing in the record in the mandamus proceedings to indicate that a receiver had been appointed, render the defense that the receiver is entitled to all the assets unavailable, upon the trial, to stockholders who were not made parties to the mandamus proceedings, and who had appeared before the court below only to protest against its entertaining jurisdiction over them.—Rouse, Hazard & Co. v. Detroit Cycle Co., 111 Mich. 251.

§ 57. Litigants under successive distinct titles.

¶ 303. Certain persons who had levied an execution on mortgaged land and had sold it were impleaded as subsequent incumbrancers and joined in an answer demanding an accounting for rents and profits, but they were thrown out of the case by a foreclosure decree that set aside their levies. They afterwards bought out the interest of an adjacent proprietor. Held, that they were not estopped by the foreclosure from bringing ejectment against the complainant in foreclosure, if their grantor could have done so, for land involved in the foreclosure suit.—Jones v. Pashby, 62 Mich. 614.

§ 58. Litigants in special or representative capacity.

Judgment against officer in representative capacity as concluding him in his personal capacity, see also post § 59.

Privity between representatives and beneficiaries, or persons represented, binding effect on one of judgment against other, see post §§ 65-76.

Estoppel to recover as administrator under Survival Act by recovery as husband for loss of decedent's services, see also post ¶ 411.

¶ 304. A trustee filing a bill to foreclose a mortgage would be bound by the decree, in his individual capacity as the holder of intervening mortgages.—Walsh v. Robinson, 135 Mich. 16.

¶ 305. A father, who as next friend, prosecutes to judgment a claim for the value of the loss of the services of his infant child, cannot maintain a subsequent suit in his personal capacity for the same injury.—Baker v. Flint & P. M. R. Co., 91 Mich. 298.

¶ 306. A judgment upon a note belonging to the estate, recovered by the personal representative in his own name, will bar an action by him upon the same note in his representative capacity.—Knapp v. Lee, 42 Mich. 41.

§ 59. The public, public officers and individual parties.

See also post ¶ 444.

Judgment in replevin for goods held by an officer as estopping a subsequent levy by another officer upon the same goods, see post ¶ 370.

Conclusiveness on undisputed facts, see post ¶ 458.

¶ 307. The federal circuit court has jurisdiction to try a suit in ejectment by riparian owner against a government agent in charge of a pier constructed in navigable

waters in front of plaintiff's premises, and the court may inquire into the title and determine the superior rights and to, render such judgment as may appear proper; the judgment cannot, however, conclude or estop the United States inasmuch as it is not a party and cannot be made so without its consent.—Scranton v. Wheeler, 57 Fed. 803.

¶ 308. Pub. Acts 1901, No. 172, § 13, makes taxes due from railroads a debt to the state, and authorizes their collection by suit by the auditor general in the name of the people. 1 Comp. Laws 1897, § 105, requires the attorney general, at the request of the auditor general, to prosecute and defend all suits relating to matters connected with his department. A suit was brought by a special charter railroad to enjoin the auditor general from collecting taxes under Pub. Acts 1901, No. 173, placing all railroads upon the same basis of taxation. The attorney general appeared in such suit and defended it on the merits, and a decision was rendered against the state. Held, that such suit was in effect one against the state, and the decision rendered was binding upon it in subsequent proceedings against the same road, involving the same questions.—People ex rel. Attorney General v. Detroit, G. H. & M. Ry. Co., 157 Mich. 144.

¶ 309. A new township is not bound by a judgment upon bonds issued by the old township of which it formed a part, where such judgment was rendered in an action brought after the division and without making the new township a party.—Hale v. Baldwin Tp. Board, 49 Mich. 270.

¶ 310. As to the right of a new township set-off from an old one to its day in court where action had been brought and judgment rendered against the old township upon bonds issued by it, and where a suit for contribution to such judgment was brought by the old township against the new, see Township of Grant v. Township of Reno, 107 Mich. 409; Township of Grant v. Township of Reno, 114 Mich. 41.

¶ 311. A judgment sustaining an answer, signed by the chairman of a board of supervisors in his representative capacity, does not raise an estoppel by judgment against his taking a contrary position in a case brought by him in his personal capacity.—Yeomans v. Board Sup'rs Ionia Co., 174 Mich. 451.

¶ 312. A decision in a suit by a tax-payer for an injunction against a city laying concrete under a street railway on the ground that the contract is ultra vires is not res adjudicata in an action by a street railway company against the city for such services rendered.—City of Detroit v. Detroit Ry., 134 Mich. 11.

§ 60. Persons notified to defend.

Effect on persons proper as parties, but not notified or impleaded, see post § 61.

Effect of judgment against garnishee to bind principal defendant, see Garnishment, VI.

Notice to covenantor to defend title to land, sufficiency, see Covenants for Title § 21.

¶ 313. Where a vendor of timber notified in writing to appear and defend his title in an action brought against the vendee by a third person for the value of the timber, fails to appear and defend, he must be held to have had his day in court and the judgment concludes him.—Fitzpatrick v. Hoffman, 104 Mich. 228.

¶ 314. A valid judgment rendered by a federal court against a township upon plank road bonds issued by it is conclusive as to the validity of the bonds upon a township set off from defendant if obtained without collusion or fraud, and if the new township had an opportunity to participate in the defense.—Township of Grant v. Township of Reno, 107 Mich. 409.

¶ 315. Plaintiffs in garnishment are bound by the judgment in a subsequent suit brought against the garnishee by his creditor's assignee which they have been notified to defend.—Butler v. Wendell, 57 Mich. 62.

¶ 316. Where B. has notified A. of a suit by an attorney for services rendered B. in an action on a bond which B. signed upon A.'s agreeing to indemnify him, and where B. has asked A. to defend such suit, A. is bound by the judgment unless collusively fraudulent.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 317. After dissolution of a firm which had unintentionally infringed a patent, the partners were sued for the infringement. One partner, being out of the jurisdiction, was not served with process, but was notified of the action by the other partners and refused to join in the defense. Judgment was recovered against and paid by the other partners. Held, in an action by the other partners against the nonappearing partner for contribution, that such judgment was conclusive evidence against him, both as to damages and costs.—Smith v. Ayrault, 71 Mich. 475.

¶ 318. In an action by a city against an abutting owner to recover the amount of a judgment paid by the city for a sidewalk injury, evidence that the city attorney sent notice of the pendency of the personal injury suit to each of the local agents of the defendant is sufficient to charge them with notice of the suit.—City of Lansing v. Detroit, L. & N. R. Co., 129 Mich. 403.

¶ 319. The fact that the attorney for an abutting owner in sitting in the trial of an action against the city for a sidewalk injury stipulated that his appearance should not bind his client, in no way relieves against a possible liability by the abutting owner who has had notice to defend in an action by the city to recover the amount of the judgment paid in a personal injury action.—City of Lansing v. Detroit, L. & N. R. Co., 129 Mich. 403.

§ 61. ——Persons proper as parties but not made such or notified.

See also post ¶ 373.

¶ 320. Judgment of ejectment against a grantee does not bind a covenantor who was not notified to defend the ejectment suit.—Mason v. Kellogg, 38 Mich. 132.

¶ 321. A finding and report by commissioners on claims of an amount due the estate cannot be regarded as res adjudicata against one who has had no notice of their proposed action, and who never appeared in any way before the commissioners.—Kimball v. Cannon, 59 Mich. 290.

¶ 322. Where, on A.'s agreeing to indemnify him, B. has signed a replevin bond for C., a judgment entered on the bond by consent against B., without notice to A., is prima facie but not conclusive evidence of A.'s liability.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 323. A judgment against a township upon plank road aid bonds, void save in the hands of a bona fide holder, is not conclusive of the township's right to recover in a suit to compel contribution to the payment of the judgment from another township organized from the territory of the former after the bonds were issued, where the township sought to be held was given no opportunity of participating in the defense in the action upon the bonds; complainant must establish the good faith of the judgment-plaintiff's holding.—Township of Grant v. Township of Reno, 114 Mich. 41.

¶ 324. A judgment for damages for personal injuries against a corporate party to a pooling agreement among several boat line owners, by which they were operated as one line but with the properties of each left intact and distinct and with a division of earnings according to a scale of percentages and the ordinary running expenses paid out of the gross earnings before division, is not binding on the other parties; where the only notice of the claim and pendency of the suit was a letter from the claimant addressed to one of the other parties and by it delivered to the traffic manager after the close of the operations under the contract, such traffic manager being also the secretary and traffic manager of the judgment defendant, whose vessel was the one in attendance on which the plaintiff suffered the injury while at a defective dock which all of them used, and in addition to that notice, which was rejected on the ground of no liability against any of the vessel companies, a notice by defendant after suit begun of its pendency and of the time for trial with a request to defend it.—White Star Line v. Star Line of Steamers, 141 Mich. 604.

§ 62. Third persons participating in proceedings.

¶ 325. One who sells chattels with warranty of title, and who, when his vendee is sued for their value by the real owner, takes upon himself the defense of the suit is bound by the result, whatever may have been the form of action.—Jennings v. Sheldon, 44 Mich. 92.

¶ 326. Where a third party in a suit upon negotiable paper claims such paper and takes upon himself the defense of the suit on that ground, the judgment binds him.—Bachelder v. Brown, 47 Mich. 366.

¶ 327. Where the claimant of personalty sold by another assumes the defense of an action for the purchase price, brought by the vendor against the vendee, on the understanding that if the defense prevails the vendee will pay the claimant instead of the vendor, the judgment concludes the claimant's rights as between vendor and vendee.—Estelle v. Peacock, 48 Mich. 469.

¶ 328. A vendor of personalty notified by his vendee to defend title will be bound by the judgment but cannot hold his own vendor bound by it unless he has given the latter notice to defend; and this is so though the latter was a witness in the case.—Axford v. Graham, 57 Mich. 422.

¶ 329. A judgment in ejectment against a husband and the tenant of certain premises, was res adjudicata as against ejectment by the wife for the same premises; where it appeared that the wife had knowledge of and participated in the former proceeding and testified that the tenant defendant in such case had been her tenant, and where no appeal was prosecuted.—Carpenter v. Carpenter, 136 Mich. 362.

¶ 330. A judgment for the amount of a lien does not prove breach of warranty unless rendered in a proceeding which the warrantors undertook to be concerned in or had proper notice to defend.—De Witt v. Prescott, 51 Mich. 298.

¶ 331. A party defendant to a bill to foreclose an alleged lien against real estate for the payment of alimony given in a divorce action, who was not a party to such former action, is not estopped by such judgment to assert title to the property, although she was called as a witness in such former action, where both she and her husband tes-

tified and strenuously insisted that they were owners of the land.—Fowler v. Blount, 191 Mich. 575.

¶ 332. On a bill to foreclose an alleged lien against real estate for the payment of alimony given in a divorce action the decree allowing such lien is not res judicata as to one claiming such land as a tenant by the entirety, where such party was not a party to the divorce action, and it is immaterial that she was a witness in such case.—Fowler v. Blount, 191 Mich. 575.

§ 63. Persons represented by parties; privity.

[Note. The general rule that a judgment is binding on the privies of the party (see ante § 54) is illustrated by the cases in the following sections (§§ 64-76), which describe the various relations. For additional cases in which the rule that one is bound by privity by that which binds his representative, see Evidence, VII, C, 3 (admissions by persons in privity to a party). For cases on the necessity or propriety of making one a party, when claimed to be represented by a trustee, see Estates of Decedents, XI, A; Trusts, IX.]

Effect of judgment against garnishee, see Garnishment, VI.

§ 64. ——Purchasers or successors pendente lite.

[Note. The effect of a filed notice of lis pendens to charge takers pendente lite and the relative rights of the takers under such a notice and of other parties is more strictly a doctrine of notice affecting title than a part of the law of former adjudication. See Lis Pendens.]

Injured minor and parent losing services of the minor, see also ante ¶ 168.

Assignees and successors before or after suit, see post § 75.

¶ 332a. An assignee pendente lite, who permits the suit to go on in the name of the assignor and acquiesces in the proceeding, is bound thereby, and any judgment that may be recovered will be a bar to any subsequent proceedings that the assignee might bring for the same cause of action.—Peters v. Gallagher, 37 Mich. 407.

¶ 332b. One, who bought replevied chattels pending a retrial of the replevin action, is bound by the result of the retrial though he was not a party and though the adversary in the present action was also not a party of record, being, however, the real party in interest, and both parties to the present suit being privies to those in the former suit.—Hoppin v. Avery, 87 Mich. 551.

§ 65. ——Principal and agent.

Judgment of cause of action waived as concluding attorney claiming lien on original cause, see also post ¶ 427.

¶ 333. A judgment in replevin against an agent does not conclude his principal, even though the principal acted as the agent's attorney at the trial.—Warner v. Comstock, 55 Mich. 615.

¶ 334. A constable seized a horse under a chattel mortgage, but the mortgagor recovered it in replevin and then sold it. The mortgagee then brought trover against the purchaser. Held, that he was not concluded by the judgment against the constable, even though the latter was his agent since agents and principals are not in privity in respect to property rights and the fact that the principal acted as attorney for the agent in the replevin suit does not alter the rule.—Warner v. Comstock, 55 Mich. 615.

¶ 335. J.'s agent moved a division fence that stood between J.'s premises and P.'s. P. moved it back again in the night. J. tried to tear it down, and as P.'s wife resisted he assaulted her. In an action therefor by Mrs. P. she could not show, as res adjudicata, that in a former suit between the agent and a third person concerning other premises, but in which the principal matter in issue was the true location of a section line that P. claimed as the boundary to the premises in suit, the result was adverse to the agent.—Phillips v. Jamieson, 51 Mich. 153.

§ 66. ——Husband and wife.

Conclusiveness of judgment in ejectment where wife not joined, see ante ¶ 37.

Judgment in ejectment conclusive upon wife who participated in the proceedings, see ante § 62.

Conclusiveness as between husband and wife of conflicting divorce decrees, see ante ¶ 155.

Conclusion by judgment as to matters which might have been litigated, see also ante ¶ 256.

Decree in favor of surviving husband not conclusive upon the executor of wife not made a party, see post ¶ 393.

Question as to emancipation of wife made res adjudicata by judgment in favor of husband for loss of wife's services, see post ¶ 411.

¶ 336. A foreclosure decree on a mortgage not signed by the mortgagor's wife and covering their homestead does not affect her homestead rights where she was not a party to the decree.—Shoemaker v. Collins, 49 Mich. 595.

¶ 337. The right of a wife and children to question a deed of the homestead will not be affected by the result of a suit in ejectment in which the wife is not made a party nor the children represented.—First Nat. Bank v. Jacobs, 50 Mich. 340.

¶ 338. A proceeding to obtain widow's allowances is not binding upon a woman who had in good faith married decedent after

the claimant had left him, and was living with him as his wife at the time of his death, but was not made a party to the proceeding brought by her predecessor.—Young's Appeal, 52 Mich. 592.

¶ 339. A decree of divorce granted to a wife on the ground of extreme cruelty is not res judicata of that question of fact so as to prevent the husband from contesting its truth in a suit by a third person against him to recover for necessaries furnished the wife pending the divorce proceedings.—Corry v. Lackey, 105 Mich. 363.

§ 67. ——Trustees, assignees for creditors, or receivers and their beneficiaries.

Judgment for breach of contract against assignor after assignment as merging the claim, see ante ¶ 217.

Judgment against trustee as binding on him individually, see ante § 58.

Assignee for creditors as representative of estate and creditors in actions, see Assignments for Creditors § 36.

Decree pro confesso against assignor as proof of fraud against assignee, see Assignments for Creditors ¶ 120.

¶ 340. In a proceeding between a creditor and an insolvent company's assignees, the former secured a decree giving him a lien on the assets against creditors generally. Held, that a general creditor who failed to give notice to the assignees that he had a special claim on the assets could not litigate over again the question settled in the former proceeding.—Farrell Foundry & Machine Co. v. Preston Nat. Bank, 93 Mich. 582.

¶ 341. Where the order for the appointment of a receiver of goods claimed under a chattel mortgage antedating the assignment, after reciting that it has been represented to the court by defendants' solicitor that the property, the sale of which under the mortgage has been enjoined, is depreciating in value, and should be sold forthwith under the order and direction of the court, and the proceeds thereof held to abide the further order of the court—authorizes the sale of the property by the receiver, and no objection is made by the assignor to such sale's being made pursuant to said order, and the final decree in effect affirms the sale, and treats the proceeds thereof as a trust fund in the hands of the receiver, the assignor cannot avail himself of the irregularity in making such order.—Burnham v. Dillon, 100 Mich. 359.

¶ 342. Whether a decree affirming the validity of a chattel mortgage, in a suit wherein the general assignee of the mortgagor is a party, is conclusive upon an unsecured creditor of the latter, who had instituted proceedings to test the validity of the mortgage prior to the assignment, quære.—Krementz v. Howard, 109 Mich. 466.

¶ 343. A judgment in an action between a mortgagor and the mortgagee passing on the question whether there had been an assignment by the mortgagee does not bind the assignee who was not party thereto or in privity to the judgment.—Aultman, Miller & Co. v. Sloan, 115 Mich. 151.

¶ 344. An assignee of a corporation who brings suit for the price of articles furnished under a contract of the assignor, the assignment having been made before the institution of an action for damages for breach of contract, is not a privy to the judgment recovered by the defendant for the breach of contract, as his rights were acquired before the defendant began his action, but he is a privy to the injury upon which the defendant's judgment rests. While the claim of the defendant for breach of contract is merged in the judgment recovered against the assignor, so that the judgment is a bar to another action, or an attempt to recoup damages against the assignor, such judgment can be set off in an action brought by the assignor, or an action may be brought upon it.—Bacon v. Reich, 121 Mich. 480.

§ 68. ——Corporation or association and stockholders or members.

Stockholders who appear specially to object to jurisdiction not concluded, see ante § 57.

Judgment on commercial paper for goods bought as judgment for goods sold under statute, see also Corporations ¶ 1173.

Disability of creditor estopped in fact to assert that stock is underpaid to claim that decree for corporation established that fact against other holders, see Corporations ¶ 1213.

Evidentiary and prima facie force of judgment against corporation when offered in suit against stockholders to enforce liability, see also Corporations § 329.

Foreign judgment against corporation as binding stockholders or officers, see Foreign Judgments §§ 10, 13.

¶ 345. Each stockholder or member of a corporation is so far an integral part thereof that, in a suit brought to determine the amount of the indebtedness of the corporation preparatory to an assessment upon the stockholders to pay the same, he is represented through the corporation itself, and bound and concluded by the determination therein and such judgment is binding in a court of another state as to those facts.—Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170.

¶ 346. In a proper case it seems that a judgment against a corporation, if obtained without fraud or collusion, is conclusive and binding upon one of its stockholders as to the nature and extent of the company's liability; but the questions whether the cause of action adjudicated was of a nature to render the stockholders liable under the

statute, and whether the conditions as to ownership of stock, and the fact of such ownership at the time specified, existed, should be considered open.—Bohn v. Brown, 33 Mich. 257.

¶ 347. Under Laws 1877, Act No. 113 (How. St., § 4110), an action for a labor debt may be brought against a corporation alone, or against the company and stockholders jointly, but not against the stockholders alone, and a judgment against the company is a bar to a subsequent action against the stockholders for the same debt.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

¶ 348. A judicial assessment on the members of an insolvent mutual fire insurance company for which a receiver had been appointed pursuant to Comp. L. 1897, § 7331, is binding on the members as privies to it and they cannot when sued for such assessment thereafter question the assessment as being excessive.—Collins v. Welch, 141 Mich. 676.

¶ 349. A judgment not only fixes the extent of liability, but the party or parties liable, and if such party is a corporation it is not merely individual members thereof that are held.—Brewer v. Michigan Salt Ass'n, 58 Mich. 351.

¶ 350. Where a bond is given to the United States by the individual members of a partnership association limited, which had entered into a contract for the construction of a federal building, conditioned upon the performance of the work by the company according to the contract and prompt payment to all persons supplying labor and materials, and signed by such individual members, who are named as principals, and binding them, their heirs, executors, administrators, successors and assigns, jointly and severally, and, after the filing of demurrers by all such individual members and a plea by the corporate surety setting up the defense that the bond was not the obligation of the individual defendants but of the association, in an action by the United States against them for the benefit of persons furnishing labor and material who had not been paid in favor of plaintiff and the judgment paid by the surety, the individual members are estopped by such judgment in an action by the surety against them in the State of Michigan to compel them to reimburse it to object that the bond was the obligation of the association and not their individual obligation.—Maryland Casualty Co. v. Scheurman, 199 Mich. 1.

¶ 351. A decree in a foreclosure suit brought by a trust company binds the bondholders of the company while it stands unreversed; if the decree or the sale under it is in fraud of their rights their remedy is by a direct proceeding to set aside the sale or the decree, and to proceed anew with another foreclosure, and not to reforeclose what has been already fully foreclosed.—Richter v. Jerome, 123 U. S. 233, 31 L. ed. 132, 8 Sup. Ct. Rep. 106.

§ 69. ——Partners.

Merger of partnership note in judgment against the partners where only one partner served, see ante ¶ 216.

Decree in partnership accounting as concluding claim for dower which a widow of a partner might have asserted in the proceeding, see ante ¶ 274.

Judgment against partners as conclusive upon absent partner who was notified to appear and defend, see ante ¶ 317.

Administrator of deceased partner not concluded by judgment establishing the existence of the partnership, see post ¶ 394.

¶ 352. A judgment on a firm debt against one of two partners, who has agreed to pay the debts of the firm, is not evidence against the other of the amount of the debt.—Thompson v. Richards, 14 Mich. 172.

§ 70. ——Persons liable over or in succession.

Judgment by third person as evidence of primary liability, see ante § 3.

Judgment on replevin bond as conclusive on indemnitor who was not made party, see ante ¶ 322.

Judgment against covenantee as evidence against covenantor in action for breach, see Covenants for Title § 26.

Contract liability of one person to indemnify another, see Indemnity.

¶ 353. A judgment between the subcontractor and the principal contractor for street work that the balance due the subcontractor was not yet earned because of a pending suit for injuries due to the subcontractor's negligent failure to place lights at excavations in the street, will bar his recovery of the amount from the city, which holds the principal's check for the amount, where the suit has resulted in a judgment against the city and an action over by the city against the principal contractor is pending and undetermined.—Anderson v. City of Detroit, 124 Mich. 471.

¶ 354. A judgment in a former action against a person primarily liable is prima facie evidence of the amount of damages in an action against the person liable over, though the latter had no notice of the former suit.—Grant v. Maslen, 151 Mich. 466.

¶ 355. A judgment against the city in an action for a sidewalk injury is not conclusive in a subsequent action by the city against the abutting owner that the latter is liable. —City of Lansing v. Detroit, L. & N. R. Co., 129 Mich. 403.

¶ 356. The decision rendered in an action against a railroad company for the death of a passenger by being thrown through the door of a vestibule between Pullman cars,

would not be res adjudicata in a suit by the railroad company against the Pullman Company involving the liability of the latter to indemnify the former.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

§ 71. ——Persons jointly liable.

Judgment against two joint debtors, one only of whom was served, see ante ¶ 27.
Conclusiveness of judgment vacated as to one defendant, see ante ¶ 153.
Effect of judgment against one of two joint debtors as bar, see ante § 41.
Release of one as release of all parties jointly liable, see Releases, III.

¶ 357. A judgment for defendants in a joint action does not bar another proceeding against a portion of them on the same cause of action.—City of Detroit v. Houghton, 42 Mich. 459.

¶ 358. At common law a judgment against one joint debtor operates as a merger, and puts an end to any action on the original contract against either.—Candee v. Clark, 2 Mich. 255; Bonesteel v. Todd, 9 Mich. 371.

¶ 359. A judgment rendered under the Joint Debtor Act, in form against two joint debtors, only one of whom was served with process, is not an extinguishment of the demand sued upon.—Bonesteel v. Todd, 9 Mich. 371; Mason v. Eldred, 6 Wall. (73 U. S.) 231, 18 L. ed. 783.

¶ 360. The payee of a note may sue the maker for the amount notwithstanding that he has recovered judgment against the indorsers; provided the judgment has not been paid.—J. A. Fay & Co. v. James Jenks & Co., 78 Mich. 304.

§ 72. ——Principal and surety.

See also ante ¶ 13.
Operation as res adjudicata of former judgment against surety which has been vacated, see ante ¶ 152.
Conclusion of sureties on appeal bond as to costs allowed, see Appeal ¶¶ 2420, 2421.

¶ 361. Sureties are concluded by a judgment against their principal obtained in the customary manner and in the course of regular proceedings, but not by a secret confession of judgment fraudulently and collusively made between him and the obligee.—Wright v. Hake, 38 Mich. 525; People for use of Clinton v. Laning, 73 Mich. 284.

¶ 362. Sureties in a bond to pay any judgment recovered against their principal cannot, when sued for the amount of such judgment, retry the merits of the original suit on the claim that they have had no day in court.—People for use of Clinton v. Laning, 73 Mich. 284.

¶ 363. A decree in a suit to reform a lease on the ground of a mistake in the matter of time of payment of rent is conclusive as to the parties, but not as against a surety on the lease who was not made a party to the suit.—Stevens v. Pendleton, 83 Mich. 342.

¶ 364. A mortgage was foreclosed, and the mortgagee was credited with certain taxes which he had paid on the land. Held, that a surety who was made a party, and who stood in the shoes of the mortgagor, was bound by such decree, and could not question the validity of the tax paid in a proceeding by bill to redeem.—Miller v. Peter, 158 Mich. 336.

§ 73. ——Persons having related interests, liens or claims on same property.

Effect of foreclosure on assignee of junior mortgage not joined as party, see also ante ¶ 300.

¶ 365. Where outstanding creditors are not made parties to a foreclosure against property by which their own claims are secured, they are not concluded by the decree and have their proper remedy.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 366. Where an accounting is had in a suit in equity, persons incidentally interested therein, but who are not parties to the suit, are not concluded thereby.—Ryerson v. Eldred, 18 Mich. 12, 490.

¶ 367. Fraud in a sale by a debtor is a matter as to which only attaching creditors have any legal interest in the trial of it in a replevin suit by the purchaser against an officer holding under the attachment, even though the latter had collusively suffered judgment; and no other creditors could have their rights conclusively determined by the result of such a suit.—McKay v. Kilburn, 42 Mich. 614.

¶ 368. On a bill to quiet titles held in severalty the owners, if not represented, will not be bound by an adverse decree.—Jenness v. Smith, 58 Mich. 280.

¶ 369. Where a bill is brought to enjoin the use of a strip of land as a passageway, and a decree is entered holding defendant has title by adverse possession, such decree cannot affect a landowner not a party to the suit.—Bean v. Bean, 163 Mich. 379.

¶ 370. A judgment in replevin against an officer holding goods under an attachment does not estop the same or prevent any other officer from levying execution on the same goods in a different suit brought by another creditor of the party against whom the attachment was issued, where such creditor had no interest in the replevin suit nor the right to intervene therein. Nor would it be conclusive of the title as against a purchaser at the execution sale.—McKay v. Kilburn, 42 Mich. 614.

¶ 371. A judgment in an action for wages under Comp. Laws 1897, §§ 9550-9552, providing for preferences of wage claims is not conclusive against a prior chattel mortgagee who is not made a party thereto.—Fisher v. Wineman, 125 Mich. 642.

§ 74. ——Landlord and tenant.

Judgment in summary proceedings to regain possession, see ante § 13; post ¶ 429.

Judgment in suit for rent as bar to subsequent suit, see ante ¶ 177.

Judgment in action for rent as concluding defenses which might have been interposed, see ante § 50.

Judgment in suit upon agreement by landlord to pay costs as bar to suit to recover costs of action on appeal bond, see ante ¶ 169.

¶ 372. In trover against a landlord for seizing a crop which the tenant had previously sold in good faith to the plaintiff, the landlord cannot justify himself by producing the record of certain summary proceedings taken by himself to recover possession of the premises from the tenant, if there is nothing in them to show that the landlord had ever claimed a forfeiture of the lease, or that the premises recovered were the same as those leased, or that the lease was in force at the time the proceedings were taken, or that the tenant had failed in any of his obligations, or that plaintiff was in any way concerned in or had any notice of the proceedings.—Miller v. Havens, 51 Mich. 482.

¶ 373. A judgment in ejectment against a tenant whose landlord is not notified of the suit, and does not appear, does not bind the landlord's subsequent grantee.—Powers v. Scholtens, 79 Mich. 299.

§ 75. ——Successors in interest and title.

Decree of foreclosure as concluding an assignee of a junior mortgage, see ante ¶ 300.

Judgment in ejectment against grantee, conclusiveness upon a covenantor who had no notice of the suit, see ante ¶ 320.

Judgment as concluding vendor who was notified to appear and defend, see ante § 60.

Judgment as conclusive upon persons who participate in the proceedings, see ante § 62.

Assignees and successors pendente lite, see ante § 64.

Judgment against covenantee as evidence against covenantor for breach, see Covenants for Title § 26.

¶ 374. A judgment recovered by one who had assigned his claim to a third party after suit begun would be a bar to any future proceedings which the assignee might commence for the same cause of action.—Peters v. Gallagher, 37 Mich. 407.

¶ 375. No one is estopped by the acts or doings of his subsequent grantees; hence litigation with assignees in which property was treated as personalty does not bind the assignors that it was so.—Bigelow v. Reynolds, 68 Mich. 344.

¶ 376. Defendants in an attachment proceeding in the federal court assigned a debt due them, and the debtor was afterward garnished and the assignee notified to appear in the federal court and maintain the rights conferred by the assignment. The assignee did not appear, and judgment was rendered against the garnishee upon the statutory issue provided for by How. St., § 8085. The assignee meanwhile sued the garnishee in the state courts and recovered judgment. Held, on error, that the assignee was bound by the proceedings in the federal court, which had possession of the principal controversy and could take cognizance of collateral issues.—Rothschild v. Burton, 57 Mich. 540.

¶ 377. Where, in a suit against a corporation, defendant's title was held valid and complainant's title was held to constitute a cloud thereupon, and to be invalid, the decree in such suit is conclusive of the rights of the parties in ejectment by the corporation against such complainant's grantee.—People's Savings Bank v. Eberts, 96 Mich. 396.

¶ 378. Plaintiff brought an action against a sheriff for taking certain personal property, which, on final hearing, was determined against the plaintiff. After the sheriff had sold the property, plaintiff brought his action to recover the same against the purchaser at the sheriff's sale, but it was held that judgment in the suit against the sheriff was a bar to the action against the purchaser.—Prentiss v. Holbrook, 2 Mich. 372.

¶ 379. Ejectment was brought against the executors of an estate, and they prevailed. The executor of one of the heirs, to whom the rest had conveyed their interests, afterwards brought ejectment for the same land against a grantee of the plaintiff in the first action. Held, that the former judgment operated as an estoppel against such grantee. And if all the heirs united in defending the first suit the estoppel would not be affected by a question whether, as between one of the heirs and the ancestor, the title was in one or the other.—Whitford v. Crooks, 54 Mich. 261.

¶ 380. The complainant's predecessor in title brought a bill to set aside certain taxes. The record showed that the case was decided in open court and, after proof and argument by counsel, the tax liens were upheld, and a decree of sale entered. Held, in a bill against the tax deed purchaser to set aside the tax deeds made in pursuance of the sale, that complainant was bound by the decree against his predecessor.—Anker v. Schreib, 158 Mich. 105.

¶ 381. In a suit by an assignee of a mortgagor to enforce a secret agreement between mortgagor and mortgagee, providing for a sale of the land and an extension of the time of payment, the decree granting the relief sought is not res judicata that the assignee's title is good against creditors of the mortgagor not made parties to the suit. —Bigelow v. Sheehan, 150 Mich. 507.

¶ 382. In an action on an insurance policy where plaintiff has assigned his claim to his attorneys to secure them for their fees they are bound by the judgment.—Dahrooge v. Sovereign Fire Ins. Co., 175 Mich. 248.

¶ 383. As a final judgment binds not only parties but their privies, one who buys from a replevin defendant to whom the property has been returned by virtue of a judgment in his favor for such return is bound by a final judgment in plaintiff's favor.—Hoppin v. Avery, 87 Mich. 551.

¶ 384. A judgment in replevin by a third person against a vendee for the amount of a lien does not prove breach of warranty of title unless the vendors undertook to defend the suit or had proper notice to do so.—De Witt v. Prescott, 51 Mich. 298; and see Axford v. Graham, 57 Mich. 422.

¶ 385. A judgment in replevin against a vendee cannot be evidence of a breach of his vendor's warranty of title in the absence of any evidence that such judgment depended upon the state of the title at the time of the sale.—Moore v. Bostwick, 23 Mich. 507.

¶ 386. A judgment in replevin in favor of a vendor against one who bought the goods from him under fraudulent representations, is not conclusive against one to whom the goods were mortgaged before the claim of fraud was made.—Vincent v. Hansen, 113 Mich. 173.

¶ 387. In a proceeding by a purchaser on foreclosure for a writ of assistance against a contract purchaser, the latter cannot avoid the effect of the foreclosure by setting up equities between himself and other defendants before the sale, and by connecting the petitioner with them.—Ketchum v. Robinson, 48 Mich. 618.

§ 76. ——Decedent and representatives, heirs and legatees.

See also ante ¶ 126.

Effect of recovery by foreign executor, see also ante ¶ 170.

Judgment on personal representative's general bond as bar to suit on his special bond, see ante ¶ 187.

Judgment on note for representative in his own name as barring an action by him in his representative capacity, see ante ¶ 306.

Authority and right of personal representative to sue or defend for estate, see Estates of Decedents, XI, A.

¶ 388. A chancery record in a suit brought by plaintiff's ancestor, through whom he claimed title, against third persons, would be relevant to show plaintiff's title, as it established the title of such ancestor as against the defendants thereto; and the plaintiff as one of the heirs-at-law was entitled to its benefit.—Weeks v. Downing, 30 Mich. 4.

¶ 389. A determination in a chancery proceeding instituted by the heirs of one child against the heirs of another, that a conveyance from their common ancestor had not been made, is conclusive in an action by the administrator of one of such children against the estate of the other child, to establish a claim for services based upon the promise of such a conveyance.—In re Colburn's Estate, 153 Mich. 206; More v. Luther, Id.

¶ 390. A judgment for defendants in ejectment brought against executors of an estate who under the statute had a right to the possession as representing the heirs, all of whom united in the defense, is an estoppel against plaintiff and all claiming in privity with him from contesting the title afterwards.—Whitford v. Crooks, 54 Mich. 261.

¶ 391. Heirs at law of a defendant in a chancery partition that has not been revived against them after the death of their ancestor are not precluded by the decree in such partition suit from bringing ejectment for their undivided interest; proceedings which ignore them and their interests cannot affect their legal rights.—De Mill v. Port Huron Dry Dock Co., 30 Mich. 38.

¶ 392. The estate of a deceased judgment debtor has no better defense to an action on the judgment, or proceedings to collect it, than he would have had if living.—Arnold v. Thompson, 19 Mich. 333.

¶ 393. A decree that the surviving husband is entitled to the entire proceeds of a mortgage payable to the husband and wife, in a proceeding in chancery to which the latter's executor was not made a party, is not conclusive against his right to recover from the husband the half of the proceeds belonging to the wife.—Luttermoser v. Zeuner, 110 Mich. 186.

¶ 394. Where in a suit involving the question of the existence of a partnership between defendants one dies and the suit is revived against the survivor, a judgment establishing the existence of the partnership does not bind the administrators of the deceased defendant in a subsequent action brought by them.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 395. An ejectment record in a suit brought by coheirs of the plaintiff against third parties, and to which the plaintiff was not a party, has no relevancy to prove title in the plaintiff.—Weeks v. Downing, 30 Mich. 4.

¶ 396. No one legatee is estopped by a finding that has been set aside on the appeal of only one in a proceeding to determine the rights of all of them upon the distribution under the will.—McClintock's Appeal, 58 Mich. 152.

¶ 397. Mere rendition of a judgment for the plaintiff in trover against the administrator of a sheriff who had seized plaintiff's property as the property of another in attachment, did not operate to transfer the title to the property in question, so as to preclude a subsequent action of trover against the deceased sheriff's successor for conversion of the property through an execution sale pursuant to judgment in the attachment suit.—John A. Tolman Co. v. Waite, 119 Mich. 341.

§ 77. Judgments in rem.

What proceedings are in rem, see specific topics treating of the various special proceedings, e. g., Attachment § 135; Garnishment; Wills, V, and see also references ante § 13.

Basis of the doctrine of res adjudicata, see ante § 2.

Ordinance vacating a street as res adjudicata, see ante ¶ 20.

Necessity that proceedings be commenced by proper person, see ante ¶ 29.

Collusion as affecting conclusiveness of divorce decree, see ante ¶ 30.

Will contest as conclusive on capacity of testator, see also ante ¶ 188.

Proceedings in bankruptcy, see Bankruptcy §§ 13, 19.

Bankruptcy discharge as quasi in rem, see also Courts ¶ 131.

Effect of decree in proceedings for sale of lands for delinquent taxes, see Taxes, XI.

¶ 398. The theory upon which a judgment in rem is regarded as binding upon all the world is that all the world have constructive notice of the seizure, with the cause and purpose of the taking, and the time and place at which any person may appear before a competent tribunal, and have a trial before the condemnation of his property.—Hibbard v. People, 4 Mich. 125; Wight v. Maxwell, 4 Mich. 45. Writ of error dismissed, 18 How. 511, 15 L. ed. 506.

¶ 399. A determination of the city council of Detroit not to vacate a street as petitioned for is an adjudication in rem, barring an application to the circuit court for a vacation of the same street unless it is shown that the circumstances have so changed as to justify it.—Detroit Real Estate Inv. Co. v. Wayne Circuit Judge, 137 Mich. 108.

§ 78. Estoppel to assert res adjudicata.

Grounds and basis for estoppels other than by judgment, see Estoppel.

¶ 400. Although a judgment could be treated as one for the whole amount confessed to be due, yet if plaintiff has taken execution and collected the lesser amount he must be regarded as having elected to treat it as a judgment for the lesser amount, and is as much bound by that election as if he had originally consented to have judgment taken for such amount.—Town v. Smith, 14 Mich. 348.

¶ 401. Where, in an action for fraudulent representations inducing the execution of a logging contract, plaintiff recovers judgment under a ruling of the court that certain overpayments claimed to have been made on the contract by defendant should not be considered in reduction of damages, for the reason that they are the subject of another suit between the parties, plaintiff, in a subsequent action upon the supersedeas bond given on appeal from such judgment, in which defendant claims a set-off to the amount of said overpayments, is estopped from asserting that defendant's claim is barred by the judgment in the former action.—Busch v. Wilcox, 106 Mich. 514.

¶ 402. Where a lessor interposes by way of set-off, in an action by the widow of one of two joint lessees, a claim upon a promissory note executed by the lessees jointly, and thereafter allows judgment to be entered against him in such case upon the express agreement with the attorney for the surviving lessee that the settlement shall not preclude the interposition of the claim in a pending suit by such lessee, the latter is estopped from asserting that such judgment is res judicata as to the lessor's claim upon the note.—McCarthy v. Sleight, 114 Mich. 182.

¶ 403. Plaintiff, who in replevin for mortgaged chattels had an opportunity to assert a former judgment upon the note secured and fails to do so, cannot urge the estoppel in a subsequent garnishment on the judgment for the note.—Bateman v. Grand Rapids & I. R. Co., 96 Mich. 441.

VI. PARTICULAR FACTS CONCLUDED OR ESTOPPED.

§ 79. In general.

Nature of res adjudicata rule, see ante § 1.

Matters of law, see also ante ¶ 4.

Judgment as evidence without estoppel, see ante § 3.

Adjudications operative as estoppel, see ante II.

Criminal decisions in criminal cases, see ante § 10.

Conclusiveness of a decision that there are no known devices for the prevention of smoke, see ante ¶¶ 194, 195.

Identities requisite to support estoppel, see ante § 39.

Causes, claims or defenses barred or merged, see ante, IV.

Matters of law, see also ante ¶ 295.

Matters involved and determined or not involved, see post §§ 80, 81.
Matters in issue but not determined, see post § 89.
Scope of particular issues, actions and judgments, see post §§ 82-87.
Materiality of fact to issues, see post § 88.
Undisputed or admitted facts, see post § 90.
Matters withdrawn from issues, see post § 91.
Matters which might have been but were not litigated, see post § 92.
Facts necessarily involved in the decision, see post § 93.
Burden of proof, presumptions, evidence, and questions of law and fact as to facts passed on and concluded, see post §§ 95-99.
Effect and conclusiveness of foreign judgments and judgments of sister states, see Foreign Judgments, II.
Conclusiveness of jurisdictional findings and recitals in foreign judgments, see Foreign Judgments § 5.
Facts open for collateral impeachment of judgment, see Judgments, VII.
Former decision as law of the case in subsequent trials, see Courts § 35; Appeal, XIV, G, XV.
Right to have modification of decree as to custody of children notwithstanding estoppel by decree, see Divorce § 118.
Right in opposing application for execution to raise objections concluded by foreclosure and deficiency decree, see Foreclosure ¶¶ 741a, 745.
Facts concluded or estopped by discharge in habeas corpus proceedings, see Habeas Corpus.
Validity and effect of tax titles and conclusiveness of tax deeds, see Taxes, XII, B.

¶ 404. That the judgment may be deemed res adjudicata of particular facts or questions, it must appear that such facts or questions were actually litigated; that they were submitted to and decided by the jury or court, and that they were not collateral issues, but were crucial questions in the former controversy.—Bond v. Markstrum, 102 Mich. 11.

¶ 405. Adjudications upon the subject-matter of a suit are conclusive wherever any question respecting it arises afterwards in a collateral suit, and in any new suit in which the pleadings put any part of it in issue; and this is so whether the adjudication was obtained on default, or whether all possible questions were raised on the trial, or whether it was correct in fact or law.—Jacobson v. Miller, 41 Mich. 90.

§ 80. Matters actually litigated and determined.

Matters in issue but not decided, see post § 89.
Matters not expressly decided but necessarily involved, see post § 93.
Construction of bill against pleader in determining facts confessed by default, see also Equity ¶ 594.

¶ 406. Where the execution and delivery of a lease are disputed in a suit for rent, the determination of the issue concludes the parties in any subsequent litigation involving the right to rent under the same lease.—Jacobson v. Miller, 41 Mich. 90.

¶ 407. A judgment upon a subscription to the capital stock of a corporation, so long as it remains in force, would be a conclusive adjudication upon any defense to the validity of the subscription.—Gould v. Vaughan, 30 Mich. 376.

¶ 408. Defendant made advances to plaintiff for wood and tan bark delivered to it during the course of the season. At the close of the season defendant sued to recover of plaintiff for overpayment. In that suit the number of cords delivered by plaintiff during the season was in issue and in evidence. Defendant recovered a judgment. Thereafter plaintiff sued to recover for 225 cords which he claimed he was not credited with in the former suit. Held, the account under the contract was res adjudicata under the former suit and plaintiff could not recover.—Paccalona v. Peninsula Bank & Lumber Co., 171 Mich. 605.

¶ 409. Where an administrator brings suit to set aside a deed conveying decedent's estate to his widow and daughters which was delivered as ordered after his death, the question as to whether a claim by the widow against the estate was proved by a fraud is foreclosed where the claim was allowed by the commissioners and on appeal by the other grantees the claim was reduced and allowed and no appeal from such allowance has been taken.—Barris v. Emmons, 173 Mich. 590.

¶ 410. A judgment for plaintiff in an action for breach of warranty in a sale of chattels affirms the validity of the contract.—Barker v. Cleveland, 19 Mich. 230.

¶ 411. Plaintiff in a previous suit against the defendant for the negligent killing of his wife recovered for his loss of her permanent services. In the present suit he sought to recover as administrator for the loss to her estate by her death. The survival statute permitted no recovery for the pain and suffering of the deceased. Held, the plaintiff's previous suit proved conclusively that his wife was not emancipated, and the court properly directed a verdict on the ground that her estate would not have received the benefit of her services.—Walker v. Lansing & S. Traction Co., 156 Mich. 514.

¶ 412. Where the validity and good faith of a chattel mortgage have been decided in mandamus proceedings, such decision is res judicata.—Weed v. Mirick, 62 Mich. 414.

¶ 413. Where in proceedings to appoint a guardian over an incompetent woman the validity of her marriage and her competency

to contract the marriage were litigated, a judgment rendered in those proceedings is res adjudicata in subsequent proceedings between the same parties for the appointment of an administrator of her estate, and to determine who are her heirs, involving like issues.—Burgess v. Stribling, 144 Mich. 532.

¶ 414. The surety of a mortgagor consented that the mortgagee should release to the mortgagor certain parts of the land mortgaged. The consideration was that the mortgagee should credit a certain sum on the mortgage debt. Later, foreclosure was had, and the surety made a party. Held, that the surety could not thereafter in a bill to redeem, in the absence of fraud, reopen the question and demand that the said release given should be treated as a payment on the debt, since that question was adjudicated in the foreclosure proceeding.—Miller v. Peter, 158 Mich. 336.

¶ 415. On a petition to the circuit court for release, on writ of habeas corpus, from arrest on a writ of capias ad respondendum issued in the superior court, petitioner's claim for release based on the alleged insufficiency in the affidavit for the writ of capias in the superior court will not be considered where the superior court, which held the petitioner to bail and overruled a motion to admit him to common bail passed on the identical question.—Ex parte George, How. N. P. 271.

¶ 416. A partition decree silent on the relative values of the parcels with the commissioners' report, also silent as to the appraisal, presumably found the parcels to be equal in value; and accordingly in assumpsit based on an agreement to allot the parcels and to pay a sum certain as owelty for inequality it cannot be shown that the decree was made pursuant to such agreement and that the parcels were unequal in value.—Burger v. Beste, 98 Mich. 156.

§ 81. Matters not in issue.

See also post ¶ 428.
Matters withdrawn from issues, see post § 91.
Matters omitted from issues, see also post ¶ 464.

¶ 417. A party is not estopped by a former litigation from vindicating, in another suit, rights that were not involved and that could not properly be litigated in the former one.—Nichols, Shepard & Co. v. Marsh, 61 Mich. 509. Writ of error dismissed in 140 U. S. 244, 35 L. ed. 413, 11 Sup. Ct. Rep. 798.

¶ 418. Estoppel from asserting a claim excluded from a former suit cannot apply where it was not within the issue in that suit, and there was therefore no opportunity to establish it.—Fifield v. Edwards, 39 Mich. 264.

¶ 419. The judgment of the court on appeal from probate that a will of a testator made on the 2nd day of May, 1898, is void on account of undue influence exerted by the principal legatee was not res judicata of the question as to whether certain property of such decedent handed over to such legatee on the 8th day of May, 1898, was a valid gift causa mortis.—Reed v. Whipple, 140 Mich. 7.

¶ 420. A judgment of the circuit court of one county confirming the appointment of a grandfather of an infant as his guardian is not res adjudicata on the question of the domicile of the father of said infant in proceedings to probate his will in another county.—Hering v. Mosher, 144 Mich. 152.

¶ 421. A testator devised certain land to his son upon the express condition that he make certain annual payments to his mother, and imposed a lien on the land for such payments. Upon the death of the mother and son, the administrator of the former recovered judgment at law against the administrator of the latter for a portion of the amount due and unpaid at her death, the court holding that the statute of limitations barred recovery for most of the demand. Held, that this decision was not res judicata of the extent of the condition unperformed and of the sum actually secured by the lien; and that the lien was not waived by taking the judgment at law.—Stringer v. Gamble, 155 Mich. 295.

¶ 422. After an attorney had received an assignment of one-half of a claim, according to his own admission, as trustee for the assignor's father, a decree rendered in an intervention by the assignor against his claim to be the owner of one-half of the judgment does not amount to an adjudication that the attorney is the absolute owner thereof.—Meyers v. Radford, 167 Mich. 135, aff'd in 231 U. S. 725, 58 L. ed. 454, 34 Sup. Ct. Rep. 249.

¶ 423. A recital in a guardianship order that the person is insane is not evidence that he lacks testamentary capacity.—Rice v. Rice, 50 Mich. 448; Rice v. Rice, 53 Mich. 432.

¶ 424. An adjudication by a bankruptcy court in a certain case, that an attachment was a valid lien on such property as was actually levied upon more than four months before the bankruptcy proceedings were begun, does not fix the identity of the property attached, and in itself is therefore incompetent as evidence to determine the validity of specific attachments.—Rowley v. Grover, 37 Mich. 588.

¶ 425. The result of a suit for the taxes of particular years is not res judicata in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents.—Lake Shore & M. S. R. Co. v. People, 46 Mich. 193.

¶ 426. A judgment for plaintiff in an action for breach of warranty in a sale of chattels concludes nothing concerning payment on such contract, and does not bar an action for the purchase price.—Barker v. Cleveland, 19 Mich. 230.

¶ 427. The unreversed judgment of a federal court, in dismissing, on motion, an action under the federal act to recover for death of an employee engaged in interstate commerce, that plaintiff had no right of action because she had elected to make application for compensation under the state Workmen's Compensation Act, while conclusive as to the issues decided, is not res adjudicata as to the claim of plaintiff's attorneys that she originally had a cause of action in which they were retained by a valid contract with her specifying their contingent compensation which defendants, with notice of their claim of lien, were bound to recognize.—Nichols v. Waters, 201 Mich. 27.

§ 82. Scope of particular issues, actions or judgments.

Decision as to custody of child, see also ante ¶¶ 76-78.
In suit on joint note by husband and wife, see ante ¶ 191.
Claim in assignment proceedings, see also ante ¶ 192.
Proceedings for commitment of child, see also ante ¶ 193.
Identities of former and later actions and issues therein, see ante §§ 35, 36.
Materiality of the fact to the issues, see post § 88.
Matters concluded by appellate judgment in suit on bond, see Appeal §§ 575, 576.
Adjudication in bankruptcy as conclusive of insolvency, see Bankruptcy ¶ 118.
Scope and effect of habeas corpus judgments, see Habeas Corpus.
Conclusiveness of decree sustaining validity of tax deed upon persons participating in the proceedings, see Taxes, XII.

¶ 428. A judgment in an action in tort to recover damages is not res adjudicata as to items of account introduced in evidence on the trial of such action in support of a defense based on the breach of a contract by plaintiff, where the question of plaintiff's indebtedness to defendant was not involved in the tort action in any way.—Perkins v. Oliver, 110 Mich. 402.

¶ 429. A judgment for the tenant in possession of a farm in proceedings by the landlord before a commissioner to recover possession thereof, rendered on other grounds than that there was no rent due at the time such suit was instituted, is not res judicata of the landlord's claim for rent due prior to the entry of such judgment, in summary proceedings subsequently instituted against such landlord by such tenant.—Cockerline v. Fisher, 140 Mich. 95.

¶ 430. An unsuccessful action by C. against P., in which action C., injured by a shot from an air-gun fired by T., a nine-year-old boy, claimed that T.'s immaturity prevented his realizing the gun's dangerous nature, and that the gun had been negligently furnished to T. under such circumstances, but in the disposition of which action the question of T.'s negligence was not involved, does not bar an action against T. himself for negligence.—Chaddock v. Tabor, 115 Mich. 27.

§ 83. ——Trover, trespass to goods and replevin.

See also ante ¶ 54, post ¶ 465.
Trover, trespass and replevin as identical causes of action, see ante § 36; and see also generally ante, III.
Effect of prior recovery to bar other causes or defenses, see ante § 43.
Judgment in replevin against agent conclusive upon principal, see ante § 65.
Judgment in replevin for goods held under attachment as estopping a subsequent levy upon the same goods, see ante ¶ 370.
Conclusiveness of judgment upon successors in interest and title, see ante § 75.
Effect of trover to pass title, see Conversion § 44.
Effect of former verdict in replevin on question of fact in later action of trover, see also Conversion ¶ 210.

¶ 431. A judgment in trespass or in trespass on the case does not determine the title to land.—Keyser v. Sutherland, 59 Mich. 455; Busch v. Nester, 62 Mich. 381; Fahey v. Crotty, 63 Mich. 383.

¶ 432. The record of an action for trespass in tearing down a line fence, where judgment went for defendant, is inadmissible in an action for assault and battery committed by such defendant to show that the work being done for him at the time of the assault was upon his own land.—Fahey v. Crotty, 63 Mich. 383.

¶ 433. In trespass for tearing down a line fence defendant pleaded title and judgment was rendered in his favor. Held, that such judgment is not conclusive evidence that defendant had title to the fence or to the line which it had inclosed, and settled nothing but defendant's nonliability to plaintiff for having torn it down.—Fahey v. Crotty, 63 Mich. 383.

¶ 434. A mortgagee of chattels brought replevin against an attaching creditor, and sought to show that the demand in one of the attachment cases, which had passed into judgment, had been paid before judgment. Held that, if there was no showing of collusion between the attachment creditor and the debtor, this would be an attempt to retry the question involved in the attachment suit.—Wallen v. Rossman, 45 Mich. 333.

¶ 435. A replevin bond against a chattel mortgagee in possession is not shown to have

been released by a discharge of the lien, and the consequent discharge of a judgment in the replevin action in favor of the defendant based on such lien, where it appears that the foreclosure, which was claimed to have discharged the lien took place on January 5th, while the judgment in the replevin action was rendered afterwards on February 20th. The judgment precludes the question.—Stafford v. Baker, 141 Mich. 44.

§ 84. ——Ejectment.

Former ejectment as identical cause of action, see ante § 36.
Judgment as estoppel to set up in a subsequent suit title acquired during the former suit, see ante § 48.
Effect of judgment in ejectment, see Ejectment § 57.
Particular facts determined by judgment in ejectment, see also Ejectment ¶ 232.

¶ 436. A judgment of recovery in ejectment for dower establishes the right of dower as res adjudicata in a proceeding under a suggestion for mesne profits.—Bemis v. Conley, 49 Mich. 392.

¶ 437. A plaintiff in an ejectment suit was given a judgment for an undivided half interest in land. At the time of said suit the defendant therein held a tax deed for said land, the redemption period having not yet expired. Said tax deed was offered in evidence by defendant in the ejectment suit. Held, that in a partition suit brought by the plaintiff in the ejectment suit against one holding title under the defendant in said suit, the judgment in said ejectment suit was res adjudicata of the legal effect of said tax title upon the title of the plaintiff.—Loranger v. Carpenter, 167 Mich. 370.

§ 85. ——Divorce.

Dismissal of suit for divorce as bar to subsequent suit for divorce, see ante ¶ 172.
Conclusive of divorce decree as to defenses not interposed, see ante § 50.
Effect of divorce decrees, see Divorce § 100.
Right of parties to divorce to litigate property rights left unadjudicated by divorce, see Divorce § 144.

¶ 438. A final decree in a divorce suit establishing that the defendant was an habitual drunkard is not res adjudicata on the question whether the defendant is an habitual drunkard in a suit begun four years later.—Paynton v. Paynton, 194 Mich. 504.

¶ 439. In a will contest, in which one of the issues is the mental incompetency of the testator, the opinion in a divorce case in which a decree was entered in favor of testator's wife on the ground of extreme cruelty is inadmissible, it not being an adjudication of a question involved in the case.—In re Walsh's Estate, 196 Mich. 42.

§ 86. ——Mandamus.

See also ante ¶ 60.
Finality of adjudication in Mandamus to operate as res adjudicata, see ante § 15.
Defenses barred because not made, see also ante ¶ 264.
Validity of chattel mortgage adjudicated in mandamus, res adjudicata, see ante ¶ 412.

¶ 440. It seems that the discretionary act of denying a writ of mandamus to compel a sheriff to execute a criminal warrant does not necessarily determine the invalidity of the warrant.—Wheaton v. Whittemore, 49 Mich. 348.

¶ 441. A mandamus directing that a capias ad resp. be vacated, and the proceeding quashed, is not an adjudication that the proceeding was absolutely void.—Johnson v. Morton, 94 Mich. 1.

§ 87. ——Suits in equity.

Conclusiveness of law judgments in equity or equity decrees in law as depending on scope of the action or suit, see also ante §§ 8, 9.
Matters conclusively proved by decree quieting title against covenantee, see also Covenants for Title ¶ 86.
Partition decree as bar to subsequent suit for contribution to cost of improvements, see Former Adjudication ¶ 275.

¶ 442. Defendant had previously filed a bill to restrain the completion of a drain on the ground that he had not been served with notice of the proceedings as required by statute. The case was heard through, and defendant's bill dismissed. Held, in a subsequent proceeding to sell defendant's lands for delinquency in paying the drain tax, the defendant could not set up said lack of legal notice as a defense, the matter being res adjudicata.—Auditor General v. McCall, 159 Mich. 318.

¶ 442a. Where in an appeal from an order of distribution by the probate court, the appellant contends that the administrator of the estate has no right to take part in the determination of the appeal, the appellant is concluded by a decree against him in a previous suit, in which he attempted to accomplish the same result by a bill for an injunction.—In re Parr's Estate, 161 Mich. 244.

¶ 443. The sufficiency of the alimony allowed in chancery cannot be reviewed in a proceeding at law against the husband's estate to recover for the wife's support.—Crittenden v. Schermerhorn, 39 Mich. 661.

¶ 444. A decision adverse to a city, in a suit begun by it in a state court but removed to the federal court, which suit was brought against a street railway company to enjoin it from operating after a certain date in cer-

tain streets on the ground of the invalidity of an ordinance extending to a certain company, to the franchise of which defendant had succeeded, the right so to operate is res adjudicata of the question in issue in said suit, upon an application by the city and certain of its citizens for a mandamus to compel the attorney general to file an information in the nature of a quo warranto to inquire into defendant's right to operate in said streets after the date named.—City of Detroit v. Attorney-General, 103 Mich. 612.

¶ 445. Where in a former chancery suit complainants claimed an easement in an alley on the ground that it was a public alley and they had acquired the right of ingress and egress by adverse user, and the defendant merely denied the easement but asked no affirmative relief, a dismissal of the bill does not render the matter res adjudicata as respects a subsequent ejectment suit between the same parties, in which plaintiffs claim title on other grounds.—Le Roy v. Collins, 165 Mich. 380.

¶ 446. While the defendant was in the hands of a receiver, the plaintiff filed a claim for goods sold and delivered to defendant under a contract of sale. The equity court found against the plaintiff in that suit on the ground that the goods were not delivered, but ruled that on the pleadings the question of breach of contract in refusing to accept the goods was before it, and held against the plaintiff in that proposition. Held, in a later suit for damages for breach of contract, the matter was res adjudicata, and the court could not say that in the previous equity suit the court had no jurisdiction of the question of the breach.—Forest City Steel & Iron Co. v. Detroit & T. S. L. R. Co., 154 Mich. 182.

¶ 447. A decree restraining the collection of a special assessment because of the invalidity of "the several proceedings to assess the same," relates only to the proceedings taken by the assessor and the board of review, and is not res adjudicata as to the preliminary resolution adopted by the common council to initiate the proceeding.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 448. Under Pub. Acts 1909, No. 300, § 26, How. St., 2nd Ed., § 6549, relating to review by the courts of an order of the railroad commission fixing railroad rates, the right of a railroad company to a review by the courts becomes fixed when the order of the railroad commission is promulgated, and proceedings for review having been instituted in a circuit court of chancery and judgment having been rendered against the railroad company by such court and by the supreme court on appeal, such judgment becomes res adjudicata as to the questions involved in the case.—Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864, aff'd in 239 U. S. 356, 60 L. ed. 327, 36 Sup. Ct. Rep. 114.

¶ 449. A foreclosure for nonpayment of interest only of a mortgage given to secure a note payable four years after the mortgagee's death to his "heirs," interest payable to the mortgagee during his lifetime only, held not to be res adjudicata of the title to the note as against the heirs in a contest between them and the mortgagee's administrator for the proceeds of the note, the interest only being payable to the mortgagee for his life time.—Love v. Francis, 63 Mich. 181.

¶ 450. One, who sues to have a mortgage declared void for fraud and infancy of the mortgagor and to set aside a foreclosure by advertisement is not barred by dismissal of the bill from disputing in ejectment that the foreclosure was irregular and void because of the irregularities; where that was not involved in the chancery suit, it being directed only to the invalidity resulting from infancy and fraud.—Bonker v. Charlesworth, 33 Mich. 81.

¶ 451. On a bill by a holder of a tax deed to quiet title to land purchased at a tax sale held that a decree establishing the validity of the particular tax, rendered in a proceeding brought for that purpose, was res adjudicata as to the sufficiency of the description of the land in the tax roll and in the tax deed issued to complainant.—Heethuis v. Kerr, 194 Mich. 689.

§ 88. Materiality to issues.

¶ 452. The first essential of the rule of res adjudicata is the identity of the matter in issue. The matter in issue is defined to be that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleadings.—Le Roy v. Collins, 165 Mich. 380.

¶ 453. When an action is sought to be maintained or defended by showing a former adjudication of questions upon which it depends, it must appear that such questions were litigated as a matter of fact; that they were submitted to and decided by the court or jury; and that they were not collateral inquiries, but crucial questions in the other controversy.—Bond v. Markstrum, 102 Mich. 11.

§ 89. Matters in issue but not determined.

¶ 454. A husband signed his own name and that of his wife to a contract for the purchase of fruit trees, and in a suit upon the contract, brought against him and his wife after he had given his notes in payment for the trees, they had judgment on the ground of his want of authority to sign her name to the contract, which was the sole question passed upon by the jury. In suit afterwards brought against the husband on the notes, held, that the former judgment did not bar the second suit, though the defense relied

on in both actions was that the trees were worthless.—Kingsbury v. Kettle, 90 Mich. 476.

¶ 455. Bill to remove a cloud from complainant's title by setting aside a deed from a father to the son alleged to be fraudulent. Decree as prayed by the bill. Held, that this decree was conclusive only as against the title of the son under the conveyance from the father, and did not estop the defendants in suit from denying complainant's title.—Beeson v. Comly, 19 Mich. 103.

¶ 455a. The denial on other specific grounds by the trial court of a motion by a defendant garnishee in a law suit to set aside the judgment against the defendant and without passing on the alleged ground that it was obtained by the fraudulent representation of the plaintiff that he would not prosecute the suit, and the affirmance of such ruling by the supreme court on appeal, do not make the matter of fraud res adjudicata so as to prevent the defendant garnishee from filing a bill in chancery to enjoin such judgment.—Steele v. Bliss, 170 Mich. 175.

§ 90. Facts undisputed or admitted.

Consent order for receiver reciting memberships in insolvent firm as conclusive on that fact, see also ante ¶ 124.

¶ 456. In a prior chancery suit against the purchaser of tax lands from the state, in which suit relator was complainant, he admitted that he was bound to pay to said purchaser the taxes of the year 1891. Held, relator could not in the present suit against the auditor general in mandamus ask for the cancellation of said tax of 1891, since he was concluded by the decree in the chancery suit.—Haney v. Auditor General, 165 Mich. 681.

¶ 457. In a previous suit at law by plaintiff against defendant, a description in a contract of the location of a railroad was recognized as an error by both parties, and the opinion recognized that error. Held, that in a subsequent suit in equity for specific performance of the same contract, the question of the error could not be raised.—Gates v. Detroit & M. Ry. Co., 158 Mich. 477.

¶ 458. Where counsel for the state fail to produce an argument or raise a point which they might have raised in a proceeding, the state cannot raise such question in a subsequent proceeding involving the same question between the same parties.—People ex rel. Attorney General v. Detroit, G. H. & M. Ry. Co., 157 Mich. 144.

¶ 459. Where the execution of a paper is admitted by failure to deny it on oath, it is expressly left outside the issue, and, not being part of the subject-matter of the suit, can be put in issue in other litigation on the same paper.—Jacobson v. Miller, 41 Mich. 90.

§ 91. Matters withdrawn from issues.

Matters omitted from issues, see post ¶ 464.
Matters which might have been but were not litigated, see post § 92.

¶ 460. Items withdrawn by a plaintiff on trial are not res judicata, but may be set off by him in a suit brought by defendant.—Busch v. Jones, 94 Mich. 223.

§ 92. Matters which might have been litigated.

Defenses and rights barred because not litigated in former suit, see ante §§ 49-52.

¶ 461. A former judgment does not operate as an estoppel upon matters of fact which might have been litigated in the former proceeding but were not.—Bond v. Markstrum, 102 Mich. 11.

§ 93. Facts necessarily involved in the decision.

¶ 462. To make a judgment in one case a bar to another action it is not essential that the object of the two suits should be the same; nor that the parties should stand in the same relative position to each other; nor that the point in controversy should have been actually litigated in the first suit; it is sufficient if its determination was necessarily involved in the judgment.—Barker v. Cleveland, 19 Mich. 230.

¶ 463. The estoppel extends to all steps involved in the judgment as necessary steps or the ground work upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.—Bond v. Markstrum, 102 Mich. 11.

¶ 464. In a lawsuit involving the title to land, the plaintiff is not estopped from contesting the regularity of a statutory foreclosure under which the title has been obtained, by having omitted to raise that question in a former suit brought by him in chancery to set aside the mortgage as invalid.—Bonker v. Charlesworth, 33 Mich. 81.

¶ 465. In replevin, where the defense is sale to defendant in consideration of making certain payments, if defendant is permitted with the aid of a bill of particulars used in a former suit to testify to certain items he claims to have paid, plaintiff may, on rebuttal, show by the record in the former suit that said items were adjudicated against defendant; provided it further appears that such adjudication necessarily determined the claim of defendant that said items were payments upon the claim sought to be enforced by plaintiff in that suit.—Avery v. Knight, 99 Mich. 311.

¶ 466. The decision of the supreme court in an action against a railroad company for

damages for personal injuries sustained in a crossing accident due to plaintiff's horse becoming frightened at the blowing of the whistle of defendant's train, and stopping on the track and refusing to go ahead until too late, that the blowing of the whistle was not a negligent act is res adjudicata in a subsequent action between the same parties, although the blowing of the whistle was not specifically charged as negligence in the first action, but the negligence relied upon was the excessive speed of the train operating concurrently with the sounding of the whistle which frightened the horse, and a determination that the blowing of the whistle was an innocent act was essential to sustain the legal conclusion arrived at and was consequently necessarily involved in the case, whether pleaded or not.—Cavanaugh v. Michigan Cent. R. Co., 195 Mich. 391.

VII. HOW URGED OR PLEADED; AND HOW PROVED OR SHOWN.

Estoppel to plead or urge judgment as bar or estoppel, see ante § 78.

§ 94. Necessity, manner and sufficiency of pleading.

Impropriety of trying issue of res adjudicata on motion to dismiss, see Discontinuance § 19.
Necessity and sufficiency of pleading of estoppels in pais, see Estoppel § 57.
Former adjudication as matter proper for plea in bar, see Pleading, III, B.
Mode of pleading judgments, see 1916 C. C. Rule 21, § 4.
Necessity of notice of defense of estoppel with plea, see 1916 C. C. Rule 23, § 2.

¶ 467. Where, in an action for damages for breach of contract, the breach relied on consisted in suing out an injunction, the decree in the injunction suit would not be admissible in bar of the action if it had not been set up or relied on in the pleadings.—Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313.

¶ 468. Chancery proceedings resulting in a decree for specific performance are admissible in an action at law to show the performance of a contract set up by plaintiff as a part of his case; and this though they are not pleaded puis darrein.—Haven v. Beidler Mfg. Co., 40 Mich. 287.

¶ 469. A previous suit which indirectly affords support to the allegation of a tender may be given in evidence in a chancery suit though not set up or mentioned in the pleadings.—Daugherty v. Byles, 41 Mich. 61.

¶ 470. A judgment in replevin of recovery and for damages for detention cannot, it seems, bar an action for unlawful trespass and personal wrongs distinct from the detention of the property; and certainly, to be used for any such purpose, it must be pleaded in bar.—Briggs v. Milburn, 40 Mich. 512.

¶ 471. Under 1897 Circuit Rule No. 7, a defendant is required with the general issue to give notice of his intention to claim that a certain chancery proceeding, in no way connected with the plaintiff's affirmative case, was res adjudicata.—Bryant v. Kenyon, 123 Mich. 151.

¶ 472. A plea of estoppel must be properly framed as such, especially in opening and closing, and it must set forth a claim that the plaintiff should not be admitted to make use of what the estoppel would exclude. The matter of estoppel alleged must be material and traversable, and if a judicial decision is relied on therefor, it must be so averred; and the decision must have been a matter coram judice.—Whittemore v. Stephens, 48 Mich. 573.

¶ 473. A plea of estoppel by judicial action or record (discharge in bankruptcy) must aver it as such and that it was before a court with jurisdiction.—Whittemore v. Stephens, 48 Mich. 573.

¶ 474. A plea of estoppel based on a judicial act which it does not aver as matter of estoppel in itself, but merely introduces as evidence and by way of argument and as a basis for a deduction, presents an issue which is a matter of legal inference only, and is bad because not traversable.—Whittemore v. Stephens, 48 Mich. 573.

¶ 475. A plea to a bill in chancery, setting up the dismissal of a former bill asking for the same relief, is insufficient if it fails to aver that the former decree was on the merits. An omission in this respect, however, may be supplied by amendment.—Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368.

¶ 476. The question of res judicata cannot be raised by a motion to quash an information in quo warranto filed by the attorney-general, but only by a plea in bar.—People ex. rel. Attorney General v. Detroit, G. H. & M. Ry. Co., 149 Mich. 122.

¶ 477. Former judgment cannot be shown under the general issue alone.—Briggs v. Milburn, 40 Mich. 512; Porter v. Leache, 56 Mich. 40.

¶ 478. A defense in the nature of a former recovery cannot be set up under the general issue alone.—Tabor v. Van Vranken, 39 Mich. 793.

¶ 479. In a suit to enforce a lien for building materials, defendant pleaded a former adjudication. After the filing of this plea the decree in the former adjudication was vacated. Complainant in the present suit filed pleas in the nature of pleas puis darrein continuance. Defendants raised no

question as to the form of said latter pleas or as to their sufficiency in pleading the fact that since the last continuance the former decree relied upon by defendant had been vacated. The fact of their being set aside was not disputed. Held, the pleas puis darrein continuance filed by complainant were to be treated the same as if nul tiel record had been the complainant's reply, upon which the pleas must be determined as a matter of law.—Lowrie & Robinson Lumber Co. v. Campbell Ave. M. E. Church, 170 Mich. 341.

§ 95. Burden of proof and presumptions.

Presumption of identity with former proceeding on immature cause of action, see ante ¶ 118.

General law of presumptions and burden, see Evidence, II.

Presumptions indulged on collateral attack, see Judgments, VII.

¶ 480. Where, in a suit upon a guaranty of rent, defendant seeks to avoid liability by showing his release by the lessor, and plaintiff introduces in evidence the record in a former suit brought by him against defendant upon the same guaranty, in which he recovered a judgment for prior instalments of rent, and it appears that the pleadings in said former suit were broad enough to cover said proposed defense, the burden of proof is upon plaintiff to show that said defense was actually made and passed upon in the first suit.—Bond v. Markstrum, 102 Mich. 11.

¶ 481. A decree in a former partition suit precludes a party defendant thereto from claiming title by adverse possession in a subsequent suit for the land awarded complainant; such defense should have been made in the former suit, and will be presumed to have been made if the pleadings and proofs in such suit are not before the court.—Pierson v. Conley, 95 Mich. 619.

¶ 482. Mandamus proceedings are not res judicata in the absence of evidence tending to show upon what ground such proceedings were decided.—Hoffman v. Silverthorn, 137 Mich. 60.

¶ 483. The decree in a suit to have an assignment of a land contract by complainant to defendant declared to be a mortgage, or a trust for complainant's benefit, or void, absolutely dismissing the bill and not dismissing it "without prejudice" or with any words of qualification, must be conclusively presumed to be a dismissal upon the merits so as to operate as a bar to a subsequent suit.—Dalton v. Mertz, 197 Mich. 390.

¶ 484. Where a bill to restrain certain expenditures by trustees under a will, and an appeal from the order of the probate court approving the account of the trustees, are both pending, and involve the same issues, and by consent of the parties the bill is dismissed, the presumption in the absence of evidence to the contrary, is that the decree of dismissal adjudicates all of the issues involved in the pleadings.—In re Ward's Estate, 152 Mich. 218.

¶ 485. The mere fact that certain items, which a defendant testifies he paid to plaintiff on the claim therein sought to be enforced, were included in defendant's bill of particulars in a former suit brought by him against plaintiff, will not warrant the assumption that the items were adjudicated in said suit; and hence an objection to the use by defendant of the bill of particulars to refresh his memory as to said items while testifying in another suit, on the ground that the items had been adjudicated in the first suit, is untenable.—Avery v. Knight, 99 Mich. 311.

¶ 486. Where a petition to set aside a foreclosure sale was dismissed on the ground that an original bill should have been filed, and the counsel for the petitioner stated that they were advised that they were mistaken in their remedy, and supposed that an order would be entered so stating, it will be presumed, on a bill to set aside the foreclosure sale, that the matter of the petition to set aside the sale was not determined on the merits, and a plea of former adjudication is properly overruled.—Butters v. Butters, 153 Mich. 153.

§ 96. Admissibility of evidence.

Admissibility of record of illegal land office proceedings for land patent, see ante ¶ 26.

Record of conviction or acquittal as evidence in civil suits, see ante § 11.

To show that former proceeding was on immature cause of action, see also ante ¶ 119.

Admissibility of record during time for new trial motion, see also ante ¶ 136.

Mode of proving judgments generally, see Evidence §§ 545, 546.

Certification of one judgment as carrying in with it another judgment referred to in the record, see also Evidence ¶ 2815.

Admissibility of pleadings, files and affidavits as documents, see also Evidence § 548.

Time for offer of proof of former adjudication, see Trial, V, B.

Order and sequence of proofs and offers of proofs, see Trial, V, B.

Sufficiency of objections to records in evidence, see Trial, V; Saving Questions.

¶ 487. The record in the former action is admissible to establish the estoppel.—Martin v. Boyce, 49 Mich. 122.

¶ 488. Where in a suit upon a bond executed by the principals and sureties in a prior bond, in the place of which the second bond was given, and to which the principals'

names were signed by one of the sureties as their agent, the principals deny the authority of the surety so to execute it, it is competent for the plaintiff to show that, upon the trial of a suit brought on the first bond, the principals defended upon the theory that the second bond was given in satisfaction of the first one; and to that end the records and proceedings in the suit on the first bond are admissible in evidence.—Busch v. Fisher, 89 Mich. 192.

¶ 489. Where the same transaction is involved in two cases the mere verdict of the jury in one of them cannot be shown in the other for the purpose of fixing the quality of the transaction. But the record in the former may operate as a bar in the latter.—Wheeler v. Wallace, 53 Mich. 364.

§ 97. ——Parol and extrinsic evidence.

Record of judgment as unimpeachable verity, see Judgments, VII.

Best evidence of scope of judgment, see Evidence § 122.

Resort to stipulation filed in the case to construe decree, see also Equity ¶ 896.

¶ 490. One who has introduced in evidence the proceedings in another suit before a justice is not at liberty to stop the inquiry with the written proceedings alone and thus prevent their true significance from being explained.—Lyman v. Becannon, 29 Mich. 466.

¶ 491. Where the written proceedings in another suit, when introduced in evidence, appear to have been so framed that they might have involved the same issue as the suit at bar, but fail to show on their face whether such issue was in fact tried and decided, it is proper to show by parol what the facts were in that regard.—Lyman v. Becannon, 29 Mich. 466.

¶ 492. Oral evidence is admissible not to contradict the record, but to show what was litigated and adjudicated in the former suit, and to identify the parties in the cause of action.—Black v. Miller, 75 Mich. 323.

¶ 493. That the merits were not decided in a former suit pleaded in bar may be shown by parol, to wit, minutes of the stenographer showing a directed verdict for want of parties.—Munro v. Meech, 94 Mich. 596.

¶ 494. Where the record does not contain the conclusive evidence as to such former adjudication, parol evidence is admissible to ascertain whether a given question was in issue, litigated, submitted, and decided, and possibly, in some cases, whether it was material, and in such event, under our system of pleading, the issue would not ordinarily be limited to the single question of such former adjudication, but the party would be at liberty to support his claim or defense by other evidence, which would be received subject to the effect that should be given to the evidence upon the question of such former adjudication.—Bond v. Markstrum, 102 Mich. 11.

¶ 495. The ground for the discharge of a prisoner in habeas corpus proceedings may be shown by parol where no order of discharge is found.—Friesenhan v. Maines, 137 Mich. 10.

¶ 496. Where the judgment of a justice is pleaded in bar it may be shown not to have been upon the merits.—Franks v. Fecheimer, 44 Mich. 177.

¶ 497. In trover for the value of wood cut from trees purchased from defendants and paid for in work performed for them by plaintiff, where defendants set up a judgment in assumpsit recovered against them by plaintiff for such work, plaintiff may prove that defendants in the assumpsit case gave evidence tending to show and recognizing plaintiff's title to the trees and wood.—Hewett v. Chapman, 49 Mich. 4.

¶ 498. In an action by a building contractor on an insurance policy indemnifying insured against loss on account of injuries to employees by accident, where it appeared that a certain person, who was engaged in cleaning the walls of the building which plaintiff was erecting, was injured by falling from the scaffold, and recovered a judgment against defendant, the declaration and charge in such former case considered and held not to establish conclusively that the injured person was the employee of the contractor so as to bind the insurer, and that the insurer should have been permitted to show that in fact the verdict and judgment rendered in favor of such person was or might have been based upon such relation other than those of master and servant within the policy.—Burke v. Maryland Casualty Co., 192 Mich. 173. (Bird, J., dissenting.)

¶ 499. Briefs of counsel are not admissible to prove the basis on which judgment was rendered in the case and that it did not settle the merits.—Greenlee v. Lowing, 35 Mich. 63.

§ 98. Sufficiency of evidence.

See also ante ¶ 196.

¶ 500. Where the subject-matter of a suit has confessedly been in litigation before, the evidence that the merits were not passed on ought to exclude all other hypotheses.—Baxter v. Aubrey, 41 Mich. 13.

¶ 501. To bar a set-off introduced in a suit between A. and B., the plaintiff put in evidence a former suit brought by B. and his wife against A., in which a recovery was sought upon the same claim now sought to be set off. It was shown that judgment was rendered in that case, but it did not appear whether it was upon the merits or

not. Held no bar.—Tucker v. Rohrback, 13 Mich. 73.

¶ 502. The record of a judicial order of partition showing that a certain person was allowed a certain portion of the land sufficiently shows that he was a party to the partition proceeding.—Willetts v. Mandlebaum, 28 Mich. 521.

¶ 503. From the report of commissioners on claims against an estate showing presentation and disallowance of a mortgage note, no appeal was taken, and in foreclosure proceedings subsequently instituted complainant's solicitor testified that the claim never was passed upon by the commissioners, but was withdrawn by him from their consideration. The commissioners testified that the claim was presented and was for reasons given by them disallowed, and this was corroborated by other witnesses. Held, that the defense of res adjudicata was fairly established.—Finley v. Dubay, 112 Mich. 334.

§ 99. Law and fact questions and instructions.

¶ 504. Whether a former adjudication interposed by plaintiff to an affirmative defense tendered under a special notice was res judicata and operated as an estoppel by judgment against such defense, held a question of law for the court.—Bishop v. Dodge, 196 Mich. 231.

VIII. COLLATERAL ATTACK.

§ 100. In general.

The general doctrine that a judgment is not assailable by the parties thereto or their privies collaterally for error or irregularity, but only for jurisdictional fraud, mistake or defects in process or procedure, is treated in Judgments, VII, which see.

The rule that a judgment is not binding on strangers sometimes finds expression in a statement that strangers may attack it collaterally, but such is merely an expression of the rule that parties and privies only are bound. See ante, V.

Collateral attack on probate decrees, see Probate Courts, III; and see also Estates of Decedents, and like topics dealing with subjects of the probate jurisdiction.

FORMER CONVICTION to FORM OF ACTION.

Cross-References.

Former Conviction—
- As bar to subsequent prosecution for merged or similar offenses, see Crimes, I. D.
- Of witness as affecting credibility, see Witnesses, VI, A.

Former Jeopardy—
- Bar to further prosecution, see Crimes, I, D.

Former Testimony—
- Admissibility in evidence, see Evidence, VII, A; Indictment, VIII, B.
- Impeaching cross-examination of witness respecting, see Examination of Witnesses §§ 66, 67.
- Relevancy and competency for impeachment, see Witnesses, VI, D.

Form of Action—
- See generally Actions; Assumpsit; Conversion; Ejectment; Nuisance; Replevin; Trespass; Waste.
- Construction of declaration to determine form intended, see Pleading, II.
- Joinder of diverse forms, see Pleading, II.
- Changing form by amendment, see Pleading, VI; Equity, VII.
- Equitable actions, see Equity.

FORMS.

CONTAINS various references to reports of cases which set out legal forms which have been approved. By reason of the Judicature Act many of the earlier procedural forms are no longer in use, and the cases referred to must be considered with that in mind. The nature and subject of the form as well as the citation of the case where it appears is shown in the following paragraphs.

Analysis.

I. Contractual and private documents.

§ 1. Contracts, assignments and sale agreements.
§ 2. Corporations and associations.
§ 3. Deeds, grants and franchises.
§ 4. Insurance.
§ 5. Trusts and wills.
§ 6. Attorneys' opinions.

II. Pleadings and procedural papers.

§ 7. Appellate procedure.
§ 8. Indictments, informations and complaints.
§ 9. Judgments and decrees.
§ 10. Notices.
§ 11. Pleadings.
§ 12. ——In equity.
§ 13. Process and returns.
§ 14. Verdicts, special questions and findings.
§ 15. Probate and administration proceedings.
§ 16. Quo warranto and extraordinary proceedings.
§ 17. Lunacy proceedings.
§ 18. Tax proceedings.
§ 19. Official acts and resolutions.

III. Instructions to juries.

§ 20. Accounts stated.
§ 21. Adjoining owners; lateral support.
§ 22. Adverse possession.
§ 23. Agency and brokers.
§ 24. Argument or misconduct of counsel.
§ 25. Assault and battery.
§ 26. Attorneys and clients.
§ 27. Bailments.
§ 28. Bastardy.
§ 29. Banking.
§ 30. Boundaries.
§ 31. Breach of promise to marry.
§ 32. Buildings, stairways and elevators.
§ 33. Carriers.
§ 34. Chattel mortgages.
§ 35. Contracts; building contracts and bonds.
§ 36. Corporations.
§ 37. Crimes and prosecutions.
§ 38. ——Homicide and homicidal assaults.
§ 39. ——Rape and carnal assaults.
§ 40. ——Evidence and presumptions and reasonable doubt.
§ 41. Damages.
§ 42. ——Torts.
§ 43. ——Personal injuries.
§ 44. Death by wrongful act.
§ 45. Dedication.
§ 46. Duress.
§ 47. Ejectment.
§ 48. Eminent domain.
§ 49. Estates and administration; claims.
§ 50. Rules of evidence and presumptions.
§ 51. Exemptions.
§ 52. Exhibitions and shows.
§ 53. Fires.
§ 54. Fish and game laws.
§ 55. Forest products, labor and liens.
§ 56. Fraud.
§ 57. Frauds, statute of.
§ 58. Fraud on creditors; bona fides.

§ 59. Gambling contracts; futures.
§ 60. Highways; injuries to travelers.
§ 61. ——Negligent driving; automobile cases.
§ 62. Husband and wife; alienation cases.
§ 63. Insurance.
§ 64. Intoxication; Civil Damage Act.
§ 65. Landlord and tenant.
§ 66. Libel and slander.
§ 67. Limitations of actions.
§ 68. Malicious prosecution.
§ 69. Master's liability.
§ 70. ——Federal Employers' Liability and railroad cases.
§ 71. Medicine and surgery; malpractice.
§ 72. Negligence.
§ 73. Negotiable instruments.
§ 74. Nuisances; diversion and pollution of waters.
§ 75. Partnership.
§ 76. Payment and tender.
§ 77. Railroads; crossing cases.
§ 78. ——Injury to animals on tracks.
§ 79. ——Fires.
§ 80. Replevin.
§ 81. Sales.
§ 82. ——Warranty and breach of it.
§ 83. Street and interurban railways.
§ 84. Telegraphs and telephones.
§ 85. Toll roads.
§ 86. Trespass.
§ 87. Wills.
§ 88. Witnesses; competency and credibility.

For forms prescribed by the statutes for particular instruments or writings, see the published statutes and indexes thereto.

I. CONTRACTUAL AND PRIVATE DOCUMENTS.

§ 1. Contracts, assignments and sale agreements.

Trust chattel mortgage, see post ¶ 10.

¶ 1. Antenuptial agreement settling property rights.—Koch v. Koch, 126 Mich. 187.

¶ 2. Of contract to furnish tie and shingle timber and to allow the other party, the mill man, to enter and take timber on agreed terms in case of default.—Carey v. Leonard, 141 Mich. 278.

¶ 3. Of contract to purchase stock and property of public service corporation (gas company) and to procure consent of stockholders to transfer, and providing for adjustment of rights if sale shall be consummated.—Lewis v. Weidenfeld, 114 Mich. 581.

¶ 4. Of option between shareholders for the purchase of one party's interest in a corporation.—Anderson Carriage Co. v. Pungs, 127 Mich. 543.

¶ 5. Of land contract providing for good title in the vendor.—Walker v. Gillman, 127 Mich. 269.

§ 2. Corporations and associations.

Stock sale agreement, see ante ¶¶ 3, 4.
Franchises, see post ¶ 7.
Trust agreement to hold stock for security, see post ¶ 11.

¶ 6. Of by-law for voluntary benevolent society forbidding its members to belong to other societies.—Mazurkiewicz v. St. Adelbertus Aid Society, 127 Mich. 145.

§ 3. Deeds, grants and franchises.

Antenuptial settlement, see ante ¶ 1.
Land contracts, see ante § 1.

Deed of water power privilege and allotment of power.—Powers v. Hibbard, 114 Mich. 533.

¶ 7. Of clause in franchise for street railway providing for liquidated damages for failure of a company to perform.—Whiting v. Village of New Baltimore, 127 Mich. 66.

§ 4. Insurance.

¶ 8. Insurance rider making loss payable to mortgagee first, then to vendors, as their

interests may appear, then to purchaser.—O'Neill v. Northern Assur. Co., 145 Mich. 516.

¶ 9. Insurance rider providing that the insured shall keep his books of account and inventory in "an iron safe at night, or in some place secured against fire in another building."—King v. Concordia Fire-Ins. Co., 140 Mich. 258.

§ 5. Trusts and wills.

Instructions in will cases, see post § 87.

¶ 10. Of a chattel mortgage of a stock of goods to trustee for creditors.—Crowley v. Langdon, 127 Mich. 51.

¶ 11. Of trust agreement putting up corporate stock as security for promissory note.—Anderson Carriage Co. v. Pungs, 127 Mich. 543.

§ 6. Attorneys' opinions.

¶ 12. Of opinion by attorney as to the marketability of proffered title to land.—Ford v. Wright, 114 Mich. 122.

II. PLEADINGS AND PROCEDURAL PAPERS.

[Note. It is essential to examine the various specific topics for precedents on forms which were criticized and for precedents on defects in forms. While such cases may not properly be cited as affording forms they are of the greatest constructive value in devising forms and testing them.]

Formal parts of affidavits, see Affidavits § 3.

§ 7. Appellate procedure.

¶ 13. As to precedents on forms in appeal or on writ of error, consult the topic Appeal and Error in those parts which deal with the sufficiency of the papers and proceedings.

¶ 14. Of assignment of error in refusing to direct verdict, criticized as being too general.—Jackson Bridge & Iron Co. v. Lancashire Ins. Co., 122 Mich. 433.

¶ 15. Of affirmance of circuit judgment under Water Craft Act with order for entry against principals and sureties below.—Delaney Forge & Iron Co. v. The Winnebago, 142 Mich. 84, aff'd in 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509.

§ 8. Indictments, informations and complaints.

Requisites and sufficiency of indictments and informations, see Indictment, I.

¶ 16. Information for perjury (set out but not passed on).—People v. Macard, 109 Mich. 623.

¶ 17. Information for endeavoring to procure perjury under Comp. L. § 11308.—People v. Clement, 127 Mich. 130.

¶ 18. Information for obtaining money under false pretenses.—People v. Johnson, 190 Mich. 170. (Stone, C. J., Bird and Kuhn, JJ., dissenting.)

¶ 19. Information for murder in language of statute.—People v. Page, 198 Mich. 524.

¶ 20. Information in prosecution for inserting fraudulent advertisement in newspapers.—Jasnowski v. Detroit Recorder's Court Judge, 192 Mich. 139.

¶ 21. Information charging offense of illegal procurement of registration as physician under Pub. Acts 1899, No. 237, How. 2nd Ed., § 5108 et seq., as amended by Pub. Acts 1913, No. 368, in language of statute.—People v. Maczulski, 194 Mich. 193.

§ 9. Judgments and decrees.

Undertaking for stay of execution, see post ¶ 61.

Requisites and sufficiency of judgments and decrees, see Judgments; Equity, X.

¶ 22. Decree of specific performance of a contract to convey land on the death of the grantor.—Simmons v. Conklin, 129 Mich. 190.

¶ 23. Decree granting a way of necessity over swamp lands covered with water to reach land owned by complainant.—Baldwin v. Erie Shooting Club, 127 Mich. 659.

¶ 24. Decree for payment of large sum of alimony in gross with security for deferred instalments.—Ferguson v. Ferguson, 147 Mich. 673.

¶ 25. Decree to establish a life estate in lands and to adjust the priorities of a mortgage.—Bowler v. Bowler, 122 Mich. 698.

¶ 26. Decree to work out subrogation of holder of void mortgage against contract of dowress to release dower to mortgagor.—Campbell v. Smith, 103 Mich. 427.

¶ 27. Decree adjusting priorities among creditors of corporation including subscribers to a bonus.—Moore v. Universal Elevator Co., 122 Mich. 48.

¶ 28. Decree setting aside compromise and discharge of judgment as suit of assignee of part of judgment, where other interests are to be protected including right to reinstate motion for new trial, and where complainant's interest is to be ascertained.—Line v. McCall, 126 Mich. 497.

¶ 29. Portions of decree on bill to construe will (modified in substance but not in form).—Hull v. Hull, 122 Mich. 338.

§ 10. Notices.

Requisites and sufficiency of notices other than process, see Notices and the cross-references there found.

¶ 30. Notice to vacate under month to month lease.—Barlum v. Berger, 125 Mich. 504.

¶ 31. Notice of sidewalk injury under charter.—Wilton v. City of Flint, 128 Mich. 156.

§ 11. Pleadings.

Requisites and sufficiency of pleadings, see specific topics in those portions devoted to procedure or pleading.

Requisites and sufficiency of pleadings, see Pleading; Equity, VII.

Forms of pleading prescribed by court rules, see Michigan Forms in published 1916 C. C. Rules.

¶ 32. Declaration in assumpsit on benefit certificate for a sum payable on assessment if so much as that sum was realized by such assessment.—Silvers v. Michigan Mut. Ben. Assoc., 94 Mich. 39.

¶ 33. Allegations of a waiver of tort and of implied promise to pay the difference between price received and real value, condemned because any implied promise was rebutted by the alleged express promise, the tort being extraneous thereto.—Bedier v. Fuller, 106 Mich. 342.

¶ 34. Allegation of defect in sidewalk suffered by city allowing plank to become splintered.—Urtel v. City of Flint, 122 Mich. 65.

¶ 35. Allegation of injuries to foot permanent in their nature.—Edwards v. Village of Three Rivers, 102 Mich. 153.

¶ 36. Of allegation of injuries sufficient to let in proof of consequential organic disease of lungs.—Montgomery v. Lansing City Elec. Ry. Co., 103 Mich. 46.

¶ 37. Declaration in an action against a township for wrongfully flooding the plaintiff's land.—McAskill v. Township of Hancock, 129 Mich. 74.

¶ 38. Declaration in action by township for indemnity for payment of a judgment in favor of a person injured because of falling from a bridge as a result of the defective condition of a railing unlawfully substituted by defendant.—Township of Hart v. Noret, 191 Mich. 427.

¶ 39. Declaration in slander.—Savlan v. Ayer, 129 Mich. 545.

¶ 40. Count in declaration charging conspiracy of several defendants to charge plaintiff with crime.—McDonald v. Hall, 193 Mich. 50.

¶ 41. A declaration in an action against an electric light company for damages for the loss of a team electrocuted and burned by coming into contact with a fallen street arc lamp and connections, held to sufficiently allege a lack of proper inspection of a rope used in elevating and lowering the lamp.—Sumner v. Eastern Michigan Edison Co., 187 Mich. 169, 12 N. C. C. A. 84.

¶ 42. Declaration in action against owner of automobile truck for death of person alleged to be due to negligence in operation.—Tuttle v. Briscoe Mfg. Co., 190 Mich. 22, 12 N. C. C. A. 909.

¶ 43. Declarations for injuries to servant by failure of employer to inspect boiler.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 44. Declaration held sufficient in an action against liquor dealer and his bondsmen for unlawful sales of liquor to husband.—Schnell v. Michigan Bonding & Surety Co., 183 Mich. 340.

¶ 45. Declaration in an action by a county against a treasurer and his sureties for the acceptance of worthless checks in payment for taxes.—Board Sup'rs of Chippewa County v. Bennett, 185 Mich. 544.

¶ 46. Declaration in action by servant against master for personal injuries.—Douglas v. Temple Mfg. Co., 197 Mich. 138.

¶ 47. Allegation of nonresponsibility of bank for cashier's act held bad because it did not aver that he lacked authority.—Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

¶ 48. Plea of general issue contemporaneously with plea to jurisdiction.—National Fraternity v. Wayne Circuit Judge, 127 Mich. 186.

¶ 49. Plea of want of legal capacity in suit to enjoin a labor union from interfering with complainant's business.—United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354.

¶ 50. As to the requisites and effect of a plea of estoppel, see Whittemore v. Stephens, 48 Mich. 573.

§ 12. ——In equity.

Plea of incapacity to sue or defend, see also ante ¶ 49.

¶ 51. Bill of information by attorney general upon relation for nuisance (faults pointed out and proper form suggested).—Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462.

¶ 52. Necessary averments in bill for relief against drain-tax, see Barker v. Township of Vernon, 63 Mich. 516.

¶ 53. Bill in equity to enjoin a labor union from interfering with complainant's business.—United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354.

¶ 54. Bill by railroad charging fraud on part of drain commissioners in establishing drain on railroad right of way, instead of on private property.—Toledo, S. & M. Ry. Co. v. Shafer, 190 Mich. 89.

¶ 55. A complaint for divorce upon the ground of extreme cruelty, held to sufficiently allege acts and specified acts of cruelty with time, place and circumstances in connection therewith.—Eistedt v. Eistedt, 187 Mich. 371.

¶ 56. Bill in aid of execution by seller of land to set aside deed to purchaser and husband on ground of fraud so far as giving title to husband.—Lipp v. Jacobs, 198 Mich. 357.

¶ 57. Bill by trustee in bankruptcy to reach property of bankrupt conveyed in fraud of creditors.—Johnson v. Harrison, 199 Mich. 221.

¶ 58. Bill by creditor of corporation against mortgagees of property of corporation charging combination to defraud complainant.—Osborn v. Detroit Kraut Co., 193 Mich. 664.

¶ 59. Bill alleging fraud of attorney and others in depriving complainant of title to her land by means of a collusive suit to quiet title in her name.—Raniak v. Pokorney, 198 Mich. 567. (Ostrander, J., dissenting.)

§ 13. Process and returns.

Requisites and sufficiency of the various writs and returns to them, see Attachment; Executions; Process; Certiorari; Mandamus; Prohibition; Quo Warranto.

¶ 60. Of undertaking on justice's docket for stay of execution.—Cox v. Crippen, 13 Mich. 502.

¶ 61. Of undertaking for stay of execution in justice's court when made in instrument filed and not on the docket.—Lustfield v. Ball, 103 Mich. 17.

¶ 62. Return to writ of attachment from justice, showing service on agent of attachment defendant, held bad because it did not state that agent had possession of defendant's goods, etc.—Faul v. Beucus, 124 Mich. 25.

§ 14. Verdicts, special questions and findings.

Requisites and sufficiency of verdicts and findings, see Verdicts.

¶ 63. Verdict in action for slander.—Maciejewski v. Ruchart, 192 Mich. 530.

¶ 64. Special questions in trial of a claim for services brought against an estate by an employee.—Van Slambrook v. Little's Estate, 127 Mich. 61.

§ 15. Probate and administration proceedings.

In lunacy proceedings, see post § 17.

Requisites and sufficiency of the various probate proceedings and papers, see Estates of Decedents; Guardianship; Probate Courts; Wills.

¶ 65. Of petition by foreign executrix for appointment as administratrix with will annexed; showing of interest; signature.—Feustmann v. Gott's Estate, 65 Mich. 592.

¶ 66. As to what petition for appointment of administrator should set forth, see Wilkinson v. Conaty, 65 Mich. 614.

¶ 67. Of affidavit of publication of order of probate judge for hearing on application for letters.—Feustmann v. Gott's Estate, 65 Mich. 592.

§ 16. Quo warranto and extraordinary proceedings.

Requisites and sufficiency of the proceedings and writs, see Quo Warranto; Mandamus; Certiorari; Prohibition.

¶ 68. Allegations in quo warranto information of intrusion into office.—People ex rel. Bolt v. Riordan, 73 Mich. 508.

§ 17. Lunacy proceedings.

Requisites and sufficiency of the proceedings, see Insane Persons, I.

¶ 69. Petition to inquire into sanity of person accused of crime.—People v. Hall, 185 Mich. 54.

§ 18. Tax proceedings.

Requisites and sufficiency of tax papers and proceedings, see Taxes.

¶ 70. Petition by county supervisor for review of decision of county board in making equalization by board of state tax commissioners.—Barnes v. Wayne County Board Sup'rs, 194 Mich. 540.

§ 19. Official acts and resolutions.

Requisites, form and sufficiency of legislative bills, see Statutes.

¶ 71. Resolutions of supervisors submitting question of county seat removal.—Peck v. Berrien County Sup'rs, 102 Mich. 346.

III. INSTRUCTIONS TO JURIES.

[Note. The sections which follow are in order and scope conformable to the alphabetical arrangement of topics in the digest, as near as was possible.]

General requisites and sufficiency of instructions, see Instructions, and see also portions of the specific topics dealing with "instructions."

§ 20. Accounts stated.

¶ 72. Charge on account stated.—Wood v. O'Callaghan, 140 Mich. 598.

¶ 73. Instruction as to reasonable time in which to object to an account stated, criticized, because it stated the time which would be reasonable.—Raub v. Nisbett, 118 Mich. 248.

§ 21. Adjoining owners; lateral support.

¶ 74. Instruction on the duty of the plaintiff to build a foundation strong enough for ordinary purposes in an action for damages caused by the pressure of an embankment made by an adjoining owner.—Abrey v. City of Detroit, 127 Mich. 374.

§ 22. Adverse possession.

¶ 75. Instruction in ejectment as to adverse possession growing out of permissive possession.—Pugh v. Schindler, 127 Mich. 191.

¶ 76. On acts of possession amounting to notice of a claim of title supporting adverse possession.—Chabert v. Russell, 109 Mich. 571.

¶ 77. On entry under license being no foundation for adverse possession against licensor.—City of St. Joseph v. Seel, 122 Mich. 70.

§ 23. Agency and brokers.

Attorneys and clients, see post § 26.
Agency or office for corporation, see post § 36.
On gambling contracts for futures, see post § 59.

¶ 78. Instruction as to liability of principal on contract made by agent having general authority to make contracts.—Hecht v. Ebers, 189 Mich. 573.

¶ 79. Instruction as to authority of agent to agree to pay extra compensation for extra services performed under written logging contract.—Martindale v. Lobdell-Emery Mfg. Co., 189 Mich. 477.

¶ 80. Instructions on need or occasion for agent to disclose agency where third person has knowledge of agency.—Harmon v. Parker, 193 Mich. 542.

¶ 81. Instruction on necessity of broker being procuring cause of sale.—Kinsey v. Barth, 192 Mich. 219.

¶ 82. On duty of broker necessary to earn commission.—West v. Demme, 128 Mich. 11.

¶ 83. Charge in action to recover commissions on the sale of real estate, see Decker v. Widdicomb, 137 Mich. 331.

¶ 84. Instructions in action for commissions on the purchase of timber, the terms of the contract being in dispute.—Holmes v. Foss, 131 Mich. 487.

¶ 85. Instruction as to the right of recovery by agent of commissions for the sale of bonds and stock of a corporation where superior officer substituted bonds and stock of individuals.—Sorensen v. Charlevoix Rock Product Co., 191 Mich. 86.

§ 24. Argument or misconduct of counsel.

¶ 86. Instruction requiring the jury to confine itself to the evidence in the case and to disregard remarks of counsel and stricken testimony.—Cameron Lumber Co. v. Somerville, 129 Mich. 552.

§ 25. Assault and battery.

Homicidal assaults, see post § 38.
Carnal assaults, see post § 39.
On damages from assault, see post §§ 42, 43.

¶ 87. On words of provocation being no justification for assault.—Goucher v. Jameson, 124 Mich. 21.

¶ 88. On liability of officer for assault by shooting a fleeing person where there was no authority to make an arrest.—Johnson v. Mack, 141 Mich. 99.

¶ 89. Instruction in action for assault and battery that jury might take into consideration all proven facts and circumstances including plea of guilty and former conviction.—Foster v. Krause, 187 Mich. 630.

¶ 90. An instruction in an action for damages for assault and battery by a servant against her mistress as to necessity of giving servant time to gather her belongings before attempting to eject her.—Gungrich v. Anderson, 189 Mich. 144.

¶ 91. Instruction in an action for damages for assault and battery on liability of opponent where aggressor, after cessation of hostilities retreats and is struck by the opponent, or when the aggressor renews the conflict.—Cornell v. Fidler, 194 Mich. 509.

¶ 92. Instruction on weight given plea of guilty in self-induced criminal proceeding in subsequent action for assault and battery.—Anders v. Clover, 198 Mich. 763.

¶ 93. Instruction as to contributory negligence in an action to recover for wilful and malicious assault.—Luckhurst v. Schroeder, 183 Mich. 487.

§ 26. Attorneys and clients.

On advice of counsel as defense, see post ¶ 255.

¶ 94. On contract for attorney's services and value of same.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 95. Instruction as to right of attorney to recover for alleged services.—Sloman v. Cady, 191 Mich. 471.

§ 27. Bailments.

¶ 96. Instruction in action against former garage proprietor for injury to automobile while under control of employee of garage.—Banks v. Strong, 197 Mich. 544.

¶ 97. Instruction in action against garage proprietor for damage to car by employer of defendant on liability of defendant as bailee for hire.—Smith v. Bailey, 195 Mich. 105, 15 N. C. C. A. 308.

§ 28. Bastardy.

¶ 98. Instruction in bastardy proceeding as to respondent's conduct generally towards women and children.—People v. Hansen, 183 Mich. 565.

§ 29. Banking.

¶ 99. Instruction as to liability of the president of a bank for negligence in loaning money of the bank where loans were approved by the board of directors under a false impression permitted by the president.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

§ 30. Boundaries.

¶ 100. Instruction in ejectment as to the evidentiary weight of old established boundary lines as against surveys after the government monuments have disappeared.—Pugh v. Schindler, 127 Mich. 191.

¶ 101. Instruction in quare clausum fregit defining what is meant by E-½ and W-½ of a fractional ¼, i. e., whether quantity or distance.—Edinger v. Woodke, 127 Mich. 41.

§ 31. Breach of promise to marry.

¶ 102. Instruction in action for breach of marriage promise on invalidity of contract based on promise to marry if plaintiff becomes pregnant.—Gagush v. Hoeft, 198 Mich. 263.

§ 32. Buildings, stairways and elevators.

¶ 103. On duty of owner of building in care of elevator towards servant of tenant, held as favorable as defendant could ask.—Pascieszny v. Boydell Bros. White Lead & Color Co., 146 Mich. 228.

§ 33. Carriers.

On damages from personal injuries, see post § 43.
Railroad crossing cases, see post § 77.
Telegraph cases, see post § 84.

¶ 104. In action for penalty for failure to carry passenger.—Freeman v. Detroit, M. & M. R. Co., 65 Mich. 577.

¶ 105. Instruction as to degree of care required of carrier towards passenger.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 106. On negligence in failure to stop car boarded by disorderly persons, where they occupied conductor's attention, the evidence as to the actions of the conductor and motorman being conflicting.—Cross v. Detroit Citizens' Street R. Co., 120 Mich. 137.

¶ 107. Instruction on contributory negligence of passenger alighting from street car.—Kirkpatrick v. Muskegon Traction & Lighting Co., 195 Mich. 519. (Steere, Ostrander and Brooke, JJ., dissenting.)

§ 34. Chattel mortgages.

¶ 108. On notice of chattel mortgage.—Loeser v. Jorgenson, 137 Mich. 220.

§ 35. Contracts; building contracts and bonds.

Sales of goods, see post §§ 81, 82.
Chattel mortgages, see ante § 34.
Negotiable instruments, see post § 73.
Insurance cases, see post § 63.
Breach of promise to marry, see ante § 31.
Agency and brokerage contracts, see ante § 23.
Contract claims against decedents' estates, see post § 49.
Gambling contracts, see post § 59.
Breach of covenants of lease, see post § 65.
On duress and fraud, see post §§ 46, 56.
Damages for breach, see post § 41.

¶ 109. Instruction on construction of contract by which a village agreed to purchase water from a spring owned by a private party.—Gregory v. Village of Lake Linden, 130 Mich. 368.

¶ 110. An instruction as to compliance with a contract giving discretion as to advertising an article, approved.—Kaempfer v. Lindsay, 121 Mich. 425.

¶ 111. Instructions on substantial performance of building contract.—Schliess v. City of Grand Rapids, 131 Mich. 52.

¶ 112. Instruction as to right to recover on quantum meruit for extra services performed under written logging contract.—Martindale v. Lobdell-Emery Mfg. Co., 189 Mich. 477.

¶ 113. Instruction in action by township for breach of paving contract on finality of certificate of one engineer upon new engineer.—Township of Rockland v. Oxnam, 198 Mich. 373.

¶ 114. On measure of recovery of quantum meruit for partial performance of building contract where contractor abandons work and building is finished by owner; held correct if limited so that recovery could not exceed the contract price.—Phelps v. Beebe, 71 Mich. 554.

¶ 115. Instruction in an action by a material man against a contractor and surety on a bond that recognition by contractor of correctness of charges against him and giving note therefor established prima facie that the material delivered was used in construc-

tion of building.—People v. Traves, 188 Mich. 345.

§ 36. Corporations.

Banking corporations, see ante § 29.

¶ 116. On bonus as gift to corporation or to promoters who formed it to carry out a projected factory.—McDermott v. Squier, 124 Mich. 523.

¶ 117. Instruction in trespass quare clausum against the president of an agricultural association for entering and tearing down a barn sold by him without authority under the defense of ratification of his action by the director's acquiescence.—Kent County Agricultural Society v. Ide, 128 Mich. 423.

¶ 118. Instruction on the question of whether or not a treasurer of a corporation who sold all his stock had also agreed to resign contemporaneously and his salary to cease.—Anderson Carriage Co. v. Pungs, 127 Mich. 543.

§ 37. Crimes and prosecutions.

Rape and carnal assaults, see post § 39.
Criminal evidence, presumptions and reasonable doubt, see post § 40.
In homicide cases, see post § 38.
Under fish and game laws, see post § 54.
General law of instructions in prosecutions for crime, see Indictment, IX, E.

¶ 119. Instruction on presence, aid or participation as constituting one a principal in crime.—People v. Repke, 103 Mich. 459.

¶ 120. Instruction on duress as defense to indictment for crime.—People v. Repke, 103 Mich. 459.

¶ 121. Instruction in a prosecution for being a disorderly person in that he was a drunkard, as to what constitutes a drunkard. —People v. Radley, 127 Mich. 627.

¶ 122. Instruction as to criminal liability for careless use of firearms.—People v. Rogulski, 181 Mich. 481.

¶ 123. General charge in a prosecution for endeavor to procure perjury under Comp. L. § 11308.—People v. Clement, 127 Mich. 130.

¶ 124. Instruction on words sufficient to amount to a threat to accuse another of crime with specific intent.—People v. Whittemore, 102 Mich. 519.

¶ 125. A lengthy charge in a prosecution for seduction, defining the crime and its incidents, recited and approved.—People v. Gibbs, 70 Mich. 425.

¶ 126. Instruction on liability for carrying revolver concealed on person.—People v. Williamson, 200 Mich. 342.

§ 38. ——Homicide and homicidal assaults.

¶ 127. Instruction on degree of murder where evidence shows lying in wait.—People v. Repke, 103 Mich. 459.

¶ 128. Instruction on specific intent essential to crime of assault with intent to commit great bodily harm less than murder.—People v. Ochotski, 115 Mich. 601.

¶ 129. Instruction on self-defense in a prosecution for assault with intent to commit murder.—People v. Bernard, 125 Mich. 550. Writ of error dismissed in 184 U. S. 697, 46 L. ed. 764, 22 Sup. Ct. Rep. 940.

¶ 130. Instruction on self-defense.—People v. Cutler, 197 Mich. 6.

§ 39. ——Rape and carnal assaults.

¶ 131. On definition of rape, and of the offenses included therein.—People v. Murphy, 145 Mich. 524.

¶ 132. Set of instructions in rape on definition of the crime, issues of resistance or consent, and character of the girl as bearing on the other issues.—People v. Crego, 70 Mich. 319.

¶ 133. Instruction in prosecution for rape limiting conviction to the time shown by the evidence.—People v. Beech, 129 Mich. 622.

¶ 134. An instruction in a prosecution for statutory rape as to alibi and reasonable doubt.—People v. Coston, 187 Mich. 538.

¶ 135. Instruction as to effect of evidence of subsequent intercourse, on trial for statutory rape.—People v. Ayers, 182 Mich. 241.

§ 40. ——Evidence and presumptions and reasonable doubt.

On competency and credibility of witnesses, see post § 88.

¶ 136. Instruction on presumption of innocence of crime charged.—People v. Warner, 104 Mich. 337; People v. Rogulski, 181 Mich. 481.

¶ 137. Instruction on presumption of guilt arising from possession of recently stolen property.—People v. May, 199 Mich. 574.

¶ 138. Instructions on what constitutes a reasonable doubt.—People v. Ezzo, 104 Mich. 341.

¶ 139. Instruction defining reasonable doubt.—People v. Swartz, 118 Mich. 292.

¶ 140. Instruction on reasonable doubt in prosecution for perjury.—People v. McClintic, 193 Mich. 589.

¶ 141. Instruction as to evidence in a criminal prosecution made up of a chain of circumstances.—People v. McArron, 121 Mich. 1.

¶ 142. Instruction on weakness of link in chain of circumstantial evidence, criticized because "single circumstance" was used instead of "single link."—People v. Willett, 105 Mich. 110, distinguishing and approving People v. Stewart, 75 Mich. 21.

¶ 143. Instructions on weight and consideration to be given to confessions in prosecution for crime, and the factors which may be considered as affecting their weight.—People v. Borgetto, 99 Mich. 336.

¶ 144. Instruction on effect of admissions or confessions made to prosecuting attorney by prisoner under arrest, criticized because ignoring effect of inducements by prosecuting attorney, and request on same subject held improperly refused.—People v. Clarke, 105 Mich. 169.

¶ 145. Instruction as to effect of statements made by the accused at the time of his arrest, and caution in consideration of same.—People v. McArron, 121 Mich. 1.

¶ 146. Instruction as to good character of an accused being sufficient to raise a doubt of guilt, criticized.—People v. McArron, 121 Mich. 1.

¶ 147. Instruction, in a manslaughter case as to the right of an accused to testify, and the credibility of his evidence.—People v. McArron, 121 Mich. 1.

¶ 148. An instruction in a prosecution under Pub. Acts 1907, No. 144, How. St., 2nd Ed., § 11539, for deserting and abandoning a wife and minor child to the effect that to sustain a conviction the jury must be satisfied beyond a reasonable doubt that the defendant refused to provide necessary shelter, food, care and clothing and that he wilfully and unlawfully deserted and abandoned them, defining abandonment and desertion, stating the elements of the offense as charged and the necessity of proof of acts constituting such elements, approved.—People v. Schelske, 187 Mich. 497.

¶ 149. Instruction in prosecution for assault with intent to rob as to effect of confession and burden of proof as to validity.—People v. Brockett, 195 Mich. 169.

¶ 150. Instruction on sufficiency of evidence to prove perjury where defendant denies commission of offense.—People v. McClintic, 193 Mich. 589.

§ 41. Damages.

On tort damages, see post § 42.
On damages for personal injuries, see post § 43.

¶ 151. Instruction as to measure of damages for delay in completion of contract to erect building.—Eaton v. Gladwell, 121 Mich. 444.

¶ 152. Instruction as to measure of damages for breach of contract to construct building.—Newton v. Consolidated Construction Co., 184 Mich. 63.

¶ 153. Instructions as to measure of damages for breach of building contract because of defective construction.—Gustov v. Clark, 190 Mich. 381.

¶ 154. On measure of damages for breach of agreement by landlord to make repairs.—Mason v. Howes, 122 Mich. 329.

¶ 155. Instruction as to the measure of damages where plaintiff was stopped by defendant from executing part of logging contract.—Martindale v. Lobdell-Emery Mfg. Co., 189 Mich. 477.

¶ 156. Instruction on measure of recovery by purchaser of moving picture business suing for damages after rescinding contract for fraud.—Johnson v. Campbell, 199 Mich. 186.

¶ 157. An instruction as to the measure of damages where articles are specially manufactured to order, are tendered to purchaser, but are refused by him, and are destroyed by fire.—Hydrex Silent Exhaust Works v. Seager Engine Works, 189 Mich. 431.

¶ 158. Instruction in action by contract purchase of farm land for damages for fraudulent representations as to productivity of the soil.—Houder v. Reynolds, 195 Mich. 256.

¶ 159. Instruction as to duty of purchaser of storage tanks to use care in preventing loss, when tank is defective.—Tatro v. Brower, 118 Mich. 615.

¶ 160. Instruction in action for breach of warranty, as to the negligence of purchaser in driving a horse after becoming aware of its condition.—Glann v. White, 181 Mich. 320. (Ostrander, Bird and Steere, JJ., dissenting.)

§ 42. ——Torts.

¶ 161. On damages to fee of land of a mill owner by reason of depositing refuse in the stream by an upper proprietor.—Neely v. Detroit Sugar Co., 138 Mich. 469.

¶ 162. Instructions as to measure of damages for flooding land by negligent operation of gates of dam.—Taylor v. Indiana & M. Elec. Co., 184 Mich. 578.

¶ 163. Instruction as to the measure of damages for the loss of and damage to property by fire from locomotive.—William R. Roach Co. v. Blair, 190 Mich. 11.

¶ 164. Instruction as to measure of damages for conversion of chattel.—Baxter v. Woodward, 191 Mich. 379.

¶ 165. Instruction on measure of damages for fraud and misrepresentation in the sale of land.—Hutchinson v. Westbrook, 191 Mich. 484.

¶ 166. Instruction on mitigation of damages for slander by fact that plaintiff's reputation in the neighborhood is already disparaged by rumors afloat.—Fowler v. Fowler, 113 Mich. 575.

¶ 167. Instruction in slander excluding damages for injury to business conducted in the name of plaintiff's wife.—Savlan v. Ayer, 129 Mich. 545.

¶ 168. On effect of mortality tables in action for damages from sale of liquor.—Merrinane v. Miller, 148 Mich. 412.

¶ 169. On proof insufficient to make out justification as sufficient on mitigation of damages by establishing disparaged repute.—Fowler v. Fowler, 113 Mich. 575.

¶ 170. On burden of proof in an action for treble damages for cutting trees under Comp. L. 1897, § 11204.—Padman v. Rhodes, 126 Mich. 434.

¶ 171. Instruction on recovery of damages by wife for shame, humiliation and disgrace resulting from drunkenness of husband, in action under Civil Damage Act, Comp. Laws 1897, § 5398, How. 2nd Ed., § 5074.—Baker v. Mohl, 191 Mich. 516.

§ 43. ——Personal injuries.

Damages from death by wrongful act, see post § 44.

In cases under Federal Employers' Liability Act, see post ¶ 271.

¶ 172. On injury to feelings as element in damages for assault.—Goucher v. Jameson, 124 Mich. 21.

¶ 173. Instruction in personal injury action as to the recovery of prospective damages.—Wilton v. City of Flint, 128 Mich. 156.

¶ 174. Instructions on right of recovery for apprehended future injuries to eye.—Finkelstein v. Michigan Ry. Co., 197 Mich. 157.

¶ 175. Instruction as to measure of damages in action by passenger against street railroad company.—Pawlicki v. Detroit United Ry., 191 Mich. 536.

¶ 176. On aggravation of injury from negligence in following directions of physician.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 177. On aggravation of damages arising from the failure of the plaintiff to observe physician's instructions and the exercise of due care after an accident.—Zibbell v. City of Grand Rapids, 129 Mich. 659.

¶ 178. An instruction in an action for damages for assault and battery by a servant against her mistress as to taking into consideration the fact that plaintiff did or did not call the defendant a liar in computing damages.—Gungrich v. Anderson, 189 Mich. 144.

§ 44. Death by wrongful act.

¶ 179. On measure of damages for death by wrongful act and elements therein and method of computing same from mortality tables and expectancy thus shown.—Davis v. Michigan Cent. R. Co., 147 Mich. 479.

¶ 180. Instructions on measure of damages in action for negligently killing a boy between 11 and 12 years of age.—Snyder v. Lake Shore & M. S. R. Co., 131 Mich. 418.

§ 45. Dedication.

¶ 181. On requisites of common law and prescriptive dedication of land for highway.—Alton v. Meeuwenberg, 108 Mich. 629.

§ 46. Duress.

¶ 182. On duress in exacting payment for goods believed to have been stolen by payer's daughter, action being to recover such money paid.—Francis v. Hurd, 113 Mich. 250.

¶ 183. Instruction as to what constitutes duress.—Voorhees v. Nelson, 189 Mich. 684.

§ 47. Ejectment.

Boundaries, see ante § 30.

Adverse possession, see ante § 22.

¶ 184. Instruction as to proof of title in ejectment by deeds of grantors in possession for considerable term of years.—Dawson v. Falls City Boat Club, 125 Mich. 433.

¶ 185. Charge in action of ejectment dealing with manner of making, and conclusiveness of, government surveys, establishment of boundary lines by adverse possession and burden of proof.—Wilcox v. Jenison, 198 Mich. 182.

§ 48. Eminent domain.

On necessity for highway, see post § 60.

¶ 186. In condemnation proceeding by judge attending the jury on assessment of damages, including the cautionary charge as to evidence, view of premises, and common knowledge, being the only things open to consideration, and also the charge as to measure of compensation, the charge as to the nature of the right of eminent domain, and the charge as to impartiality and freedom from favor or fear.—Fort St. Union Depot Co. v. Backus, 103 Mich. 556.

¶ 187. Instruction as to measure of damages for constructing railroad in street opposite apartment house.—Kuhn and Brooke, JJ., dissenting. Plantenga v. Grand Rapids Terminal Ry. Co., 190 Mich. 661.

§ 49. Estates and administration; claims.

Action by administrator of lessor, see post ¶ 246.

Wills and probate, see post § 87.

¶ 188. On right to recover for services rendered under alleged contract to pay by legacy or devise.—Allen v. Fields' Estate, 124 Mich. 466.

¶ 189. Instruction as to the necessity of an express contract for remuneration for services rendered for deceased by a claimant against the estate.—Van Slambrook v. Little's Estate, 127 Mich. 61.

¶ 190. Instruction as to conclusiveness of a receipt in full given to a deceased by a claimant against the estate.—Van Slambrook v. Little's Estate, 127 Mich. 61.

¶ 191. Instruction as to recovery for services performed for decedent.—Stoner v. McConaughy's Estate, 181 Mich. 381.

§ 50. Rules of evidence and presumptions.

On competency and credibility of witnesses, see post § 88.

In cases of negligent driving in highways, see post § 61.

In master and servant cases, see post §§ 69, 70.

On proof in crim. con. cases, see post § 62.

To prove breach of warranty, see post ¶ 305.

In will cases, see post § 87.

On amount of proof to show fraud, see post § 56.

On presumption of malice in slander, see post ¶ 248.

In criminal cases, see ante § 40.

¶ 192. Instruction as to preponderance of evidence.—Murdock v. Roe, 186 Mich. 233.

¶ 193. Instruction as to "fair" preponderance of evidence.—Van Slyke v. Rooks, 181 Mich. 88.

¶ 194. Instruction on preponderance of evidence in action by servant against master for damages for personal injuries.—Barkow v. Donovan Wire & Iron Co., 190 Mich. 563.

¶ 195. Instruction as to consideration of all evidence in action for breach of purchase contract, modified.—Blitz v. Roach, 121 Mich. 135.

¶ 196. Instruction on failure of the defendant in a personal injury suit to produce a material witness.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 197. Instruction as unfavorable presumption from nonproduction of material witness.—Dowagiac Mfg. Co. v. Schneider, 181 Mich. 538.

¶ 198. On inferences to be drawn from failure of plaintiff to attend trial and testify.—Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77.

¶ 199. Instruction on the failure of the plaintiff in a personal injury suit to call the attending physician as a witness.—Vergin v. City of Saginaw, 125 Mich. 499.

§ 51. Exemptions.

¶ 200. As to exemption of a team belonging to one who was preparing to use it as a farmer in another state.—People ex rel. Fletcher v. Lee, 71 Mich. 493.

§ 52. Exhibitions and shows.

¶ 201. Instructions on liability of show proprietor for injury to patron during storm.—Jacobs v. Hagenbeck-Wallace Shows, 198 Mich. 73, 16 N. C. C. A. 535.

§ 53. Fires.

Fires caused by locomotives, see post § 79.

On measure of damages, see ante § 42.

¶ 202. Instructions on sufficiency of fire-screen on wood burning vessel to prevent escape of sparks.—Burrows v. Delta Transp. Co., 106 Mich. 582.

§ 54. Fish and game laws.

¶ 203. Instruction defining weight of fish "in the round" had in possession in violation of Pub. Acts 1899, No. 88, § 2.—People v. Dornbos, 127 Mich. 136.

§ 55. Forest products, labor and liens.

¶ 204. Instruction on sawyer's lien where it was claimed that such lien had been relinquished, see Germain v. Central Lumber Co., 120 Mich. 61.

¶ 205. Instructions on status of logs as in transit or not for purpose of taxation.—Hill v. Graham, 72 Mich. 659.

§ 56. Fraud.

On fraud suspending limitations, see post ¶ 250.

False representations affecting insurance, see post § 63.

On undue influence in will cases, see post § 87.

Good or bad faith and notice, see post §§ 73, 81.

On measure of damages, see ante § 42.

¶ 206. On the question of fraud under a contract to furnish all tin cans necessary in the purchaser's business for one year, the fraud consisting in the purchaser's misrepresentation as to the number of cans used in past years and in contemplation for the term covered.—E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591.

¶ 207. Instruction on kind and quantum of proof to show fraud, held correct except that it required "clear" proof.—Walsh v. Taitt, 142 Mich. 127.

¶ 208. Instruction on proof required to establish fraud.—State Security & Realty Co. v. Badger, 200 Mich. 104.

§ 57. Frauds, statute of.

¶ 209. Instruction as to liability on promise to pay the debt of another.—Feist v. Root, 189 Mich. 595.

§ 58. Fraud on creditors; bona fides.

¶ 210. Instruction on disparity between price paid to an insolvent for a stock of goods and its real value as evidence of fraud. —Schloss v. Estey, 114 Mich. 429.

¶ 211. Instruction on bona fides of sale alleged to have been made to defendant garnishee to hinder and defraud creditors.—Sloman v. Goebel Brewing Co., 118 Mich. 442.

¶ 212. Instructions in action for obtaining credit by means of a false financial statement.—Krolik v. Lang, 187 Mich. 286.

§ 59. Gambling contracts; futures.

¶ 213. Instructions in suit to recover on contract for purchase of wheat for future delivery and on margins.—DeMary v. Burtenshaw's Estate, 131 Mich. 326.

§ 60. Highways; injuries to travelers.

On dedication of highway, see ante § 45.
Negligence of drivers, see post § 61.
Railroad crossing cases, see post § 77.
Toll or plank road cases, see post § 85.

¶ 214. Instruction as to public necessity for laying out highway.—Rogren v. Corwin, 181 Mich. 53.

¶ 215. On duty of city as to leaving street being repaired in reasonably safe condition for travel, see Beattie v. City of Detroit, 137 Mich. 319.

¶ 216. Instruction on liability of the township for injuries to a threshing engine caused by the collapse of a bridge.—Coan v. Township of Brownstown, 126 Mich. 626.

¶ 217. General charge in action for sidewalk injury against a city.—Newman v. City of Ann Arbor, 134 Mich. 29.

¶ 218. Instruction on general bad condition of sidewalk as importing notice to municipality that it was defective.—Grattan v. Village of Williamson, 116 Mich. 462.

¶ 219. On constructive notice of bad condition of sidewalk from lapse of time after observed defects.—Fuller v. City of Jackson, 92 Mich. 197.

¶ 220. On character of defect in walk from which constructive notice to municipality may be presumed.—McGrail v. City of Kalamazoo, 94 Mich. 52.

¶ 221. Instruction on character of inspection requisite to due care by village officer after being notified that a walk is in bad condition, where it appeared that the stringers were decayed and the plank projected over them at the ends.—Hunter v. Village of Ithaca, 141 Mich. 539.

¶ 222. Instruction on the right of a plaintiff to recover for personal injuries against a city, if injury occurred before the adoption of a charter provision requiring notice and fixing the statute of limitations at one year.—Broffee v. City of Grand Rapids, 127 Mich. 89.

§ 61. ——Negligent driving; automobile cases.

Street railway injury cases, see post § 83.

¶ 223. Instruction on care required of driver approaching another driver from the rear and attempting to pass.—Ladd v. Germain, 145 Mich. 225.

¶ 224. Instruction as to due care in operating automobile.—Levyn v. Koppin, 183 Mich. 232.

¶ 225. Instruction as to excessive speed of automobile constituting negligence per se. —Levyn v. Koppin, 183 Mich. 232.

¶ 226. Instruction that operation of automobile at speed in excess of that prescribed by statute, negligence per se.—Westover v. Grand Rapids Ry. Co., 180 Mich. 373.

¶ 227. Instruction as to plaintiff sleeping or "nodding" in vehicle into which defendant's automobile was driven, constituting contributory negligence.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

¶ 228. Instruction on rights and duties of pedestrians and operators of automobiles on streets and at crossings.—Wilson v. Johnson, 195 Mich. 94.

¶ 229. Instruction on burden of proof in action for death of pedestrian by automobile.—Amley v. Saginaw Milling Co., 195 Mich. 189.

¶ 230. Instruction as to evidence sufficient to permit recovery for injury due to automobile running into rear of vehicle in which plaintiff was riding.—Grogitzki v. Detroit Ambulance Co., 186 Mich. 374.

§ 62. Husband and wife; alienation cases.

¶ 231. Instruction on right of wife to recover for board and lodging furnished a third person.—In re Burnham's Estate, 199 Mich. 326.

¶ 232. Instructions on right of father to advise son respecting a proposed or existing separation from such son's wife, where suit for alienation is brought against the father. —Rice v. Rice, 104 Mich. 371.

¶ 233. Instruction as to proof of adultery in an action for criminal conversation.— Knickerbocker v. Worthing, 138 Mich. 224.

§ 63. Insurance.

¶ 234. Instruction on voluntary exposure to unnecessary risk within accident policy.—Hess v. Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196.

¶ 235. Instruction on exposure or employment not within rated class of risk in accident policy.—Hess v. Preferred Masonic Mut. Acc. Assoc., 112 Mich. 196.

¶ 236. Instruction as to the effect of representations of health and attendance by physicians in an application for life insurance.—Blumenthal v. Berkshire Life Ins. Co., 134 Mich. 216.

¶ 237. Instruction as to recovery on accident policy where death due solely to accident and partly to disease as contributing cause.—Skinner v. Commercial Travelers' Mut. Acc. Ass'n, 190 Mich. 353.

¶ 238. Instruction on fraud in concealing name of one of firm of insured in making application for insurance.—Jacobs v. Queen Ins. Co. of America, 195 Mich. 18.

¶ 239. Instruction on waiver of forfeiture under life insurance certificate.—Jones v. Preferred Bankers' Life Assurance Co., 120 Mich. 211.

¶ 240. Instruction on waiver of conditions in insurance policy.—Morgan v. Illinois Ins. Co., 130 Mich. 427.

¶ 241. Instructions on estoppel to assert that taking additional insurance avoided the policy where insurer had notice and did not object, see Rauch v. Michigan Millers' Mut. Fire-Ins. Co., 131 Mich. 281.

§ 64. Intoxication; Civil Damage Act.

On measure of damages, see ante § 42.

¶ 242. Instruction defining term "intoxicated person," approved.—Lafler v. Fisher, 121 Mich. 60.

¶ 243. Charge in action by wife under Civil Damage Act for death of husband due to falling in hot pond while intoxicated.—Holtquist v. O'Connell, 196 Mich. 484.

§ 65. Landlord and tenant.

As to elevators, see also ante ¶ 103.

Damages for breach of agreement, see ante § 41.

¶ 244. Instruction as to eviction of tenant by depriving him of beneficial enjoyment of demised premises.—Bamlet Realty Co. v. Doff, 183 Mich. 694.

¶ 245. Instruction as to liability of lessor for refusal to let lessee into possession of demised premises.—Murdock v. Roe, 186 Mich. 233.

¶ 246. Instruction in action by administrator of estate of woman against decedent's son for rent on rights of mother to possession and use of property leased by son to her and subleased to him and burden of proof to establish tenancy and agreement to pay rent.—Heinze v. Heinze, 195 Mich. 365.

§ 66. Libel and slander.

On elements, measure and mitigation of damages, see ante § 42.

¶ 247. Instructions in an action for slander as to malice and privileged communications.—Moore v. Thompson, 92 Mich. 498.

¶ 248. Instructions on presumption of malice in publication of libelous matter.—Davis v. Marxhausen, 103 Mich. 315.

¶ 249. Instructions on meaning of words having an ordinary sense but used in libel in a qualified sense—instruction criticized for failure to charge that meaning as a whole was to be taken.—Randall v. Evening News Ass'n, 101 Mich. 561.

§ 67. Limitations of actions.

Adverse possession, see ante § 22.

¶ 250. Instruction as to the statute of limitations not running where the existence of the claim is unknown or concealed from the plaintiff.—Wolkins v. Knight, 134 Mich. 347.

¶ 251. As to mutual accounts and the running of the statute of limitations where the debtor has always denied liability on the account and the evidence is conflicting as to the authority of the creditor to credit the account with an item which would bring it within the statutory period.—Bay City Iron Co. v. Emery, 128 Mich. 506.

¶ 252. Instruction excluding indorsements of payments on the back of a note introduced in evidence under an issue of fact as to the running of the statute of limitations.—Ocobock v. Myers' Estate, 127 Mich. 181.

§ 68. Malicious prosecution.

¶ 253. Instructions on elements of malice and want of probable cause in action for malicious attachment, stated in substance with approval.—LeClear v. Perkins, 103 Mich. 131.

¶ 254. Instruction on effect of asking and acting on advice of counsel as defense in malicious prosecution.—Gurden v. Stevens, 146 Mich. 489.

¶ 255. Instruction on advice of prosecuting attorney as defense to action for malicious prosecution of criminal action.—Whittemore v. Walter, 193 Mich. 365.

§ 69. Master's liability.

Interstate transportation liability cases, see post § 70.

¶ 256. General charge in an action for personal injuries caused by the employee being

struck by a piece from a riveting soft-head alleged to be defective.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 257. Instruction as to proper inspection of a machine by a master, approved.—Burnside v. Novelty Mfg. Co., 121 Mich. 115.

¶ 258. Instruction on the failure of the employer to furnish safe tools.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 259. Instruction on assumption of risk by an employee in an action for personal injury caused by being struck by a piece from a riveting soft-head alleged to be defective.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 260. Instruction in action for death of laborer caused by cars knocking chute which had been removed from emptied ice car against decedent as to sufficiency of instrumentalities for removing ice from track to ice house.—English v. Michigan Cent. R. Co., 188 Mich. 286.

¶ 261. Instruction commenting upon the facts of a personal injury suit by a servant against the master and leaving the questions of contributory negligence and negligence to the jury.—Ouellette v. Michigan Alkali Co., 129 Mich. 484.

¶ 262. On contributory negligence and assumption of risk of operator of a saw who was injured through defective condition.—Chilson v. Lansing Wagon Works, 128 Mich. 43.

¶ 263. Instruction as to assumption of risk by employee ordered to perform a service without scope of employment.—Hemmila v. Cleveland Cliffs Iron Co., 184 Mich. 567.

¶ 264. Instruction as to nonliability of master for failure of a fellow-servant engaged in testing rock in the roof of a mine drift preliminary to timbering to warn another miner as to the risks to be incurred or as to manner of performance of work.—Aho v. Cleveland Cliffs Iron Co., 188 Mich. 218.

¶ 265. Instruction as to inapplicability of doctrine of safe place where miners are engaged in timbering drift to make it safe as a passageway.—Aho v. Cleveland Cliffs Iron Co., 188 Mich. 218.

¶ 266. Instruction on burden of proof and preponderance of the evidence in an action for personal injuries.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 267. Instruction directing verdict for defendant on ground of negligence of fellow-servant, in action for death of trammer caused by large rock falling down stope.—Lesh v. Tamarack Min. Co., 186 Mich. 399.

¶ 268. On liability of one contractor to his servant for injury from acts of servants of another contractor working on the same building construction.—Penner v. Vinton Co., 141 Mich. 77.

§ 70. ——Federal Employers' Liability and railroad cases.

¶ 269. Instruction as to contributory negligence in an action under the Federal Employers' Liability Act.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 270. Instruction on assumption of risk in action under Federal Employers' Liability Act.—Miller v. Ann Arbor R. Co., 196 Mich. 297.

¶ 271. Instruction as to diminution of damages in an action under the Federal Employers' Liability Act because of contributory negligence.—Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177.

¶ 272. Charge to the jury on the right of a brakeman to recover for injuries alleged to have been caused by stepping in a hole between the ties while walking between moving cars.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 273. Charge to the jury in an action for personal injuries to a brakeman setting out the rules of a railway company as to examination of tracks and machinery and entering between moving cars and the duty of the employee to obey the rules.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 274. Instruction summing up the evidence and leaving to the jury the question of negligence of a railroad company in leaving a hole between the ties causing injury to a brakeman.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

§ 71. Medicine and surgery; malpractice.

¶ 275. Instruction as to liability of physician in action for performing operation without consent of patient.—Zoterell v. Repp, 187 Mich. 319.

¶ 276. An instruction as to liability of a physician for negligence in setting and treating a fractured arm.—Wilk v. Black, 188 Mich. 478.

§ 72. Negligence.

Carrier cases, see ante § 33.
Negligent injury to person attending show, see ante ¶ 201.
To travelers on highways, see ante §§ 60, 61.
To users of highway bridges, see ante ¶ 216.
Of automobile drivers on highways, see ante § 61.
Of master towards servant, see ante §§ 69, 70.
Malpractice by physician, see ante § 71.

Railroad negligence other than to passengers and servants, see post §§ 77-79.
Street railway cases other than injuries to passengers and servants, see post § 83.

¶ 277. Instruction on accident and negligence in an action for personal injuries sustained by an employee.—Noble v. Bessemer Steamship Co., 127 Mich. 103.

¶ 278. Instruction as to giving of evidence so that jury could place themselves at time and place of collision with automobile and that accident not proof of negligence.—Jolman v. Alberts, 192 Mich. 25.

¶ 279. Instruction on proximate cause in action by servant for damages for personal injuries.—Barkow v. Donovan Wire & Iron Co., 190 Mich. 563.

¶ 280. Instruction on contributory negligence consisting in invitation to defendant to operate mechanism of gun when same was erroneously supposed to be unloaded.—Bahel v. Manning, 112 Mich. 24.

¶ 281. Instruction in an action for personal injuries as to defects and injuries existing prior to the accident.—Leslie v. Jackson & Suburban Traction Co., 134 Mich. 518.

¶ 282. General charge to the jury in an action for personal injuries caused by a falling wall which had been left standing after a fire.—Lauer v. Palms, 129 Mich. 671.

¶ 283. Instruction as to contributory negligence of person injured by workmen rolling a steel rail on her foot,—Sosnofski v. Lake Shore & M. S. Ry. Co., 134 Mich. 72.

¶ 284. Instructions as to flooding of lower land by negligent operation of gates of dam.—Taylor v. Indiana & M. Elec. Co., 184 Mich. 578.

§ 73. Negotiable instruments.

¶ 285. Instruction on bona fides of holder where collusion with maker to procure defendant's indorsement is alleged.—Beath v. Chapoton, 124 Mich. 508.

¶ 286. Instruction as to liability on forged note because of unreasonable delay in notifying holder of forgery.—Kole v. Lampen, 191 Mich. 156.

§ 74. Nuisances; diversion and pollution of waters.

Negligence, see ante § 72.
On measure of damages, see ante § 42.

¶ 287. Set of instructions given in case for nuisance by fouling stream through lands bought by plaintiff from another during continuance of the nuisance.—Neely v. Detroit Sugar Co., 138 Mich. 469.

¶ 288. Instruction as to the right of a riparian owner to recover for damages caused by unreasonable user by upper riparian owner.—Neely v. Detroit Sugar Co., 138 Mich. 469.

§ 75. Partnership.

¶ 289. Instruction on partnership under the facts where the parties have an understanding that they shall not be partners.—Hinman v. Littell, 23 Mich. 484.

§ 76. Payment and tender.

On duress in exacting payment, see ante § 46.

¶ 290. Instruction as to effect of tender.—Hoffman v. Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

§ 77. Railroads; crossing cases.

Carrier cases, see ante § 33.
In eminent domain proceedings, see ante § 48.
Federal Employers' Liability cases, see ante § 70.
Street and interurban railways, see post § 83.

¶ 291. Instruction on negligence in kicking cars with unnecessary speed and force while men were in them at the duty of unloading for their master, the consignee.—Dolson v. Lake Shore & M. S. R. Co., 128 Mich. 444.

¶ 292. Instruction on want of barriers on approach to railroad crossing or contributory negligence as proximate cause of injury to driver.—Gage v. Pontiac, O. & N. R. Co., 105 Mich. 335.

¶ 293. Instruction on exceeding speed limit fixed by ordinance as evidence of negligence in running train through city and over crossings.—Haines v. Lake Shore & M. S. R. Co., 129 Mich. 475.

¶ 294. Instruction on duty of engineer in operating switching engine where vision obscured by steam.—Sergeant v. Grand Rapids & I. Ry. Co., 198 Mich. 385.

¶ 295. Instruction on care required of one about to cross railroad track, see Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 296. Instructions on right to rely on automatic electric signal bell at railroad crossing, where it has been installed and operated for a time to the traveler's knowledge but is out of order and not working at the time.—Tobias v. Michigan Cent. R. Co., 103 Mich. 330.

§ 78. ——Injury to animals on tracks.

¶ 297. Instructions on sufficiency of cattle guards to avoid statutory liability where they had become filled up so that animals walked over them.—Hathaway v. Detroit, T. & M. R. Co., 124 Mich. 610.

§ 79. ——Fires.
On measure of damages, see ante § 42.

¶ 298. Instruction on duty of care of railroad company with respect to combustible matter lying alongside tracks.—Briant v. Detroit, L. & N. R. Co., 104 Mich. 307.

¶ 299. Instruction as to duty of railroad company to use engines which will not cause fire.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 324.

§ 80. Replevin.

¶ 300. Instruction in replevin on rescission of sale of goods sold on credit as to the right to take other similar goods in case of confusion.—Clark v. William Munroe Co., 127 Mich. 300.

§ 81. Sales.
Chattel mortgages, see ante § 34.
Fraud and misrepresentation, see ante § 56.
On transfers in fraud of creditors, see ante § 58.
Replevin to recover goods, see ante § 80.
Damages for breach of agreement, see ante § 41.

¶ 301. Instruction on estoppel to object to measurement of goods sold by receiving statements of measurement and payment according thereto without objection, and retaining such money.—Taylor v. Butters & Peters Salt & Lumber Co., 103 Mich. 1.

¶ 302. Instruction as to what constitutes good faith in the purchase of goods from a fraudulent purchaser.—Pinkerton Bros. Co. v. Bromley, 128 Mich. 236.

¶ 303. Charge in an action by purchaser of hay to recover payment on contract and damages for breach, in which defendant sought to recoup damages for breach by plaintiff.—Saginaw Milling Co. v. Schram, 198 Mich. 773.

¶ 304. Instruction in action to recover balance on lease of goods, title to which was retained until full payment.—La France v. Cullen, 196 Mich. 726.

§ 82. ——Warranty and breach of it.
Damages for breach, see ante § 41.

¶ 305. Instruction as to proof necessary to show breach of guaranty of condition of steam-heating plant.—Avery v. Burrall, 118 Mich. 672.

¶ 306. Instruction as to effect of breach of implied warranty and of defendant's reliance on warranty in an action for the purchase of a shipment of potatoes.—Pentland v. Jacobson, 189 Mich. 339.

¶ 307. Instruction on defense that eggs placed in cold storage afterwards became unfit for food as unmaintainable.—E. P. Stacy & Sons v. Moher, 200 Mich. 81.

§ 83. Street and interurban railways.
Carrier cases, see ante § 33.

¶ 308. Instruction on liability of street railroad for injuries to pedestrian caused by falling in excavation made in course of construction of track, where street rendered dangerous by storms.—Norris v. Detroit United Ry. Co., 193 Mich. 578.

¶ 309. Instruction on liability of interurban railroad for negligent injury to cows suddenly darting on track.—Bewernitz v. Detroit, J. & C. Ry., 195 Mich. 528, 16 N. C. C. A. 227.

¶ 310. Instruction on mutual rights of interurban railroad and others in highway and duty of railroad to operate its cars in observance of such rights.—Bewernitz v. Detroit, J. & C. Ry., 195 Mich. 528, 16 N. C. C. A. 227.

¶ 311. Instruction as to superior right of street car over automobile in use of street. Westover v. Grand Rapids Ry. Co., 180 Mich. 373.

¶ 312. On relative duties where boy of 15 was injured because his cart caught in street railway track as car approached.—Quirk v. Rapid Ry., 137 Mich. 493.

¶ 313. Instruction as to the necessity for a headlight on an electric car in an action for killing stock driven along a highway.—Ensley v. Detroit United Ry., 134 Mich. 195.

¶ 314. Instruction on neglect of last clear chance to avoid injury to member of parade marching ahead of street car negligently, but seen by motorman as he approached.—Montgomery v. Lansing City Elec. Ry. Co., 103 Mich. 46.

¶ 315. Instruction on duty of motorman to immediately apply brakes upon perceiving perilous condition of plaintiff.—Walter v. Detroit, J. & C. Ry. Co., 191 Mich. 667.

¶ 316. Instructions in action for collision between street car and vehicle driven onto track in order to avoid pile of paving material, where evidence was conflicting as to whether plaintiff looked for and should have seen approaching car.—Reinhardt v. Saginaw-Bay City Ry. Co., 186 Mich. 413.

¶ 317. Instruction as to degree of care to be observed by driver of automobile before crossing street car track on observing approaching car.—Westover v. Grand Rapids Ry. Co., 180 Mich. 373.

¶ 318. Instruction as to contributory negligence in driving vehicle onto street car tracks to avoid pile of paving material, without looking for and observing approaching street car.—Reinhardt v. Saginaw-Bay City Ry. Co., 186 Mich. 413.

¶ 319. Instruction as to contributory negligence of a motor cyclist in attempting to cross a street railway track, although a car was backing toward the crossing, plaintiff knowing of defendant's custom of warning approaching traffic when a car was to be backed over the crossing.—Tiley v. Detroit United Ry., 190 Mich. 7.

§ 84. Telegraphs and telephones.

¶ 320. Instructions on liability of telegraph company for delay in delivery of telegram.—Burroughs v. Postal Tel. Cable Co., 199 Mich. 672.

§ 85. Toll roads.

¶ 321. Instruction on the duty of a plank road company to maintain a road in suitable condition.—Monyhan v. Detroit & Saline Plank-Road Co., 129 Mich. 549.

§ 86. Trespass.

Assault and battery, see ante § 25.
Boundaries of land, see ante § 30.
On measure of damages, see ante § 42.

¶ 322. Instructions in action of trespass for cutting timber on land in which treble damages are sought under Comp. Laws 1897, § 11204, How. 2nd Ed., § 13317, on burden of proof and on necessity that the acts of defendant be wilful, wanton or evilly designed in order to hold that trespass is not casual and involuntary.—Connor v. McRae, 193 Mich. 682.

§ 87. Wills.

¶ 323. General charge to the jury on the question of whether a will was properly executed.—Ferris v. Neville, 127 Mich. 444.

¶ 324. Instruction in action to establish lost will, in which claimed that will has been revoked, that question whether will void because executor subscribing witness not involved.—Maynard v. Keene, 189 Mich. 97; In re Keene's Estate, Id.

¶ 325. Charge in will contest on right of testator to make will and defining essentials to exercise of power.—Porter v. La Rue, 192 Mich. 477; In re Brower's Estate, Id.

¶ 326. Instruction in will contest on revocation of will by destruction of part.—In re Walsh's Estate, 196 Mich. 42.

¶ 327. Instruction in will contest that validity of contract for expensive monument could not be determined.—In re Warring's Estate, 196 Mich. 720; McGinnis v. McCarn, Id.

¶ 328. Instruction in will contest that suit is necessary to recover legacy paid to beneficiary to which she was not entitled.—In re Warring's Estate, 196 Mich. 720; McGinnis v. McCarn, Id.

¶ 329. Instruction on mental competency to make will.—Anderson v. Kendrick, 199 Mich. 240; In re Hewitt's Estate, Id.

¶ 330. Instructions on testamentary capacity of a testatrix, sick and approaching death.—McHugh v. Fitzgerald, 103 Mich. 21.

¶ 331. Instruction in will contest as to insane delusion which would vitiate will.—In re Rockett's Estate, 191 Mich. 499.

¶ 332. Instruction in will contest as to the testatrix's drafting the substance of her will in her own handwriting while mentally competent.—Spencer v. Terry's Estate, 127 Mich. 420.

¶ 333. On disinheritance of only son as indicative of undue influence or lack of capacity of testator because of natural injustice of the will under such circumstances as appear. [Charge held as favorable to contestant as the law permits.]—In re Morse's Estate, 146 Mich. 463.

¶ 334. Instructions on undue influence in will contest.—Soule v. Henry, 197 Mich. 473; In re Curtis' Estate, Id.

¶ 335. Set of instructions on undue influence affecting will, held not unfavorable to proponent.—Sullivan v. Foley, 112 Mich. 1.

¶ 336. Instruction as to what is necessary to justify a finding of undue influence in a will contest.—Waters v. Reed, 129 Mich. 131.

¶ 337. Instructions on undue influence upon a testatrix in a weakened and dying condition by the legatees, her sisters.—McHugh v. Fitzgerald, 103 Mich. 21.

¶ 338. Instruction as to the weight of evidence of illicit cohabitation in showing undue influence.—Waters v. Reed, 129 Mich. 131.

¶ 339. On presumption arising from the fact that a will assailed for undue influence was drawn by one of the proponents.—Bush v. Delano, 113 Mich. 321.

¶ 340. Instruction in will contest on burden of proof to show mental incompetency of testator.—Soule v. Henry, 197 Mich. 473; In re Curtis' Estate, Id.

¶ 341. Instruction as to burden of proof as to mental capacity in will contest.—In re Gardnier's Estate, 198 Mich. 203.

§ 88. Witnesses; competency and credibility.

¶ 342. Instructions on credibility of witness alleged to have been incompetent at the time of a transaction and so to have been incapable of remembering it.—Mead v. Harris, 101 Mich. 585.

¶ 343. On right and privilege of jury to disregard entire testimony of witness who

has testified falsely to any material fact.—Cole v. Lake Shore & M. S. R. Co., 95 Mich. 77.

¶ 344. Duty of jury to consider interest, bias and prejudice of witnesses in determining their credibility.—Foley v. Detroit & M. Ry. Co., 193 Mich. 233.

¶ 345. On right of jury to consider as bearing on credibility the failure of a party to produce articles for inspection by the jury.—Withey v. Pere Marquette R. Co., 141 Mich. 412.

¶ 346. On existence of a gift as depending on credibility of witnesses.—Parke v. Nixon, 141 Mich. 267.

¶ 347. In case of homicide on credence to be given testimony of an accessory.—People v. Nunn, 120 Mich. 530.

FORMULÆ to FRAMING ISSUES.

Cross-References.

Formulæ—
Food standards, see Food.
Trade processes and formulæ, see Patents and Inventions.
Injunction against disclosure, see Injunctions, II.
As assets contributed to corporation or partnership, see Corporations §§ 50, 268.
Fornication—
Disorderly conduct, see Crimes, II; Indictment.
Adulterous acts, see Crimes, II; Indictment.
Ground for divorce, see Divorce.
Forthcoming Bonds—
See Attachment, VI, D; Replevin, II; and see also Arrest, IX (bail); Civil Arrest, IV (bail).
Fortuitous Event—
Distinction between accident and negligence, see Negligence; and see also Carriers; Master and Servant, III; Railroads, VIII; etc.
Fortune Tellers—
As disorderly persons, see Crimes § 62.
Forwarders—
See Carriers § 65.
Foster Parents—
See Adoption; Parent and Child.
Foundation—
For secondary evidence, see Evidence, IV, B.
For lay or expert opinions, see Evidence §§ 248-252, 270-291, 292-297.
For admissions or declarations or res gestae, see Evidence, VII.
For admission of writing as a document, see Evidence, VIII.
For any of the foregoing in criminal evidence, see Indictment, VIII, B.
For examination of witness by leading questions, see Examination of Witnesses §§ 14-17.
See also references under "Laying Foundation."
Building foundations, see Adjoining Owners §§ 1-5; Building Contracts; Mechanics' Liens.
Foundlings—
See Adoption; Poor Persons.
Fourteenth Amendment—
See Constitutional Law, V, X.
Fourth of July—
See Holidays.
Fractions of Days—
Computation of time, see Time.
Fractures and Dislocations—
Adequacy and excessiveness of awards, see Damages § 237.
Framing Issues—
See Equity, VIII, B; Verdicts and Findings.

FRANCHISES.

TREATS of rights under public grant to carry on a business or a public service at a certain place. It excludes the franchise to be and exist as a corporation (see Corporations, II, IV, XIII, B), and permissive licenses to use streets or highways not amounting to franchises (see Highways, X, XI; Municipal Corporations, IX, D). Matters pertaining distinctively to franchises for specific purposes or service are treated in specific topics, Canals; Electricity; Ferries; Gas; Navigable Waters; Railroads; Street Railways; Toll Roads and Bridges; Telegraphs and Telephones; Waters.

Analysis.

§ 1. In general; power to grant and capacity to take.
§ 2. Grant; construction, duration and termination.
§ 3. Franchise outrunning corporate term of taker.
§ 4. Conditions and breach of condition.
§ 5. Transfer and devolution to successors.
§ 6. Protection or forfeiture by action or suit.

§ 1. In general; power to grant and capacity to take.

Grants and construction and term thereof, see post § 2.
Franchise for longer than corporate term, see post § 3.
Distinctness of the corporate and operating franchises, see Corporations ¶ 41.
Rights and franchises of foreign corporations and admission to do business in state, see Foreign Corporations.
Public control and regulation of highways and highway uses, see Highways, IX.
Proper and contemplated highway servitudes, see Highways, X, XI.
Power of municipality to reduce or regulate fares under provisions of statutes or under franchises of street railways, see Municipal Corporations, IX, C.
Municipal regulative power over streets and power to permit uses thereof, see Municipal Corporations, IX, D.
Titular and permissive rights of railroads and street railways in streets and highways, see Railroads, I, III; Street Railways, I.
Banking franchises, see Banking, I.
Franchises for electric public service, see Electricity § 2.
Franchises for ferries, see Ferries § 1.
Railroad and street railway franchises and charters, see Railroads, I; Street Railways, I.
Water supply franchises, see also Waters, VI.
[Note. The statutes relating to franchises and grants of them are numerous and so closely related to other topics in this digest that it has been deemed best not to make a collection of references which might be misleading. See topics treating of the various kinds of corporations and public services, e. g., Electricity; Gas; Waters, VI; Railroads, I; Street Railways, I; and see also Municipal Corporations, IX.]
Inhibition of grant by special act, see Const. art. XII, § 1.

¶ 1. Section 28 of art. VIII of the Constitution of 1909, conferring local power to grant franchises, abrogates Act No. 264, Public Acts 1905, How. St., 2nd Ed., § 2041, conferring rights on persons, firms or corporations to the use of the streets and alleys of cities and villages for the distribution of electricity, power and heat.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

¶ 2. A legislative grant to municipalities of power to permit the use of streets and public places by public utility companies, does not impair or lessen the sovereign power of the state to subsequently grant similar rights to persons, firms or corporations regardless of any action on the part of municipalities.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

¶ 3. A franchise to maintain and operate a street railway in a street is an interest in land.—Detroit Citizens' St. Ry. Co. v. City of Detroit, 124 Mich. 449.

¶ 4. The power of a municipality to grant exclusive rights in its streets will not be implied from general language in the statutes but must be clearly and explicitly expressed.—Detroit Citizens' St. Ry. Co. v. City of Detroit, 110 Mich. 384.

¶ 5. A city council has the power to pass an ordinance granting a franchise to lay gas pipes in any and all the streets and alleys of the city without reserving the right to say what streets, and although the ordinance may not have been a wise one to make, the city is bound by its terms.—City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74.

¶ 6. A city charter (Local Acts 1899, No. 437, chap. 24, § 11), giving the council the right to contract for not exceeding 10 years for the supplying of light and water to the city and its inhabitants and to grant the use of streets, etc., to enable the performance thereof limits the power of granting a franchise for the use of the streets to the period of ten years.—Sullivan v. Bailey, 125 Mich. 104.

¶ 7. A proviso limiting the period for a franchise to thirty years in a section of a city charter (Local Acts 1899, No. 437, chap. 9, § 5), authorizing the council to grant a franchise to a street railway does not authorize the granting of a thirty-year franchise for water or light where other sections limit the right to contract for these services for a period of ten years.—Sullivan v. Bailey, 125 Mich. 104.

¶ 8. A charter (Local Acts 1881, No. 347, §§ 12, 16), giving a common council power to provide for the public lighting of the city and to control placing of posts gives the power to contract for such lighting but not to grant a perpetual easement for the maintenance of poles and wires.—Horner v. City of Eaton Rapids, 122 Mich. 117.

¶ 9. Individuals, like corporations, can manage street railways, ferries, turnpikes or bridges, the franchises of which may nevertheless be perpetuated.—McKee v. Grand Rapids & R. L. St. R. Co., 41 Mich. 274.

§ 2. Grant; construction, duration and termination.

Implication that franchise term corresponds to power of enfranchising city, see ante ¶¶ 6, 7.
Conditions and breach of them, see post § 4.
Forfeitdre for breach of condition, see also post § 4.
Alteration, repeal or depreciation of franchise as impairment of contract, see Constitutional Law § 172.
Effect of repeal of city charter and enactment of new one on outstanding franchises from city, see also Corporations ¶ 118.

Estoppel of city to revoke franchise for lighting on ground that corporation was organized as a "manufacturing" corporation and not as an electric corporation, see Corporations § 98, ¶ 355.
Repeal or amendment of franchise as a "taking," see Eminent Domain § 29.
Questioning franchise to be corporation, collateral attack and estoppel, see Corporations §§ 10-14.
Official records and grants as documentary evidence, see Evidence § 539.
Validity of clause fixing damages for nonexercise of franchise, see Damages § 182.
Constitutional provisions as to street uses by public service corporations, see Const. art. VIII, §§ 19, 25, 28.
Limitations on grants by townships, see Const. art. VIII, § 19.
Constitutional limitations on street uses and franchises, see Const. art. VIII, §§ 28, 29.
Constitutional provisions as to term and extensions, see Const. art. VIII, §§ 24, 29, art. XII, § 3.

¶ 10. A right to extend a street railway line conferred by resolution of a township board, taken in connection with its acceptance by the company, constituted a franchise and was not subject to revocation.—Township of Hamtramck v. Rapid R. Co., 122 Mich. 472.

¶ 11. Although street franchises are to be strictly construed, the intention of the parties when clear, will be given effect.—Houghton County St. Ry. Co. v. Common Council of Village of Laurium, 135 Mich. 614.

§ 3. Franchise outrunning corporate term of taker.

Term of franchise to individual, see also ante ¶ 9.
Toll road franchises, see also Toll Roads.
Power of corporation to take franchise for longer than its charter term, see Corporations § 84.

¶ 12. The fact that the corporate life of a street railway corporation is for a certain term as fixed by statute is no bar to the acceptance by the company from the city of franchises, supported by a good consideration, the title to which would not expire with the corporation itself.—City of Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

§ 4. Conditions and breach of condition.

Conditions as to fares to be charged by street railways, see also Street Railways, I.
Conditions in street railway and railroad franchises as to time for construction, completion and operation, see also Railroads, I; Street Railways, I.
Breach of condition as defense to action for tolls by franchised toll road corporation, see Toll Roads.
Subjection of franchise holder to subsequent statutory liability, see also Toll Roads.
Construction of bond to secure completion of franchised street railway, see also Bonds ¶ 87.

¶ 13. A city which confers upon a street railway company the right to construct a "Y" switch upon a street may attach conditions to its grant, as there is no obligation upon the city to confer such a right.—Rapid Ry. Co. v. City of Mt. Clemens, 118 Mich. 133.

¶ 14. A condition imposed upon a street railway by its franchise from a township granted under Comp. L. 1897, § 6446, is as binding as though it were imposed by statute.—Township of Grosse Pointe v. Detroit & L. St. C. Ry., 130 Mich. 363.

¶ 15. A city has the right to insist upon the proper performance of the work of laying gas pipes in the streets and to exact bond in a reasonable amount before the work is entered upon, under an ordinance granting the right to lay such pipes in all the streets and alleys under the supervision and direction of the city engineer.—City of Kalamazoo v. Kalamazoo Light & Power Co., 124 Mich. 74.

¶ 16. Wilful disregard by a railroad company of a condition requiring completion of its railway within a fixed period, will cause a forfeiture of the franchise.—Township of Hamtramck v. Rapid R. Co., 122 Mich. 472.

¶ 17. The fact that a village as such suffers no damage by failure of a street railway company to exercise its franchise will not prevent the retention of a certified check as liquidated damages to its inhabitants.—Whiting v. Village of New Baltimore, 127 Mich. 66.

§ 5. Transfer and devolution to successors.

Franchise for longer than corporate term, see ante § 5.
Transfer to corporate successor by succession, see Corporations § 212.
Necessity of consent by grantor of franchise to alienation by corporate grantee, see also Corporations ¶ 298.
Evidence of fraud in sale of franchises by concealment of material conditions, see Fraud ¶¶ 457, 458.
Subjection of gas franchise in hands of taker to burdens on original holder, see Gas.
Subjection of transferee to conditions of telephone franchise, see Telegraphs and Telephones.
Franchise passing as incident to foreclosure of mortgage by holding corporation, see Corporations § 89.
Sale of franchises on execution, see also Corporations §§ 198, 199.
Leviability of franchises and their appurtenances, see Executions § 26.
Mortgage of corporate franchises, see Corporations §§ 88, 89.

¶ 18. The purchaser of the property and rights of a telephone company is charged with knowledge of the duties and liabilities imposed upon the purchased company by the franchise under which it was operating.—Mahan v. Michigan Tel. Co., 132 Mich. 242.

§ 6. Protection or forfeiture by action or suit.

Mandamus to compel rendition of specified service, see Mandamus, IV.

Quo warranto to forfeit franchise for breach of conditions, see Quo Warranto.

Injunction bills by attorney general, see Injunctions.

Who may complain of usurpation of corporate power, see Corporations § 95.

Injunction to protect corporate franchises against destruction of necessary easements, see also Corporations ¶ 750.

¶ 19. Equity is not invoked to declare a forfeiture when it is asked to enjoin a street railway company from entering and from constructing its road under a license that has expired.—Detroit & B. P. R. Co. v. Detroit Suburban R. Co., 103 Mich. 585.

¶ 20. Private citizens and property owners who have contributed to a bonus for a railroad through their city upon the motive of benefit to the community and so to their property cannot maintain a bill to restrain the taking up of the track or the discontinuing of the use thereof in the city, where the injury apprehended is not specific to them or their property, but is common to their fellow citizens and property-holders; the remedy is by suit in the name of the attorney-general.—Henry v. Ann Arbor R. Co., 116 Mich. 314.

¶ 21. Chancery has jurisdiction, upon an information filed by the attorney-general, to preserve franchises of a public nature from usurpation or destruction; e. g., to restrain a city from discontinuing a public market.—Attorney General v. City of Detroit, 71 Mich. 92.